

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 irrelevant 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 manoeuvring 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 accuser, 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 babysitter, 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 effectively 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 Crime and Its Treatment in Canada, 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 Reinvestigation

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 admittedly 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 MacGillivray 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 MacGillivray 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 MacGillivray 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 MacGillivray called Sergeant MacIntyre, although MacGillivray apparently indicated to MacDonald that MacIntyre had been notified. The evidence only permits one to speculate as to what may have been said between MacGillivray and MacIntyre if such a call was made. Chief of Police Gordon MacLeod would have been advised by MacGillivray 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 adjudged 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 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 stanching 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 Mallowney, 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 Mallowney 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. Mallowney 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). Mallowney was detailed to begin his search between approximately 8:30 a.m. and 8:45 a.m. (T. v. 9, p. 1589). Mallowney 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

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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 outweighed 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 Mallowney 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.

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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 when exhibits are seized, but rather the consistency of their condition from the time of the alleged offence.

E. Failure to Actively Consult with
Patrol Officers as to Specific Knowledge.

102. The allegation has been made with some force that John MacIntyre failed to consult with patrol officers outside of the Detective Department at any time during the investigation of the Seale murder. It has been suggested that this was dishonest or incompetent or both (T. v. 35, pp. 6421-6428). It has been suggested that this demonstrates such gross carelessness on the part of John MacIntyre that, in conjunction with other evidence, it indicates a malicious desire to prosecute, convict and imprison Donald Marshall, Jr., without some honest belief in his guilt. It is respectfully submitted that that is not the case at all. Any proven failure to consult, which we do not accept, did not at any time detract from the proper investigation of this crime nor did it result in any misdirection of the investigation from the unknown third person toward Donald Marshall, Jr.

Department Interaction in 1971

103. The operation of the Sydney City Police Force in 1971 was such that constables were not supposed to get involved in investigative work (T. v. 7, p. 1154). Communication from the constable's point of view would be made through the occurrence or crime report form (T. v. 7, pp. 1155, 1161-1162). There were no shift briefings permitting the foot patrols to know what the Detectives were doing or vice versa (T. v. 7, pp. 1172, 1210-1211). These general views expressed by Ambrose MacDonald were consistent with the evidence given by Howard Dean (T. v. 9, pp. 1484, 1488-1489, 1502, 1518-1519, 1530, 1538-1541), John

Mullowney (T. v. 9, p. 1565), John Butterworth (T. v. 11, pp. 1968, 1982); Wyman Young (T. v. 17, p. 3098), Arthur Woodburn (T. v. 20, pp. 3697-3698), and Richard Walsh (T. v. 7, pp. 11283-1286; T. v. 8, pp. 1332, 1335, 1338-1340, 1348-1350, 1358-1359, 1375-1376, 1406, 1416).

104. Walsh did indicate that normal practice would have detectives sit down and discuss what happened with patrolmen in particular cases through informal meetings in hallways or by being sent for (T. v. 8, pp. 1349-1350). Ambrose MacDonald confirmed this view, and his evidence includes examples of this being done (T. v. 7, pp. 1155, 1161-1162; 1138). Edward MacNeil explained how contact would occur:

There was never any sort of formal approach to a matter like that. It was more on an individual - more on an individual basis. Certainly if any Constable had any information he would pass it on to the persons investigating the case and it wouldn't - it wouldn't be out of the normal for the investigators to - to ask the Constables either if they had any thoughts on the matter....(T. v. 15, p. 2622).

What the Patrolmen Knew and Were Directed to Do

105. Howard Dean, who was with Corporal Martin MacDonald, was the first police officer to speak directly with Donald Marshall, Jr. Dean stated that Marshall said at the scene that he and Sandy Seale had been stabbed by "a tall fellow with white hair and a short fellow" (T. v. 9, pp. 1474, 1478). A Crime Report subscribed with Dean's name (Exhibit 16 - R. v. 16, p. 11) confirmed that Marshall's description given was of a man

in his mid-forties who was "very tall" and had white hair. The second man was much shorter and younger. Dean says that he came across nothing during the balance of that Saturday morning shift which was relevant in any way to the circumstances of the stabbing, does not recall discussing the events of that evening with anybody when he came off shift and made no attempt to speak with any detectives before he went home as he did not believe that there were any detectives around (T. v. 9, p. 1488). Dean received no messages from any of the detectives and received no messages from anyone in the police department before coming back on shift at midnight (T. v. 9, p. 1489). Dean returned to his regular patrol without being given any further description of possible suspects and does not recall doing anything particularly directed to the stabbing again (T. v. 9, pp. 1490-1491). Thus, Dean does not recollect conveying this description by Marshall to anyone (T. v. 9, p. 1518). Dean does not recall anything in Marshall's description about the assailants looking like priests, or hearing an updated or changed description over the car radio (T. v. 9, pp. 1519-1520). Dean at no time tried to flesh out the description Marshall had given, and does not recall his partner doing so (T. v. 9, pp. 1524-1525).

106. Richard Walsh overheard conversation between Marshall and Dean at the scene with respect to the description of the assailants. Walsh recalled Marshall saying that one big man and one small man had been involved, both dressed in dark clothing (T. v. 7, pp. 1301-1302; T. v. 8, p. 1420). Walsh is

unsure about any mention of white hair (T. v. 8, p. 1420). Walsh at that time may have heard a comparison of these men to priests, but indicated that that may have first been mentioned the following Sunday afternoon when he came in contact with Marshall at Membertou (T. v. 7, p. 1301). Walsh received no direction with respect to any searching to be done or for what kind of description (T. v. 8, pp. 1411-1412). As to the information which he had received, Walsh does not recall doing anything to convey that information to anyone in the Detective Division (T. v. 8, p. 1335). Although he would not say that it had not happened, Walsh could not recall being questioned at any time by members of the Detective Division (T. v. 8, pp. 1338, 1349, 1350). An indication of what Walsh actually had in the way of description the night of the stabbing is indicated in the note of his partner for that night, Leo Mroz (Exhibit 16 - R. v. 16, p. 11). This note is supplementary to a notation under which Walsh's name appears describing the assailants as a very tall man in his mid-forties with white hair and a second much shorter and younger man. Mroz in his note discusses attempts to locate "the two described persons" in the note which appears on the same page. In his own occurrence report, Walsh does not repeat the description given by Donald Marshall but rather simply refers to the "two suspects described by Donald Marshall" (Exhibit 16 - R. v. 16, pp. 12-14). It was Walsh's impression that the taller man was the one with white hair when he was speaking with Donald Marshall, Jr. on the Sunday afternoon (T. v. 8, p. 1420).

107. Ambrose MacDonald received a description of the assailants from either Walsh or Mroz of two men, one tall, the other shorter, and one or both wearing a dark-coloured trench coat and possibly a beret or tam (T. v. 7, p. 1128). That night MacDonald got no direction from any superior officer or detective, was not involved in the investigation the following day and received no specific directions on his next shift (T. v. 7, pp. 1130, 1170, 1173-1174). MacDonald has no recollection of even seeing Sergeant MacIntyre until the evening of June 4, 1971 (T. v. 7, p. 1136). MacDonald indicated that the description according to Corporal Dean was what he had been looking for (T. v. 7, pp. 1163, 1168-1169). It is the same as the description he recalls receiving from Donald Marshall, Jr. on the Sunday evening (T. v. 7, p. 1134).

108. John Mallowney worked at the St. Joseph's Dance on Friday night, May 28, 1971. He was not contacted by the Police Department after leaving the dance until he came into work the next morning (T. v. 9, p. 1558). Mallowney did get some briefing on the Saturday morning but was not given any description of possible suspects (T. v. 9, pp. 1559-1560). However, he also testified that he was aware Donald Marshall had given a description to some police officers the night before and kept it in mind (T. v. 9, p. 1562). Mallowney was given no specific description to go and search for, and really had no further involvement in the investigation other than the search for a weapon in the Park (T. v. 9, pp. 1564, 1586). Mallowney did say

that he did not recall any differences or changes in the description to be considered in this case, and agreed that the description he would have been using would have been based on whatever report had happened to be filed at that time (T. v. 9, p. 1587).

109. Edward MacNeil was a traffic officer with the Sydney City Police in 1971 and claimed to have no personal knowledge of the Seale case (T. v. 15, p. 2622). The notes of R.C.M.P. Officer Murray Wood suggested that he was at least present during a meeting between Wood and MacIntyre where a description of a man 45 to 50 years old with grey hair was passed along (Exhibit 40, T. v. 15, pp. 2619, 2622). For his part, MacNeil was never asked to look for two men including an old man with grey hair (T. v. 15, p. 2641). MacNeil did not recall his apparent involvement with Ebsary or even a knife incident in 1970 at this time (T. v. 15, p. 2623).

110. Wyman Young testified that he was never given any briefing by any detectives investigating the Seale stabbing, and in particular was never asked to be on the lookout for two men, including an old man with grey hair (T. v. 17, p. 3100, 3107). Young was never asked by the Detectives if he had had any recollection about people known to be involved in knife offences (T. v. 17, p. 3101). Indeed, Young agreed with the opinion expressed by counsel for Donald Marshall, Jr. that MacIntyre was the kind of person who only gave out information about a case when he chose to give it out (T. v. 17, p. 3105).

111. Arthur Woodburn received no instructions whatsoever about the Seale stabbing (T. v. 20, p 3697). John Butterworth, who worked the same shift as Woodburn, had no specific involvement with the Seale stabbing either (T. v. 11, p. 1970). That shift was off from the Friday afternoon before the stabbing until the Tuesday.

Specific Knowledge of Roy Ebsary/Jimmy MacNeil

112. The police officers who were patrol constables in 1971 generally did not know who Roy Ebsary was: Howard Dean (T. v. 9, p. 1522); Wyman Young (T. v. 17, p. 3094); and Arthur Woodburn (T. v. 20, p. 3696). John Mallowney did not know Ebsary (T. v. 9, p. 1565), although he did know of Jimmy MacNeil. The same goes for John Butterworth (T. v. 11, pp. 1981, 1988-1989). Norman D. MacAskill did not know Ebsary (T. v. 17, p. 3039), though once Ebsary was brought forward MacAskill recalled having seen him once at a shopping centre sometime before. Richard Walsh does not appear to have been asked about any personal knowledge of Roy Ebsary or Jimmy MacNeil. Ambrose MacDonald knew Jimmy MacNeil, and also knew the short-order cook from the Esplanade Grill to see him (T. v. 7, pp. 1147, 1167-1168). However, MacDonald did not know the short-order cook as Roy Ebsary and had never associated the two until 1982 (T. v. 7, pp. 1167-1168). "Red" MacDonald did not know Roy Ebsary by name (T. v. 10, p. 1667), and neither William Urquhart (T. v. 52, p. 9614) nor John MacIntyre (Exhibit 15 - R. v. 15, p. 10ff.) knew him at all.

113. The lack of knowledge on the police force about Roy Ebsary and Jimmy MacNeil seems to be confirmed as a reasonable state of knowledge on the basis of the general lack of knowledge about Roy Ebsary in the community. For example, Jimmy MacNeil testified that Roy Ebsary in 1971 was a regular at the State Tavern, and was known by the regulars as distinctive, and known to usually wear the kind of coat Ebsary was wearing on May 28, 1971 (T. v. 2, pp. 516-517, 596). However, MacNeil did not agree that Roy Ebsary stood out at the State Tavern (T. v. 2, p. 517). Roy Ebsary himself certainly did not feel that he would have been well known by the police and did not feel familiar with them (T. v. 1, pp. 209-212).

114. David Ratchford testified before this Commission that when he met Roy Ebsary in 1974 he knew that he had never seen Ebsary before, and had not known who Ebsary was. According to Ratchford, Ebsary was "absolutely not" a character on the streets of Sydney (T. v. 24, p. 4411). Donald Marshall, Jr. did not recognize either Roy Ebsary or Jimmy MacNeil, neither did Patricia Harriss (if she indeed met Ebsary and MacNeil that night at all), nor did George Wallace MacNeil, nor Roderick Alexander MacNeil, nor Debbie MacPherson, nor Linda Muise. Staff Sergeant Harry Wheaton says that Donna Ebsary says that the school children knew (T. v. 42, pp. 7738-7739), but this does not appear to be borne out by the first-hand evidence.

The Basis For Changing What the Patrols Were Looking For

115. The patrol officers were not the only officers

making notes or at least drafting reports on the night of May 28, 1971. At these Commission hearings notes identified by "Red" MacDonald were introduced (Exhibit 38) which contain two sparse descriptions but no reference as to which description related to the person who had stabbed Seale:

I. Heavy set.
Short.
Dark Blue Coat. To KNEES.
Hair - Grey.
Black Low shoes.
Wearing Glasses.
Dark Rims
#Tall - 5-11.
Black Hair
Clean Shaven
Corduroy Coat 3/4 Length
Brown in Colour

116. This Commission may find that Exhibit 38 and the descriptions contained in it were available to John MacIntyre on May 29, 1971. If that is so, there is one specific difference with the descriptions received by the constables on the night of the stabbing - that it was the short man who had grey hair, whether or not he did the stabbing. If Exhibit 38 was correct, and if that description was communicated to John MacIntyre on Saturday, May 29, 1971, that should certainly have been communicated through the Desk Sergeants on duty to the patrolmen

in case they observed anyone of apparent relevance to the description.

117. It is respectfully submitted, however, that no one - including John MacIntyre - saw these notes of "Red" MacDonald, or even had the contents communicated (T. v. 35, pp. 6412-6421). "Red" MacDonald told this Commission that he had a briefing with the Desk Sergeant Len MacGillivray after coming from the hospital:

...and I think from what I hear, he contacted patrol cars and advised them what to look for, for the rest of the night. (T. v. 10, p. 1663).

"Red" MacDonald did not answer the question about passing along the description to Sergeant MacGillivray, but did state that to the best of his personal knowledge that discussion with MacGillivray would permit the police to recognize if someone came back into the Park "fitting the description that I received from Marshall" (T. v. 10, p. 1663). However, the only crime report containing a description of the assailants and which would have been available to MacGillivray and subsequent individuals acting in the Desk Sergeant position would have been that subscribed with the names of Mroz, Dean, Walsh and M. McDonald - which has the short man being young and the tall man having the grey hair (Exhibit 16 - R. v. 16, p. 11). If MacDonald had told MacGillivray something different than had originally been reported, where was it recorded?

118. It is reasonable to believe that MacIntyre never saw or heard the description in MacDonald's notes. One factor to

consider on this is that "Red" MacDonald had worked beginning at 4:00 p.m. until midnight on Friday, was called back to work almost immediately after leaving at midnight, and continued to work until 4:00 a.m. approximately (T. v. 10, p. 1663), Saturday morning. "Red" MacDonald was not scheduled to work Saturday (T. v. 10, p. 1670). However, "Red" MacDonald testified that he was out to work at 7:30 a.m. (T. v. 10, p. 1670). According to "Red" MacDonald, MacIntyre came in at 8:30 a.m. or 9:00 a.m., there was a fifteen or twenty minute briefing, after which he and MacIntyre drove through the Park area three or four times to look around and see if anything "might pop up" (T. v. 10, pp. 1672-1676).

119. "Red" MacDonald testified that a search may have been conducted by John MacIntyre, but "I didn't conduct it". (T. v. 10, p. 1675). To the best of "Red" MacDonald's knowledge, some men from the day shift were asked to go into the Park area - how many he could not say (T. v. 10, p. 1674). As a result of that search:

Well, like Sergeant Mallowney the day after reported picking up the kleenex with blood on it, you know...that was laying in the area for a day or so. (T. v. 10, p. 1676)

MacDonald cannot recall anything else happening that day except that Marshall was around the Police Station (T. v. 10, pp. 1677-1678). MacDonald could not say for sure when he finished either because "I didn't have to work" (T. v. 10, p. 1684). Perhaps the most crucial point however was stated when "Red" MacDonald was asked by Commission Counsel where the investigation stood at the

end of that first day:

— Well, I'm not sure if Sergeant MacIntyre had Donald Marshall in the office and took a statement from him. I'm not sure on that day.

Q. I think it's fair to say, sir, the first statement that we're aware of is dated the 30th, which would be the following day?

A. On a Saturday. (T. v. 10, p. 1685)

At that point Commission Counsel corrected "Red" MacDonald's evidence as to what day May 30 would have been.

120. It is respectfully submitted that "Red" MacDonald's evidence indicates that the day he actually started work again after going home on the Saturday morning was on Sunday. MacDonald referred to the kleenex found by Mallowney as having sat around at the Park for a day or so (when in fact it may have been there as little as nine hours and at most twelve if we assume that it is connected to the stabbing). MacDonald associated the taking of the statement from Donald Marshall, Jr. with the next time he worked after going home on the Saturday morning. All of the rest of MacDonald's evidence is not verifiable as to date given the general nature of the activity conducted - although one may consider that it would have been reasonable for the Detectives to have returned to the scene from time to time after the search by the patrol officers had failed to turn up any weapon on the chance that they might see something missed by the searchers. Also, if "Red" MacDonald had been out on Saturday, why did he testify to this Commission that he

himself conducted no search but rather that one had been done.

121. — On May 11, 1982, "Red" MacDonald gave a written statement to Staff Sergeant Harry Wheaton (Exhibit 99 - R. v. 34, pp. 95-96), in which MacDonald is reported to have said:

My next shift [after being called out on the night of the stabbing] as I can recall was Sunday the 30th of May, 1971. I worked that shift with John MacIntyre nine to five. We checked around the park and after dinner we went to Louisburg. We went to Chants home in Louisburg and they told us their son Maynard was in Catalone and described the house.

We went to Catalone and picked up Chant and John talked to him outside the car. Inside car there was no pressure put on Chant in my presence. There was very little talk. We returned to the station and John took over and that was the only dealings I had with Chant.

While "Red" MacDonald's statement to Staff Sergeant Harry Wheaton does not give a complete account of MacDonald's activity in relation to the Seale murder investigation, it does give this independent confirmation that makes it reasonable for this Commission to conclude "Red" MacDonald did not come back out to work after three and a half hours sleep on Saturday, May 29, 1971, and then work through until dinner time that day. MacDonald testified to this Commission that he was not scheduled to work Saturday, and his statement Staff Sergeant Harry Wheaton in 1982 is that he did not in fact work Saturday after having gone home at 4:00 a.m.

122. It is respectfully submitted that it is open to this Commission to decide "Red" MacDonald did not in fact come

out to work on Saturday, May 29, 1971, but rather left the investigation for John MacIntyre to take over. It was MacIntyre's "place to take over the investigation" (T. v. 10, p. 1671). No suggestion is being made that "Red" MacDonald should not have been out, but we respectfully submit that it is not possible to conclude that he was. Of course, if "Red" MacDonald had not been out on the Saturday with John MacIntyre, he would not have been able to show John MacIntyre his notes (Exhibit 38). "Red" MacDonald never actually states that he showed MacIntyre his notes anyway. Therefore, John MacIntyre would not have been in any position to be informed of any difference in the description from what appeared in the written reports at the Police Station. That is why there may have been no change in any direction about what the patrols were to look for in the way of alleged assailants.

123. A final point to consider on whether it is reasonable to believe whether or not John MacIntyre ever saw "Red" M.R. MacDonald's notes is that those notes never formed part of the Sydney City Police file. When John MacIntyre prepared an inventory of materials to turn over to the R.C.M.P. in 1982 (Exhibit 88) those notes were not included even though material in the possession of other police officers such as William Urquhart's Dan Paul note was. "Red" MacDonald was still an active police officer in 1982. The argument that John MacIntyre knew about Exhibit 38 in 1971 would have been stronger if there was some reference in Exhibit 88, but there is not.

124. It is respectfully submitted that John MacIntyre's position that he did not know about the notes at any time is not only correct but reasonable. In the intervening day MacIntyre would have been talking with Donald Marshall, Jr. when "Red" M.R. MacDonald was not there. Even "Red" MacDonald who says he was there feels that MacIntyre and Marshall spoke that day without "Red" MacDonald being involved. There is no evidence as to what Marshall may have said on the Saturday to John MacIntyre, but in "Red" MacDonald's mind it may well have made the disclosure of his notes redundant.

Specific Directions by John MacIntyre

125. Although some of the patrol men testified to this Commission that no special directions were received from the Detectives in this investigation, it appears that their recollection may be faulty. Leo Mroz, Richard Walsh's partner on the night of the stabbing, gave a statement to the R.C.M.P. on May 19, 1982 recalling that":

I remembered a description of two priestly looking men in a white VW with foreign plates being passed to us. We checked many vehicles that night (Exhibit 99 - R. v. 34, p. 99).

126. This "priestly looking" description was first given Sunday by Marshall to MacIntyre (Exhibit 16 - R. v. 16, p. 17), and by Marshall to Walsh and McDonald (e.g., T. v. 8, p. 1420). That must therefore have been communicated to patrol officers such as Mroz on the direction of MacIntyre.

127. The description of a white Volkswagen did not come

from either John MacIntyre or "Red" MacDonald. The only officers having contact with Donald Marshall, Jr. on the night of the stabbing would have been Howard Dean or his partner of that time - Martin MacDonald, now deceased. If Mroz was looking for two priestly looking men in a white Volkswagen with foreign plates on the night of the stabbing, Richard Walsh must have been looking for the same thing - even though he does not now remember. Of course, the possibility exists that Mroz is mistaken about which night he began looking for the white Volkswagen. He and Walsh, Dean and Martin MacDonald would all have been commencing work again at midnight Saturday until 8:00 a.m. Sunday. The most that can be taken from Mroz's statement is that at some point he became aware of a white Volkswagen with foreign plates which he ought to look for in connection with the stabbing and, if possible, two priestly looking men.

128. Oscar Seale testified before this Commission about a car being involved in the stabbing (T. v. 29, p. 5361). What Seale was told by Donald Marshall, Jr. was that Marshall and Sandy:

...were in the park...and they were talking and two - two men pulled up in a car.

Oscar Seale could not recall whether it was a white car with Manitoba license plates or a blue car with white Manitoba license plates. Marshall continued:

And they [the two men in the car] asked him and my son if they had any cigarettes and matches and they said, "No". He said that he then said that

— this man took out a knife and says, "I don't like Niggers", and stabbed Sandy in the stomach. He then took the knife and said, "I don't like Indians", and made a slash at him. (T. v. 29, p. 5361).

Seale asked Marshall:

About this car, are you sure it was Manitoba license plates?

and Marshall said yes. Marshall said that the two men got in the car and drove away (T. v. 19, p. 5362).

129. Oscar Seale spoke with the R.C.M.P. who referred Oscar Seale to the Sydney Police, although after some persistence by Mr. Seale did agree to "see what we can do" (T. v. 19, pp. 5363-5364). All this occurred prior to 8:30 a.m. on May 29, 1971. As counsel for Donald Marshall, Jr. brought out in evidence, Oscar Seale was unaware until the time of testifying before this Commission that John Pratico had given a statement on May 30, 1971 referring to a "white Volkswagen, blue license and white number on it" (T. v. 29, pp. 5407-5408; Exhibit 16 - R. v. 16, p. 22).

130. There is no evidence that Oscar Seale communicated the point about the white or blue Volkswagen to John MacIntyre at any time in 1971. As highlighted by counsel for Donald Marshall, Jr. in Oscar Seale's evidence, John Pratico did give a statement to the Sydney City Police on Sunday, May 30, 1971 which referred to two men running from the direction of screams in the area of Crescent Street, jumping into a white Volkswagen, with blue license and white lettering on the license (Exhibit 16 - R. v 16, p. 22). This was the third or perhaps fourth statement which

John MacIntyre took on Sunday, May 30, 1971, and, if true, suggested that the perpetrators of the crime who had been strangers to Donald Marshall, Jr. (Exhibit 16 - R. v. 16, p. 17) were not local. Since there was at least the suggestion that the assailants were not local, it is reasonable to believe the likelihood of identifying the assailants positively through local witnesses would not be as strong as finding a vehicle with out of province plates.

131. It is respectfully submitted that the white Volkswagen theory cannot be discarded lightly. Another witness, Rudy Poirier ultimately gave a statement on July 2, 1971 which, like the testimony of Oscar Seale, reported Donald Marshall, Jr. associating the two men with a white Volkswagen the day after the stabbing (Exhibit 16 - R. v. 16, p. 95).

132. On Saturday, May 29, 1971, R.C.M.P. Officer David Murray Wood testified that the only information he could get from the Sydney City Police was a minimal description of a man forty-five or fifty years of age with grey hair (T. v. 10, p. 1821). On Monday, May 31, 1971, the day after the first statement was taken from John Pratico, David Murray Wood has a note (Exhibit 40) indicating interest between 9:00 a.m. and 11:00 a.m. in a:

...Light blue Volkswagen parked on Pitt Street near Chic'N'Coop Restaurant New York license: 9993-OR, noticed grey haired man with grey beard, thirty-five to forty years standing of Maple Leaf Restaurant, appeared to be a stranger. Later observed a man thirty-three to thirty-eight years, brown hair, receding hairline, wearing a brown T-shirt, driving above-noted Volkswagen, Sydney

Shopping Centre...drove out Prince Street
towards K-Mart, Sydney City Police
-- advised.

Wood could not say where he got the indication to be on the look out for this light coloured Volkswagen, nor could he advise who would have been advised at the Sydney City Police (T. v. 10, pp. 1809, 1839). Considering Pratico's first statement (Exhibit 16, p. 22), Wood testified that he could think of no other reason why he would be looking for the Volkswagen and reporting to the Sydney Police except that a request to be on the look out for such a Volkswagen had come from the Sydney City Police (T. v. 10, pp. 1839-1840).

133. Joseph Terrance Ryan was Murray Wood's partner in 1971. His notes (Exhibit 41) identify the same light blue Volkswagen on Pitt Street on May 31, 1971 as had been identified by Wood (T. v. 11, p. 1858). However, Ryan's notes for that Monday continue, indicating that:

May 31, 1971: 8:30 a.m. until 5 p.m.
Patrolled locally by H.04-37 [police car
no.] re: assistance City Police re:
murder. Attempt to locate a white
Volkswagen, possibly Ontario registration
(Exhibit 40).

Ryan was unable to say whether the assistance in searching for the light coloured Volkswagen was the result of a request to him from the Sydney City Police, or as a result of information coming from a third source through his partner Murray Wood (T. v. 11, p. 1860).

134. It appears obvious from the notes of the R.C.M.P. officers that the Volkswagen theory was a real lead being pursued

early in the week following the stabbing of Sandy Seale. It is respectfully submitted that this Commission should conclude that the source for this interest was the Sydney City Police and particularly John MacIntyre who was directing the investigation at that time. This submission was made on the following reliable and reasonable grounds. It would be unlikely that the R.C.M.P. would take direction from some third party to look for a white Volkswagen for the purpose of reporting it to the Sydney City Police, particularly if, as some alleged, the Sydney City Police had already decided that Donald Marshall, Jr. was responsible for the stabbing. If Marshall was responsible for the stabbing, the white Volkswagen would have been an unnecessary and time-consuming diversion. Also, if the white Volkswagen theory was only something which Oscar Seale and the R.C.M.P. officers were interested in, Constable Leo Mroz would not have been told to look for it at any time.

135. There is no evidence to justify any inference that the Sydney City Police were aware of a white Volkswagen as early as the night of the stabbing as Leo Mroz's statement would suggest. Indeed, if the Sydney City Police had been aware, it is likely that that is the kind of information which would have been conveyed to Murray Wood on the Saturday morning in addition to the other information which Murray Wood obviously received (Exhibit 40; T. v. 10, pp. 1802-1803, 1825), and it would likely have appeared in the Crime or Occurrence Reports (e.g., Exhibit 16 - R. v. 16, pp. 11-16). Murray Wood and Joseph Terrance Ryan

were both looking for a light coloured Volkswagen from first thing in the morning the day after John Pratico's 6:00 p.m. statement. It is respectfully submitted that that is where the information came from and the Sydney City Police were quite properly pursuing that lead.

Conclusion

136. It is respectfully submitted that the evidence about the white Volkswagen indicates that the criticisms of John MacIntyre for not actively consulting with his patrol officers in the early days of this murder investigation are unfounded. In the absence of notes about informal consultation as described by Richard Walsh, Ambrose MacDonald, and Edward MacNeil, it is not surprising that after more than sixteen years these officers do not recall every piece of advise or direction which may have been received from the Detective Department directly or through the Desk Sergeant. Ambrose MacDonald did keep notes and has notes of informal consultations with the Detective Department.

137. The white Volkswagen lead was communicated. By the time the white Volkswagen lead was brought to the attention of the Police, the Detectives also had Marshall's formal statement fixing the description of his alleged assailants. Leo Mroz's statement to the R.C.M.P. in 1982 is interesting here as well because his language follows that of Marshall's May 30, 1971 statement comparing the appearance of the assailants with priests. Despite the absence of complete documentation on this point, we respectfully submit that this Commission should find

that there was in fact regular and sufficient consultation between the Detective Department and the patrol shifts.

138. There is no proven failure to consult. Even if there was, it is evident from the knowledge or lack of knowledge of Roy Ebsary among the police officers who testified before this Commission that consultation would not have identified Roy Ebsary or Jimmy MacNeil as potentially involved in this kind of crime. Those who perhaps ought to have memories of Roy Ebsary were not prompted sufficiently by the circumstances of the crime to recall or associate it with Roy Ebsary (Section D supra). John MacIntyre can scarcely be faulted for the fact that others may have had useful information in the recesses of their mind which they did not disclose to John MacIntyre.

F. Failure to Review Criminal Files to
Determine Suspects with a Modus Operandi
of a Knife

139. It is clear from documentation filed with this Commission that the Sydney City Police had had contact with Roy Ebsary in April, 1970 in relation to a weapons offence under the Criminal Code - specifically a twelve inch butcher knife (Exhibit 16 - R. v. 16, p. 1). It is also known that on that same date Roy Ebsary was fingerprinted by Detective William Urquhart (Exhibit 121). It appears from this documentation that Roy Ebsary appeared in Court on April 9, 1970 and pleaded guilty to possessing the concealed knife and being drunk in a public place, being fined with respect to both charges. It is also known that a Police Record Card indicating the April 8, 1970 matters as well as other liquor and criminal matters in February, 1958, and May, 1970 existed (Exhibit 18 - R. v. 18, p. 34).

The Form in Which Records are Kept

140. This Commission heard evidence from Howard Dean who, at the time of the hearings, was in charge of records for the Sydney City Police, and had been in charge since 1983. There was also evidence given at the Commission Hearings that Constable LeMoine was actually in charge of the records section in the Sydney Police Department (T. v. 9, p. 1591) but LeMoine was not called. Dean personally had no knowledge as to the manner in which records were kept in 1971 (T. v. 9, pp. 1498-1499). However, it is a reasonable assumption that any ability to use the record system in 1987 would not have been less productive

than any system which was in place in 1971. Therefore, if the system in 1987 could not be easily used to provide certain information, it would not have been possible to use the records in 1971 in that way either.

141. According to Howard Dean, offence records were filed by name (T. v. 9, p. 1499). There was no filing system by type of weapon, or by description (e.g., an older man). Occurrence and crime report records were filed in the records section in the same way - by name (T. v. 9, p. 1501). Howard Dean concluded for this Commission that in order to use the records of the Sydney Police to find an unnamed older man with a knife, "we would have to go right through all the reports to see if there was anything on it for that". Over a few years significant amounts of records would have accumulated, and indeed Howard Dean had never been requested to simply go through all the records in the hopes of matching up an individual with a description of the person and the offence (T. v. 9, pp. 1500-1502).

142. Other officers testified about the Sydney City Police records in 1971. Richard Walsh went so far as to say that there was no set record section and filing was achieved by taking all reports at year end, tying them up and putting them in a cardboard box which was placed somewhere "until some day they might be needed or surfaced" (T. v. 7, pp. 1285-1286). Edward MacNeil testified about the existence of a hard-cover book of criminal charges with disposition in addition to the other

records created by the Department's contact with an individual (T. v. 15, pp. 2612-2613).

143. Edward MacNeil expressed the opinion that the Sydney Police Department's system of record-keeping would not allow for review about the activities of unknown persons except through something triggering the memory of the officers who may have originally been involved with the unknown person (T. v. 15, pp. 2613-2614). This appears to be a reliable opinion. Nothing triggered in Edward MacNeil's mind about Roy Ebsary in 1971 (T. v. 15, p. 2623). William Urquhart's recollection was not triggered (T. v. 54, pp. 9833). "Red" MacDonald's recollection was not triggered (See Section G, infra). This Commission does not have the evidence of Fred LeMoine who was the other officer whose recollection may have been "triggered". While there is some evidence that John MacIntyre could have seen the MacNeil and LeMoine report, and that MacIntyre had an excellent memory, (T. v. 8, pp. 1392-1393), there is nothing to suggest that his recollection was triggered or indeed that he had any recollection.

The Alleged Failure

144. Whether or not anyone was in charge of records in 1971, John MacIntyre certainly was not. It is respectfully submitted that the evidence is clear that the Sydney City Police records were effectively useless in the case of an unidentified suspect. Indeed, the records, being based on name rather than conduct, or name cross-referenced with conduct, were no better

than the memory of individual police officers. In the absence of some memory-being of assistance in supplying a name which could then be researched, the records could provide nothing. 145. Unfortunately, there was no testimony which actually quantified the amount of work which would have been entailed for the Sydney City Police to review all of their criminal files to determine whether any might be suspects given a modus operandi of a knife. Only knowing how much work would be involved would permit a judgment as to reasonableness in not doing such a search. Therefore, it is respectfully suggested that it cannot reasonably be suggested, without some more evidence, that the failure to identify Ebsary as a possible suspect through criminal records should be described as a failure by John MacIntyre. Instead, it is respectfully suggested that the evidence as to the condition of records at the Sydney City Police Department should be the subject of some consideration and recommendation by this Commission which could make the system more useful.

M.C.I.S.

146. An R.C.M.P. telex dated Sunday, May 30, 1971, and forwarded from Sydney to Halifax at 3:11 a.m., remains a document of entirely unknown authorship (Exhibit 16 - R. v. 16, p. 90), as is a follow-up telex sent June 5, 1971 at 12:56 p.m. (Exhibit 16 - R. v. 16, p. 91). After giving some background about the case and a description of the alleged assailant, this document seeks a records check "for person(s) in Sydney met area using similar type MO with photos etc".

147. Evidence given by R.C.M.P. Officers at the Commission Hearings indicated that the R.C.M.P. had available to them, and on request for municipal forces, the "Maritime Crime Index Section" (M.C.I.S.) whose purpose was to corrolate information on various criminals and criminal activity throughout the region. This would permit the determination of suspects for current crime by looking at the method of operation in comparison with similar incidents in the past (T. v. 11, pp. 1867-1868). The R.C.M.P. Officers were unsure whether Sydney City Police information would have been fed into the M.C.I.S. system (T. v. 11, pp. 1868-1869, 1882; T. v. 10, p. 1844). The so-called "C.P.I.C." system was not in place in 1971 (T. v. 9, pp. 1503-1504).

148. In addition, the R.C.M.P. in 1971 would have had an index card system for recently released criminals, individuals on parole, outstanding warrants, and that kind of thing, maintained on a local basis (T. v. 11, pp. 1882-1883). These latter records would not have included occurrences or prosecutions handled by the City of Sydney Police (T. v. 11, p. 1883).

149. The only indication that the M.C.I.S. search had any success was that David Murray Wood testified that if such a search was successful, photographs and any other information would have been forwarded to the N.C.O. of the Sydney Detachment, as the exhibit itself requests. Wood himself has a note (Exhibit 40) indicating that on June 3, 1971, he provided a photograph to the Sydney City Police, and this could have been a photograph

which was made available as a result of the M.C.I.S. search (T. v. 10, p. 1852). For their part, the Sydney City Police apparently took three "mug-shots" of white men to show Sandy MacNeil within a few days of May 31, 1971, but none were the man whom MacNeil had seen in the area of Wentworth Park on the night of May 28, 1971 (T. v. 11, pp. 1924-1926, 1929-1930). For his part, George Wallace MacNeil was unable to recall being contacted about photographs (T. v. 11, pp. 1942-1943). If no reply had been received from M.C.I.S. it should have been followed up (T. v. 28, pp. 5283-5284), but these would have been internal R.C.M.P. communications and nothing in the possession of this Commission points conclusively to whether a reply was or was not received. From Wood's evidence about the photograph it would appear that the probability is that a reply was received.

Conclusion on Records

150. It is respectfully submitted that when one considers the evidence with respect to each of the potential sources of information - Sydney City Police records and R.C.M.P. records - no criticism of John MacIntyre in relation to those records can be maintained. The Sydney Police records were not useful because they were not indexed in a way which would be of assistance until the Sydney City Police had a name. There seems to be a probability that the M.C.I.S. search was helpful in a limited way, but whether the name and method of operation of Roy Ebsary was even in the M.C.I.S. system remains entirely unknown. There is certainly nothing to connect the lack of

success in finding Roy Ebsary with the criminal record systems of either the Sydney City Police or the R.C.M.P. to John MacIntyre. No one has ever suggested that James MacNeil could have been discovered this way. None of this has any possible connection with John MacIntyre. Any suggestion of failure on John MacIntyre's part because of the lack of usefulness of the records is, we submit, unsupported and therefore unjustified.

G. Failure to Discover Roy Newman Ebsary
or James William MacNeil

Means of Discovering Ebsary or MacNeil

151. Although subject to some variation in important details from time to time, Donald Marshall, Jr. consistently related to the Sydney City Police and others that he and Seale had been set upon by two men on Crescent Street as a result of which Seale was fatally stabbed and Marshall was slashed on the arm. Marshall indicated to the Police that the assailants were unknown strangers, and at least by Sunday, May 30, 1971, had advised the Sydney City Police that the assailants had said that they came from Manitoba (Exhibit 16 - R. v. 16, p. 17).

152. On the strength of what Donald Marshall, Jr. had told the Sydney City Police, indications were that the assailants might not be known offenders in the Sydney area. Indeed, throughout the investigation none of the witnesses who had seen or claimed to have seen the people answering the description of either Ebsary or MacNeil suggested that these individuals were local people (e.g., Exhibit 16 - R. v. 16, pp. 22, 26). In this kind of situation it would be reasonable for the local police force to seek assistance from the R.C.M.P. which had broader information sources, through such vehicles as the Maritime Crime Index Section. At the same time, even though the assailants described themselves as having come from away, the possibility certainly existed that the assailants were in fact unidentified locals. There would have been sufficient cause however, from the description of events given by Donald Marshall, Jr., that the

M.C.I.S. should be employed for any assistance which it could give. ---

153. A parallel source of discovering whom the assailants might be would have been through local Sydney City Police records, particularly if the inference were taken that Seale's assailants had not been honest in saying that they were from out of province, or indeed out of the Sydney Metropolitan area. With hindsight this Commission knows that the Sydney City Police had fingerprint records and charge records in relation to Roy Newman Ebsary (Exhibit 16 - R. v. 16, p. 1; Exhibit 18 - R. v. 18, p. 34; and Exhibit 121). This Commission knows that James^W William MacNeil neither at that time in 1971 nor since had any criminal record or official contact with the Sydney City Police (T. v. 2, pp. 458-459) other than that which his brother initiated on November 15, 1971. In any event, it would be reasonable to consider local Sydney City Police records as an avenue by means of which Roy Ebsary's name could have come to the attention of the Sydney City Police - whether or not this avenue would be practicable, with which we will deal in a moment.

154. A third avenue through which Roy Ebsary and Jimmy MacNeil could have been identified and considered in relation to this matter would have been through some personal suspicion or idea raised in the mind of a police officer - Detective or Constable. This would not only include identification of Ebsary or MacNeil through some recollection of official police contact with either of them, but would also include a police officer

sifting through his general store of knowledge gained as a result of regularly patrolling the City and dealing with its various citizens. While this means of identifying Ebsary and MacNeil would not be scientific like some computerized criminal record retrieval system, it would have been an important and valuable avenue to pursue in 1971, whether or not it was successful in coming up with Ebsary and MacNeil's names.

155. The fourth potential source of information which could have lead to the discovery of James William MacNeil and Roy Newman Ebsary would have been advice to the Police by some third party. The effectiveness of this means of discovering suspects would require of course, three steps. First, the third parties would have to be aware of the person. Second, the third person would have to know that the Police were looking for such a person. Once the third person had made a connection between what he or she knew and what he or she knew the Police were seeking, the third person would have to make the decision to communicate whatever information they had to the Police so that the possible lead could be pursued. This is not a system or means of discovering witnesses or offenders which is in anyway controllable by the Police, but it is a means by which some discoveries could be made if citizens co-operate. The police could only affect the second factor: letting the public know what they were looking for.

156. A further means of identifying unidentified suspects is through information which can be gathered from real

evidence - such as hair, fibre, finger print, and other scientific analyses. However, this first requires that the real evidence exists and then requires that the real evidence is capable of producing from scientific analysis some identifiable characteristic. There is then a requirement that the characteristic discovered from the real evidence, such as a fingerprint, means something in relation to other information or data accessible by the Police. For example, it is not much use to have a fingerprint if there is no effective means of comparing it with any fingerprints which may be available. There has to be a known identifying characteristic associable with a particular individual to give meaning to the characteristic which is discovered to be connected with the crime.

157. The final means for discovering who Ebsary and MacNeil were, would have been the means which eventually resulted in the discovery of Ebsary and MacNeil in 1971: admission or confession by one of the individuals for whom the Police had been looking. In the event that no one else can come up with any suggestion as to whom the Police should be looking for, this means of discovering unidentified suspects very quickly becomes the only means to produce results, reliable or not. In any event, this means of discovering offenders who cannot be identified by the victim or by other means, is entirely within the control of the unidentified suspect and his or her companions.

The Avenues Followed:

M.C.I.S.

158. -- No information came forth on Saturday, May 29, 1971, which would have suggested that the assailants described by Marshall and Seale had been local people - as nothing to that effect came forward until November 15, 1971. Donald Marshall, Jr. was around the Police Station on Saturday at the request of John MacIntyre (Exhibit 1 - R. v. 1, pp. 70-74) for the purpose of providing information. No formal statement was taken from Donald Marshall, Jr. until Sunday afternoon, but it is scarcely conceivable that John MacIntyre and Donald Marshall, Jr. would have had discussions about the stabbing without some recounting of events in line with the statement which he eventually gave (Exhibit 16 - R. v. 16, p. 17). Although there is no reason to believe that the "white volkswagen" information had surfaced at that time, the "Manitoba" remark very easily could have and the fact that Marshall did not know them, indicating a possible non-local offender.

159. At 3:11 a.m. a telex was sent to the Maritime Crime Index Section at "H" division in Halifax from the Sydney Detachment of the R.C.M.P. (Exhibit 16 - R. v. 16, p. 90). The telex indicates one time of 3:11 a.m. on Sunday, May 30, 1971 and a handwritten notation on the document indicates that it could have been handled by the Criminal Investigations Branch the next morning, May 31, 1971. The telex itself identifies both known persons involved, one of whom had died. The telex does identify Donald Marshall, Jr. as "possibly the person responsible" no

doubt based on the fact that he was, at that point, the only other known person involved. Then the telex recounts a version of events which is attributed to Donald Marshall, Jr.:

Marshall states he and deceased were assaulted by an unknown male approx. 5'8 to 6' tall, grey haired approx. 50 yrs. who stated he did not like Indians or Negroes and assaulted both persons with a large knife.

This is a different and more complete description than had been available to John MacIntyre to give to David Murray Wood earlier on May 29, 1971 (Exhibit 40). There is no evidence of Donald Marshall, Jr. speaking to anyone else other than John MacIntyre on the Saturday. However, any "Manitoba" connection is not mentioned.

160. John MacIntyre appears to have been the only responsible officer who spoke with Donald Marshall, Jr. on Saturday, May 29, 1971 during the day, and so may well have provided all or part of the information which appears in the telex. However, the telex itself is an internal R.C.M.P. document (T. v. 10, p. 1817) and the wording chosen for it and the details contained in it cannot be ascribed to John MacIntyre. It would also have been appropriate to seek a check for persons in the Sydney metropolitan area given the time when the request was being made because the "Manitoba" reference may well have been false - as indeed it was.

161. The telex does request that the records be checked:
...for a person(s) in Sydney met area
using similar type MO with photos
etc....(Exhibit 16, R. v. 16, p. 90).

David Murray Wood testified to this Commission that each R.C.M.P. Detachment kept its own local records (T. v. 11, p. 1883) which would normally have to be checked. If this telex was purely some internal R.C.M.P. initiative in Sydney, no special request for a records check for the Sydney metropolitan area would have been necessary because the Sydney R.C.M.P. would have had that information in their own records. It is respectfully submitted that the logical inference to take from the M.C.I.S. request is that that section of the R.C.M.P. check its records not only for the Maritimes, but when forwarding information to include information which M.C.I.S. might otherwise assume that the Sydney Detachment had - because, as the telex indicates:

Circumstances presently being
investigated by Sydney PD (Exhibit 16 -
R. v. 16, p. 90)

162. The records of M.C.I.S. were set up in such a way that an "MO" search could be done. Such a search would not be geographically limited. It is respectfully submitted that special mention of the Sydney metropolitan area would not necessarily be restrictive. In the request to M.C.I.S. it would be implicit that information from the whole maritime region was being sought.

163. The M.C.I.S. request may or may not have been successful in turning up any suspects (Compare Exhibit 40; T. v. 10, p. 1852). No witness could tell this Commission that Roy Ebsary's criminal record with the Sydney City Police Department was also in the M.C.I.S. system. However, the M.C.I.S. request

was a reasonable potential source of information to pursue. It is respectfully submitted that the evidence before this Commission leads to an inference that John MacIntyre participated to some extent in ensuring that that avenue was pursued.

Local Sydney City Police Records

164. Elsewhere in this submission we have dealt at length with the Sydney City Police records (Section F, infra). It is sufficient to state here that without the name of any alleged offender, the records of the Sydney City Police were virutally inaccessible because they were, and still are, filed by name only. While in an objective sense one might have expected a thorough review of the Sydney City Police records in an attempt to come up with a name, in fact it was not a practicable response at the time. There is little or no evidence as to what kind of effort would have been required to actually unearth either the Roy Ebsary occurrence report (Exhibit 16 - R. v. 16, p. 1), or his criminal record (Exhibit 18 - R. v. 18, p. 34), or his fingerprint records (Exhibit 121). John MacIntyre very directly, and we suggest honestly, acknowledged to this Commission, that he did not believe any general review of the records was carried out (T. v. 32, p. 5947). There was nothing in the context that demonstrates this as a failure by John MacIntyre given that the alternative would not have been reasonable.

165. The organization of the criminal records of the Sydney City Police were only as good as the memory of a name by police officers using it, a name which could be associated with a

description or a particular type of event. In 1971, none of that would have been under John MacIntyre's control. It is respectfully submitted that this avenue for discovering Marshall's assailant was effectively denied to John MacIntyre. It is not justifiable to consider any criticism of John MacIntyre for not discovering Roy Ebsary through the Sydney City Police records.

Police Officer Memory

166. It is in the nature of the work of police officers that they regularly come into contact with various members of the public, law-abiding and otherwise. As a result, it is reasonable to expect police officers when confronted with a crime by an unidentified individual to attempt to associate any information about the crime with their general knowledge of different people and the habits of different people. However, this avenue of identifying potential suspects requires that there first be knowledge of someone who might be a potential suspect, and then further requires that the police officer be able to recall and associate that knowledge with the crime at hand.

167. This Commission cannot go into the recesses of men's minds to determine if such attempted associations were made. The evidence before this Commission indicates that in the case of most of the police officers, the discovery of Roy Ebsary through recall would have been ineffective because they did not know him (See Section E, supra). John MacIntyre did not know Roy Ebsary (Exhibit 15 - R. v. 15, p. 10), and neither did

William Urquhart (T. v. 52, p. 9614). For these police officers, the fact that they did not know Roy Ebsary precluded this possible avenue of discovering who Ebsary was by recollection in the hours, days and weeks following the stabbing of Sandy Seale.

168. Some police officers would have had reason to know Roy Ebsary but did not recall who he was or associate him in their minds with the stabbing which had occurred: Edward MacNeil and Fred LeMoine (Exhibit 16 - R. v. 16, p. 1; T. v. 15, p. 2623), and this Commission only heard from the former (T. v. 15, pp. 2609-2612, 2613-2614, 2623-2624). William Urquhart did not recall Roy Ebsary either as a result of fingerprinting (Exhibit 121; T. v. 52, p. 9614). It was disclosed at these Commission Hearings that other police officers did have knowledge of Roy Ebsary to varying degrees, but none either associated him with this crime or knew his name. Certainly none of them testified about discussing a recollection with John MacIntyre that would have caused some change in the circumstances that could have at least eased the difficulty of uncovering Roy Ebsary. For example, if Ed MacNeil had indicated to the Detectives that he had dealt with an older man and a large knife within the last eighteen months, then an item by item search through the occurrence reports for the previous two years might have been reasonably contemplated.

169. Deputy Chief Norman MacAskill did not know Roy Ebsary by name although he recalled for this Commission that he had indeed seen the person he now knows as Roy Ebsary at a

shopping centre sometime before this incident in 1971 (T. v. 17, p. 3039). Lew Matheson, the Assistant Crown Prosecutor in 1971, related to this Commission that Norman MacAskill told him on the night of November 15, 1971, that he knew Mary Ebsary, and knew her well enough to describe her as the "anchor" of her household (T. v. 27, p. 5018). If indeed Norman MacAskill knew that Ebsary family well enough to understand the workings of the household, it may be inferred that he could have associated the man who was Mary Ebsary's husband with the name Ebsary. However, there is no evidence that Norman MacAskill ever communicated this thought to John MacIntyre or anyone else, if this Commission decides to accept the inference from the attributed remark.

170. Detective "Red" M. R. MacDonald testified that in 1969 or 1970 he had become aware of a report about a man with a gabardine coat walking around with a bunch of medals on his chest, up and down Charlotte Street (T. v. 10, p. 1667). Apparently this individual would tell people that he was in the Royal Navy (T. v. 10, p. 1668). However, as questioning by Commission Counsel pointed out, "Red" MacDonald did not know Roy Ebsary's name and there was nothing in the description given by Donald Marshall, Jr. that reminded "Red" MacDonald in any way of this character on Charlotte Street (T. v. 10, pp. 1667-1668). "Red" MacDonald indicated that his recollection was associated more with medals and the Navy than what he had to work with on May 29, 1971 (T. v. 10, p. 1668). "Red" MacDonald was not asked further about this.

171. Ambrose MacDonald testified that in May, 1971 he was not aware of a man by the name of Roy Newman Ebsary, and indeed never heard the name "until this incident", and then never associated the name with the person who actually was Roy Ebsary "until I saw him after 1982 or during 1982" (T. v. 7, p. 1167). MacDonald's reference to the time of "this incident" referred to late 1971 "when there was talk of Jimmy MacNeil and Roy Ebsary". Ambrose MacDonald in May, 1971 had seen the short order cook at the Esplanade Grill behind the counter but had never heard him speak nor heard him regale people with stories. MacDonald knew that this short order cook had worked in several restaurants and hotels, but does not recall ever having seen him on the street (T. v. 7, p. 1168). Indeed, MacDonald indicated that he was misled by the initial description which had indicated a taller man with white hair and the tam or beret. MacDonald had associated this with:

...a very stately man who lived on the north end of the Esplanade. He was very tall and wore the Legion jacket with medals and the beret at times. I kept associating that as being Roy Ebsary, but because of his clean cut appearance and things I just couldn't imagine this man being involved in a crime and I find out since then I was...I was looking at the wrong guy all these years. (T. v. 7, pp. 1168-1669).

Thus, while Ambrose MacDonald did go through the natural process of association, that did not lead him to the short order cook at the Esplanade Grill. There is no evidence that Ambrose MacDonald ever conveyed the association he made between the description

given and another individual in Sydney to anyone.

172. — Ambrose MacDonald did testify that the State Tavern which Ebsary was supposed to frequent was on Leo Mroz's beat (T. v. 7, p. 1166). This of course does not prove that Mroz knew who Roy Ebsary was either by description or name. Mroz is dead. This Commission does have a statement given by Leo Mroz to Corporal James Carroll on May 19, 1982 (Exhibit 99 - R. v. 34, pp. 98-99) but in it Mroz mentions nothing about having known Roy Ebsary in 1971 despite the fact that Roy Ebsary's name would have been very current in May, 1982.

173. It is respectfully submitted that while police officers may use their general fund of knowledge for the purpose of assessing descriptions of events and persons against their own knowledge of individuals in the community, this is a process which is individual to each police officer and not obviously reliable. Despite its weaknesses, this avenue of considered recollection provides a reasonable avenue for identifying potential suspects who are otherwise unidentified. It was an avenue which could not assist John MacIntyre in 1971 because the knowledge either wasn't there, or was too incomplete for the development of a useful association. That is not John MacIntyre's fault.

Information From Third Persons

174. A further potential source of information which could have lead to the discovery of James William MacNeil and Roy Newman Ebsary would have been advice to the Police by some

civilian witness discovered in the course of the investigation. Civilian witnesses must first obviously be identified to the Police either through other civilian witnesses (as Scott MacKay may have been discovered through Debbie MacPherson - T. v. 7, p. 1138), or by coming forward on their own. There is ample evidence that the Sydney City Police interviewed a number of people despite being hampered by the lack of a list of persons at the scene having been compiled at 12:15 a.m. on Saturday, May 29, 1971. Witnesses were interviewed not only for what they themselves saw in relation to the crime, but also with respect to other persons who might be pursued for other, and perhaps better, information (e.g., Exhibit 16 - R. v. 16, pp. 123-125, 127, 129-131, 133-143).

175. With particular reference to persons answering in some respect the descriptions given by Marshall, statements were taken from Maynard Chant and John Pratico on May 30, 1971 (Exhibit 16 - R. v. 16, pp. 18-23). Alanna Dixon was pressed about other people being seen in the Park (Exhibit 16 - R. v. 16, pp. 24-25) but came up with no one of a description similar to that given by Marshall. George Wallace MacNeil and Roderick Alexander MacNeil gave a joint statement on May 31, 1971 which was to be the closest description to Marshall's received in the course of the entire investigation (Exhibit 16 - R. v. 16, pp. 26-27). The only other witness interviewed prior to June 4, 1971 who asserted that she had been in the Wentworth Park and Crescent Street area at a time close to the stabbing, Debbie MacPherson,

could not give the police any assistance about seeing a man in what she recalls described as "a man with a trench coat" - even though John MacIntyre apparently pursued this point with her vigourously (T. v. 4, pp. 714-715, 719). Thus, it is respectfully submitted that it cannot be said that John MacIntyre did not make any efforts to pursue the description Marshall had given him with other witnesses who had spoken about being in the Wentworth Park/Crescent Street area at the time of the stabbing. 176.

The Sydney City Police and John MacIntyre did not stop at word of mouth as to who might have been in the area of the stabbing. Given the absence of some reasonably definitive list compiled of who was in the area, it was necessary for the police to let the public know that it was looking for people who had information about two men alleged to have been in Park and who appeared to be connected with the stabbing. This Commission has in evidence that information was given to the newspaper, and the newspaper gave prominent coverage to the investigation (Exhibit 42). Other media were also used. George Wallace MacNeil testified that he took the initiative to come forward with the person who had been in his company on the Friday night after hearing an appeal for assistance on the radio or television (T. v. 11, pp. 1939-1940). George MacNeil was able to connect the plea to knowledge which he had, and then made the effort to come forward with that information to the Sydney City Police. This seems to have been a rare occurrence in this investigation but that is no fault of John MacIntyre's. The only means by

which witnesses can be identified where none appear to exist is to let the public know and this was done. The community itself must accept the responsibility for any lack of response, and therefore lack of success, in this area.

Real Evidence

177. A regular means of identifying unidentified suspects is through information which can be gathered from real evidence - in particular, fingerprints on weapons. As indicated above, the utility of this avenue for indentifying unidentified suspect requires that there be some real evidence such as a weapon or car keys which could yield the identifying information. In this case there were no such pieces of real evidence. That foreclosed this avenue of investigation (See also Sections B,C,and D, supra).

Admission or Confession

178. From time to time information will come into the possession of the police from an acutal participant in a crime. Obviously, this is the best kind of identifying information, leaving aside questions of cogency and reliability. In this particular case one of the participants in the event lost consciousness and died before anyone could obtain an indentification from him. The other individual known to be involved provided a description but in no case was he able to attach that description to a name or some specific individual about whom he knew (Exhibit 16 - R. v. 16, p. 17). Roy Ebsary was certainly taking no steps to come forward, and Mary Ebsary

did not really believe that her husband had been involved with the stabbing in the Park (Exhibit 16 - R. v. 16, p. 182; T. v. 24, pp. 4545-4547, 4551, 4557, 4560-4561)..

179. The evidence before this Commission leads to this point. The only person capable of positively identifying Roy Ebsary as the assailant who killed Sandy Seale was James William MacNeil, the fourth person present at the event. As indicated above, Jimmy MacNeil was known by some of the police officers, but not as a result of being associated with any kind of criminal activity - let alone murder. There was no reason to pick Jimmy MacNeil's name out of the air and to go to see him.

180. It is acknowledged that Jimmy MacNeil has been bothered for a long time about not coming forward to the Police right away (T. v. 3, pp. 455-456). Jimmy MacNeil has testified that a number of factors were inhibiting him from coming forward between May and November, 1971. Whether or not it was intended this way, there is some evidence that Jimmy MacNeil understood his Wandlyn Motel meeting with Mary and Greg Ebsary as a threat of trouble if he reported Roy Ebsary's involvement in the Seale stabbing to the Police (Exhibit 16 - R. v. 16, p. 182; T. v. 3, pp. 451-453, 506-507, 620-622). Jimmy MacNeil had apparently also spoken with his father about the matter, and his father told him that it was a matter of self-defence so no more should be said about it (T. v. 3, pp. 449-450, 612). Finally, Jimmy MacNeil testified that he did not come forward because he did not believe that Donald Marshall, Jr. would ever be convicted (T. v.

3, p. 624).

181. -- It is respectfully submitted that this last reason was the operative reason because it suggests that if he did have fears that a conviction would be imposed he would have come forward - as he indeed did on November 15, 1971. MacNeil still needed to be persuaded by his brother John to report the matter in November, 1971 (Exhibit 16 - R. v. 16, p. 171). Regardless of whether Jimmy MacNeil's failure to come forward sooner is understandable, it was a matter entirely beyond the control of John MacIntyre.

Conclusion

182. John MacIntyre has been criticized for not being able to uncover Roy Ebsary after the stabbing in 1971. No police officer is omniscient. The only thing that a Detective is able to do in indentifying unidentified suspects is to pursue with diligence all reasonable avenues which might lead to the discovery and identification of the perpetrator of the crime. It is respectfully submitted that John MacIntyre used the resources that were available to him from a practical point of view in a diligent attempt to discover Roy Ebsary. He did not succeed. There is no evidence that John MacIntyre disregarded, ignored, or otherwise mishandled any of the reasonable avenues of investigation described above. We respectfully submit that this Commission should arrive this same conclusion and find that any inability to uncover Jimmy MacNeil or Roy Ebsary was not attributable to any default on the part of John MacIntyre.

H. Failure to Interview Young Persons in
the Presence of a Parent or Other
Responsible Adult

The Law

183. Although there are now, in 1988, explicit provisions in the Young Offenders Act, S.C. 1980-81-82 c. 110, s. 11 and 56, with respect to a young person who may be charged with an offence, there is little that is new with respect to taking witness statements from young persons. The standard with respect to statements of accused young persons prior to the Young Offenders Act was uneven and did not admit of any hard and fast rules. It is worthwhile reviewing the experience of the Courts with respect to the legal treatment of confessions from young persons because the standard for accused young persons before the Young Offenders Act can not be considered as any lower than for witnesses who were not accused.

184. In R. v. Jacques (1958), 29 C.R. 249 (Que. S.W. Ct.) a child of fourteen and a half was apprehended by the police, driven for some 135 miles in silence, deprived of his personal belongings, imprisoned behind double, locked doors with a barred window in a cell normally used for those detained on suspicion of murder, was under the constant watch of a permanent guard who could see him always, was not given one full meal during a detention of two days, had to use a toilet in the sight of his guard, was given no opportunity to see a relative, and until the statement began was spoken to by no one. As a result of these rather horrific facts, the Court suggested that the police should, at p. 268:

- (1) Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation;
- (2) Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
- (3) Carry out the questioning as soon as the child and his relative arrive at headquarters;
- (4) Ask the child, as soon as the caution is given, whether he understands it and if not, give him an explanation;
- (5) Detain the child, if there is not a possibility of proceeding according to (3) above, in a place designated by the competent authorities as a place for the detention of children.

Chief Justice McRuer approved the guidelines with respect to having a parent present in R. v. Yensen (1961), 130 C.C.C. 353 (Ont. H.C.).

185. The presence of parents at the taking of a statement from a child has remained an important consideration in determining the voluntariness of a statement from a suspected or accused young person: e.g., R. v. R. (No. 1) (1972), 9 C.C.C. (2d) 274 (Ont. Prov. Ct.). However, the presence of a parent or similar person was only one factor to be considered on the admissibility of a statement from an accused young person, and the absence of such a person would not necessarily vitiate that statement: e.g., R. v. M. (1975), 22 C.C.C. (2d) 344 (Ont. H.C.J.); R. v. A. (1975), 23 C.C.C. (2d) 537 (Alta. S.C., T.D.);

R. v. D.M. and J.P. (1980), 58 C.C.C. (2d) 373 (Ont. Prov Ct.).
186. -- It is respectfully submitted that the prevailing opinion even after the date of the events with which this Commission is concerned was as stated in R. v. Blais (1974), 19 C.C.C. (2d) 262, at p. 266 (Man. Q.B.) where it was pointed out that:

The real protest argued for the accused goes to his interrogation and the taking of his statement without the presence of the parent. The law however does not debar interrogation of a juvenile save in the presence of a parent or other adult related by ties of blood or friendship. Circumstances, of course, may alter cases; and I would not for a moment say there may not be occasions where it would be fatal for the police to neglect or refuse to call the parent, or to invite the parent to visit or speak with the juvenile before or during the interrogation, or at least to attend during the interrogation, even if cautioned not to interfere. There may indeed be cases where it would be preferable, if not essential, for the police to so involve a parent; and of course my attention was drawn to the decisions in...Jacques...and...Yensen....

The Jacques and Yensen cases are discussed at some length in the article "Confessions By Juveniles", written by a Family Court Judge and Magistrate, and appearing in the (Canadian) 5 Crim. L.Q. 459 (1962-63). In Jacques, the interrogation followed two days of detention in a barred cell ordinarily occupied by adults involved in major crimes, accompanied by other conditions of impropriety; in Yensen the accused youth was retarded. As the writer of the article concludes, it is questioned about whether the remarks by the very experienced trial Judges in those cases ought to be looked upon as principles of general application. Certainly, the

circumstances here in no way reflect or even approximate what occurred in the two cases cited.

Apart from those decisions, counsel cited no authority which would debar the interrogation of a juvenile until a parent is given opportunity to attend this interview. As always, the matter is one to be considered in light of all the circumstances, including the age and intelligence of the accused and, possibly, the circumstances and nature of the offence itself. The learned trial Judge, experienced in such matters, saw no special circumstances in this case, nor do I, such as would make it incumbent upon the officers to speak to the mother of the accused before they did.

187. In the article titled "Confessions By Juveniles" referred to in the above citation, Judge Fox referred to an unreported Ontario Juvenile Court decision heard in early 1962 by the title of Re R.M. The facts of that case involved a thirteen year old boy described by psychiatrists as being in the "bright normal" range, but charged with having murdered a seven year old girl. Following a long trial involving a voir dire concerning a statement given some eleven days after the girl was found dead, the boy was convicted of having committed a delinquency in the nature of manslaughter. Fox commented at p. 467, 5 Crim. L.Q.:

In that case, no relative was present while the written statement was taken by the police. The boy did not ask to have one present. He said he wanted to tell the truth - the whole truth - and the evidence was that he felt relieved after making the statement. There was a very strong suggestion on the voir dire that he was not free to tell the truth on an earlier occasion when he was being questioned by the same police officers in the presence of his mother. On that

occasion, the boy told his mother that he was not going to lie. When asked by -- defence counsel on the voir dire what he had meant by that statement, he stated quite frankly that his mother had warned him, following the discovery of the girl's body, that if the police should come and question him, he was to say that he had been home all day, which the mother well knew was not so. It was not until the boy found himself alone with the police officers, a week later, in the juvenile detention home, that he finally broke down and said that he would like to tell the truth - the whole truth - which, as far as was indicated at the trial, he did. The statement followed.

Considering this case in the context of some inflexible rule about having a parent present, Fox continued at pp. 468-469:

One is driven to ask, in a case of this kind - in the very peculiar circumstances leading up to and surrounding the taking of the statement - if there was even a remote possibility that the police would have discovered the whole truth in the presence of these parents or either of them. And, after all, it is the duty of the police to do everything that they can, within the bounds of fairness, and according to the rules set down in the cases for the taking of such statements, to seek out the truth, wherever it may lie. In this case, it is submitted, the interests of all parties, the boy himself, the local community, and the cause of justice, were better served than had both parents, or either of them, been present when the boy told the "whole truth" to the police.

This is not to suggest, however, that the police are not to exercise special care in the matter of questioning or eliciting statements from children who are suspected of having committed or being involved in the commission of a crime or offence.....

Undoubtedly, there must be countless

other cases like Re R.M. coming before our courts from day to day in which there are strong reasons for believing that it would not be for the good of the child or in the interest of the community, that a parent or other relative should be present while the child is being interrogated or is being invited to make a statement to a person in authority. In such cases, it is submitted, it would be perfectly proper for the investigating officer, in the absence of the parent, to conduct his interrogation and take a statement from the child provided he complied, as far as possible, with the Judge's Rules, and those additional rules which have developed in English and Canadian case law surrounding the taking of such statements.

188. With respect to young persons as witnesses the Courts historically held that there was a lower standard required in interviewing a child witness and eliciting a complaint or story from them. Obviously evidence elicited by threats would be inappropriate: R. v. Mullen, [1968] 1 C.C.C. 320, at p. 334 (B.C.C.A.). Also, it is improper to interfere with a young person with respect to the substance of the evidence they are giving once that young person has gone on the stand and commenced to give evidence: R. v. Singh (1979), 48 C.C.C. (2d) 434 (Man. C.A.). In that case a fifteen year old girl gave testimony for the Crown against her father on the charge of arson. After giving her evidence, she was taken to an interview room in the Police building and questioned by a police officer who pointed to some incriminating letters which her father had written and who told her that it was known that she had lied on the stand. The girl eventually went back on the stand and recanted her former

false testimony. The Manitoba Court of Appeal decided that such questioning did not disqualify the girl as a witness - though it would certainly affect the weight of her evidence. The Court also stated at p. 438:

There was some suggestion that the course of action was proper having regard to the fact that the witness was being persuaded to tell the truth, rather than to give false evidence. In my opinion, improper interference with a witness is wrong whether the motive or result of that interference is to produce true testimony or false testimony....Where no improper means are used, it is material to consider whether it is sought to have a witness speak the truth or falsehood, but where improper means are used, it is immaterial what the motive is. The law must be assiduous in protecting witnesses from improper interference, especially during the course of the trial. Had counsel recalled Paramajit to ask for a ruling that she was adverse, the learned trial Judge could then have considered whether to have her further questioned. Such questioning would have taken place in the Court-room before the judge, not in the Public Safety Building in the presence of two police officers.

Although decided well after the situations under consideration by this Commission, it is acknowledged that everything said there would appropriately apply to the events in 1971. In considering the contact with a witness if no improper means are used and the motive is to have witnesses speak the truth, there can be no objection. Improper interference is, and always has been, nothing more than improper interference.

189. John Watson in his book The Child and the Magistrate, Jonathan Cape (London: 1965) at p. 74 comments this

way on interviewing and eliciting the truth from young persons:

-- Anyone can talk to children. Too many people not excluding some magistrates, talk at them. An older boy or girl will usually respond to the invitation, "Tell us all about it" but with a young child it is more difficult, especially if he is nervous. A method of coaxing him to speak, which is sometimes effective, may be likened to a military manoeuvre. An attacking general seldom commences operations by a headlong assault on the enemy's centre. He is more likely to begin by cautious reconnaissance and a delicate probing of the enemy's flanks. The same applies with young children: an enveloping movement is more likely to succeed than a direct assault. "Why did you steal your father's watch?" is bad strategy. The enemy closes his ranks and you are rebuffed.

How much wiser to begin on the flanks with a few simple questions about his home and surroundings. Has he any brothers and sisters? How old are they and what are their names? Where do they live? How does he usually spend his evenings and week-ends? None of these things may be very material; but the questions are factual, uncontroversial and reassuringly removed from the delicate question of his father's watch. The child answers them glibly, gets used to the sound of his own voice and gains a measure of self-confidence. Further questions, more material to the issue, may concern the amount of his weekly pocket money; how he spends it; what happens if it runs out; who his friends are; whether his dad approves of them; whether his friends have watches...As like as not the reason why he stole father's watch will become so plain that the direct question need not be asked.

190. Although the case is an old one, R. v. McGivney (1914), 22 C.C.C. 222 (B.C.C.A.) expresses the view that in some

circumstances it is highly appropriate to vigorously challenge a young person about what they are saying to ensure so far as possible that the truth is being received. Mr. Justice Martin stated at pp. 227-228 in relation to an alleged recent complaint that:

That opportunity here was manifestly, at the latest, when her grandmother first challenged her attention by asking her who had hurt her, and her answer in effect was that no one had done so. Whatever could be said to excuse her silence before that time, nothing could excuse it thereafter. To admit evidence of that nature in such circumstances would, in my opinion, be more than dangerous. While one may be justified in making due allowance for the actions or conduct of young children, yet at the same time it must be remembered that their minds, often highly imaginative, are singularly open to suggestion and the limit should be placed on that allowance and indulgence when prejudice to the accused is likely to result from a further extension thereof. When a reasonable just opportunity is established in the case of a child, there is no more justification for departing therefrom than in the case of an adult.

Neither the Courts nor the police are required to blandly accept every word spoken by a young person and full challenge may be justified where circumstances demand an indication of whether the truth is being told or not.

The Practice in 1971

191. The practice with respect to taking statements from young persons in 1971 was the subject of comment by many witnesses, but at the same time many were not taking statements from young persons in 1971: e.g., Richard Walsh and Ambrose

McDonald. It is respectfully submitted that the most cogent evidence as to R.C.M.P. practice was given by Douglas James Wright. Wright testified that he did not recall the policy that was in place when he was doing actual police work but did recall that it certainly was not mandatory that an adult or parent had to be present when taking a statement from a juvenile. As far as his practice was concerned:

I've had adults present interviewing juveniles, yes, and in particular if it was a more serious matter, hey. I'd have the parent present or one of the parents present.

Q. But you don't consider it to be - and did not at that time, I mean, consider that to be a mandatory thing?

A. No, I'm aware of in latter years, of course, force policy did change, but this would be long after I left the police field - the active police field itself. I don't know when that policy changed. I think the latter's 70's or '80, '81. (T. v. 28, pp. 5254-5255).

David Murray Wood testified to consistent effect with what Wright had stated:

We would have one of the parents present at all times or a school teacher if it happened to be at school, and there likely would be two officers present (T. v. 10, p. 1816).

192. The Sydney City Police had no written policy in 1971 (T. v. 10, p. 1696), and it was "Red" MacDonald's evidence that with anyone under 16:

Well, you have to see the parents of the boy first or the person...And if you want

to take a statement from them, you'd have to have one of the parents, you know, --with him. (T. v. 10, pp. 1695-1696).

William Urquhart was perhaps more realistic when he stated:

We always tried to get the mother or the father or the guardian with the juvenile when a statement was taken. But sometimes they requested that they didn't want their parents involved.

Q. You're saying it was your practice, then, that you would make some attempt to have a parent or a guardian with them?

A. Yes, if at all possible.

Q. I see. Was that a practice within the department itself, do you know, or was that just your practice?

A. No, I would say it was a practice within the department. The only reason it would change is, as I said before, if the person involved didn't want, they'd come in and say, "Look, I'll tell you what's going on but I don't want my parents to be involved or I don't want anybody else to know about it." (T. v. 52, p. 9481).

No differentiation as between accused juveniles or suspected juveniles and witness juveniles was discussed. The differentiation question began to be asked of "Red" MacDonald but was not immediately answered and Commission counsel did not pursue it (T. v. 10, p. 1696).

193. John MacIntyre was very frank when asked about any rule that he followed with respect to having parents present:

Q. Okay. Now what about when you're taking statements from juveniles; is there any different practice that you follow?

A. No, I don't think. Wait now. Again
- Again if there was a parent there
that wanted to sit in on it, no
problem.

Q. Well would you always make certain
that a parent was there?

A. No, I wouldn't say that....I always
like to have a parent present if
they're there and sometimes a parent
or the juvenile - (We're talking
about juveniles now?)

Q. Yes.

A. - probably wouldn't want them
there....[and after being referred to
"Red" MacDonald's evidence]...In
1971, I - I must say that I did talk
to juveniles without their parents at
times and I also said if a parent
could be present that I liked for
them to sit in and if they didn't sit
in it was because they objected to it
or the party objected to it....But I
did take statements without - without
parents sitting in. (T. v. 32, pp.
5850-5852).

Norman MacAskill took the same position (T. v. 17, pp. 3035-
3037).

194. It is respectfully submitted that the practice
indicated by Douglas Wright and John MacIntyre was consistent
with the applicable law at the time in relation to accused
persons. Indeed, it is unknown if any witness at this Commission
distinguished between accused juveniles and those who were merely
witnesses, but it appears that if there was no mandatory
requirement for a parent to be present during the statement of an
accused juvenile then there would certainly be no mandatory rule
of parental presence for the statement of a young person who was

merely a witness. While this Commission may wish to consider the validity of ~~that~~ position today, ~~that~~ cannot change the context of the legal and operational framework under which the Sydney City Police were operating in 1971.

Interviews With Young Persons in This Case

195. Barbara Floyd was interviewed by John MacIntyre and John Mallowney on Saturday, May 29, 1971 in the presence of her parents. The police told her parents to make sure that Barbara was telling the truth "and stuff like that", which her parents did (T. v. 18, p. 3131). In the course of the investigation of the Sandy Seale stabbing John MacIntyre also interviewed Joan Clemens in the presence of her mother Emily and her husband, Joan's father (T. v. 19, p. 3499). MacIntyre:

...had what you call a voice of authority and that he was in charge and we were there to answer his questions as he asked them. (T. v. 19, pp. 3499-3500).

Debbie MacPherson (Timmins) was interviewed on Thursday, June 3, 1971 in the presence of her brother Steven and Uncle Allan MacPherson for the entire interview of about an hour or an hour and a half (T. v. 4, pp. 714, 721, 727). The evidence from MacPherson is that when MacPherson's brother told the police present to stop asking questions, they did (T. v. 4, p. 715).

Pratico

196. With respect to John Pratico, he was sixteen and a half years old in May, 1971 (T. v. 10, p. 1997). Arguably the law permitted him to be treated as an adult, as he was by the Court system (Exhibit 1 - R. v. 1, pp. 42, see 155; T. v. 28, pp.

5227-5228). Adults are treated as adult whatever the mental difficulties. R. v. Helpard (1979), 49 C.C.C. (2nd) 35 (N.S.S.C., A.D.). In any event, John Pratico first received an indication that the police wanted to speak with him through his mother (T. v. 12, p. 2039). Pratico did not ask the police whether or not his mother could go to the Police Station with him, and gave evidence both that she did go with him that first day and she did not go with him that first day (T. v. 12, pp. 2040-2041, 2207-2208). Pratico's mother certainly did come to the Police Station that day, and John Pratico's evidence was that his understanding was that the police had told his mother that she should come to the police station when she was ready (T. v. 12, pp. 2040-2041, 2112). John Pratico's mother did not sit in while he was being questioned, and is unsure whether she was at the station to take him home (T. v. 12, pp. 2054-2055). It will also be recalled that Pratico's first statement followed a period of time sitting on a bench at the Police Station with Maynard Chant (T. v. 12, pp. 2016, 2043, 2044).

197. With respect to John Pratico's statement on June 4, 1971, Pratico says that his mother did not go with him to the Police Station, and he is unsure whether she showed up later or not because his mother was at the Police Station on a few occasions (T. v. 12, pp. 2061-2062, 2112). However, in John Pratico's February 25, 1982 statement to James Carroll of the R.C.M.P., John Pratico had indicated with respect to the second statement that:

A couple of days later the police came, I wasn't home, my mother took me to the Sydney Police Station around one or two o'clock I think. I talked MACINTYRE alone at first, MACDONALD came in a few minutes later. I sent my mother home to look after my sister. (Exhibit 99 - R. v. 34, p. 50)

Although this statement and even the passage quoted contains assertions of fact which are not supported by the documentary evidence, it appears that John Pratico is asserting no complaint with respect to whether or not his mother was present in the interview room. As can consistently be seen in this case, the Sydney City Police certainly took the approach during this investigation to keep in contact with parents and did not covertly interview their children.

198. Mrs. Pratico mainly confirms what was related by John Pratico. After satisfying her concern that John would get his meals on that Sunday, she left after about five or ten minutes (T. v. 13, pp. 2259-2266, 2293-2296). Margaret Pratico did not know that her son gave a second written statement to the Police, leading to the inference that she was neither at the Police Station nor did she know anything about John being interviewed again (T. v. 13, p. 2300). However, this Commission has some contrary evidence from John Pratico and it may be that the passage of years has either caused Mrs. Pratico to forget entirely about the second statement, or to merge the experience of being at the Police Station twice into one.

Chant

199. With respect to Maynard Chant, when he was

discovered on the Friday night his father was ultimately called and Maynard was turned over to him for transport back to Louisburg from Sydney (T. v. 5, p. 792). However, Chant indicated that his father was probably "at his limit" with Maynard at the time (T. v. 5, p. 793). Chant was fourteen years of age at the time of the stabbing (T. v. 5, p. 799). He acknowledged that it was in his habit to lie:

If I was doing something that wasn't right in my parent's eyes. Giving in to maybe some mischief of something. It was - it's not, it's something that was done in our home, lying. I was always told to tell the truth. I was brought up to tell the truth. But I don't know why I lied. I Just probably lied to cover up or basically why young people lie. (T. v. 5, pp. 800-801)

200. Maynard Chant's first subsequent contact with the Sydney City Police came on Sunday, May 30, 1971 when the police were found parked in the Chant driveway at Louisburg when the Chants arrived home from church in Sydney (T. v. 20, pp. 3524-3425). Beudah Chant may well be confusing the car in the driveway with Sunday because she says at that time the police were suggesting that Maynard had not told the complete truth - a fact which she says was also mentioned to her by a police officer who came to her door on Friday, June 4, 1971 (see Compare T. v. 20, pp. 3525-3526 with p. 3534). Other evidence from "Red" Michael MacDonald indicates that when he and MacIntyre went to Louisburg on Sunday, Maynard was not home so MacIntyre spoke to either Chant's mother or father, after which Chant was found at a baseball field somewhere on the Louisburg Highway, at which time

MacIntyre, Maynard Chant and MacDonald proceeded back to Sydney (T. v. 10, ~~p~~-1694). Maynard Chant himself recalls driving with one police officer on the Louisbourg-Sydney highway as far as Catalone and some questions being asked while the car was stopped at the side of the road (T. v. 5, pp. 796-797). Chant also recalls being questioned in the driveway at his home on the Sunday after getting home from church (T. v. 5, pp. 795-796). Chant was unable to place in time when he went into Sydney - whether it was on the Sunday or within the next three or four days (T. v. 5, pp. 797, 839). Elsewhere Chant states that he does not recall any contact with the police between May 30, 1971 and June 4, 1971. Chant says the May 30, 1971 statement was taken in the police car while in his parents' driveway at Louisbourg (T. v. 5, pp. 808, 809, 814). However, Chant also gives evidence about being intimidated by Donald Marshall, Jr. at the Sydney City Police Station just before being asked to give his statement (T. v. 5, pp. 830-831). Chant was unsure about any contact with the Sydney City Police between May 30 and June 4, 1971 at all (T. v. 5, pp. 846-848).

201. It is respectfully submitted that with respect to the May 30, 1971, statement John MacIntyre and "Red" MacDonald drove to Louisbourg and were waiting in the Chant driveway when the family returned from church. A discussion was held between John MacIntyre and the parents as a result of which Maynard Chant went to Sydney in the custody of the police officers without the company of a parent. It appears from the evidence that Catalone

would have been passed on the way from Louisbourg to Sydney, but how it fits into the narrative of events here is a mystery. Maynard Chant did not mention it in his statements to the R.C.M.P. in 1982 (Exhibit 99 - R. v. 34, pp. 47-48, 81-83), though the latter statement does have a reference to Maynard Chant being driven to Sydney at some point by the Crown Prosecutor. It is respectfully submitted that it is not possible to conclude that there was some third interview besides May 30, 1971 and June 4, 1971 involving John MacIntyre. The important point is that the parents were consulted by John MacIntyre prior to there being any discussions with Maynard Chant, and it may be presumed that there was no objection by either Maynard Chant or his parents if the questioning took place for at least some time on Chant property and later well away from the control of the Chants in Sydney.

202. The second June 4, 1971 statement is much clearer with respect to parental involvement. Maynard Chant and Beudah Chant agree that when they were contacted on June 4, 1971 for further questioning by the Sydney City Police, and both went to meet the Sydney City Police at the Louisbourg Town Hall (T. v. 5, p. 854; T. v. 20, p. 3535). Wayne Magee says that he invited Beudah Chant to attend (T. v. 20, p. 3628).

203. Maynard Chant acknowledged in evidence before this Commission that by June 4, 1971 his parents certainly understood the seriousness of speaking with the police and had admonished Maynard to tell the truth (T. v. 5, p. 849). Beudah Chant

confirmed this indicating that she had told Maynard after the Sunday statement:

"Well, Maynard, if you're not telling the truth, you'd better tell the truth because this is very serious and, you know, you might get in trouble yourself if you - " because he was on probation and he said he was telling the truth. (Emphasis added) (T. v. 20, p. 3532).

For his part Maynard Chant said that he was bothered quite a bit about having signed the false statement on May 30, 1971 (T. v. 5, p. 843). Chant also indicates that he was probably ashamed (T. v. 5, p. 860). Chant perceived when his mother kept telling him to make sure that he told the truth that she was getting upset (T. v. 5, pp. 855-857) - and while Beudah Chant does not say that she was upset and neither does Wayne Magee (T. v. 20, p. 3638), Beudah Chant and Maynard Chant were united on the fact that Beudah's prime concern was to make sure that Maynard was telling the truth (T. v. 5, p. 863). Maynard Chant summarized his relationship with his parents at that time on the basis that "I was doing a lot of wrong and I was more or less concealed within myself at that time" (T. v. 5, p. 860).

204. Beudah Chant says that after some period of time Beudah Chant believes that John MacIntyre asked her to leave thinking that Maynard might talk more freely if she was not there (T. v. 20, p. 3538). Beudah Chant agreed to leave (T. v. 20, p. 3538), made no objection to leaving (T. v. 5, p. 857), and she herself was of the view that if she did leave Maynard would open up with what he knew to the police (T. v. 20, pp. 3539-3540).

Within approximately 20 minutes of Beudah Chant leaving the statement was finished (T. v. 20, p. 3453). Beudah Chant had been in the hallway and had heard no banging of tables or raising of voices while she had waited for him (T. v. 20, pp. 3543, 3566-3567).

205. It is respectfully submitted that it is unnecessary for the purposes of the parental presence issue to go beyond the assertion of Maynard and Beudah Chant that she at one time left the room where the statement was being taken. John MacIntyre and William Urquhart both recalled that everyone whose name is listed at the end of the statement (Exhibit 16 - R. v. 16, p. 54) was indeed present throughout the taking of the statement. Wayne Magee does not recall Beudah Chant leaving at any time (T. v. 20, pp. 3633-3634, 3644), and thus his evidence may be supportive of MacIntyre and Urquhart.

206. However, it is respectfully submitted that when the facts are assessed that Maynard Chant felt himself in an uncomfortable position due in part at least to repetitive admonitions by his mother to tell the truth, and the fact that Beudah Chant herself felt that leaving the room where the statement was being taken was the most appropriate approach in the circumstances, no criticism can be sustained that MacIntyre was acting outside of established legal procedures at that time. Indeed, Maynard Chant perhaps made the most compelling argument for this when he stated to counsel for Donald Marshall, Jr. that if his mother had stayed he would have continued to say

that he had not seen anything:

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

when in fact what he now admits to be his appropriate position that what he intended to convey was that he had not seen anything about a knife going in to the victim (T. v. 6, p. 1054).

O'Reillys

207. Mary O'Reilly (Csernyik) was fourteen years of age in 1971 and gave a statement to the Sydney City Police on June 18, 1971. She recalls that either her mother and father or just her mother picked her up at school that day and took her to the police station (T. v. 18, p. 3293). The police did not come to the school to get her, and therefore contact for this statement must have been made first with the mother. Mary O'Reilly testified that her mother did not go into the statement-taking room with her, but she does not know if her mother waiting outside (T. v. 18, p. 3293).

208. Catherine O'Reilly (Soltesz) was Mary's sister and walked into the statement-taking room before Mary's statement was finished (T. v. 18, p. 3294; T. v. 19, p. 3376). Catherine O'Reilly testified that she had been picked up at school by the police through the principal's office (T. v. 19, p. 3374). Catherine O'Reilly did not give a straight answer at first to the question of whether her mother was still present at the police station when she arrived:

Q. Were you alone or was your sister -

A. I was alone.

Q. Was your mother there?

A. I was alone. (T. v. 19, pp. 3374-3375)

but later stated:

Q. Was your mother at the police station?

A. I don't remember her being there.

Q. Did you ask if she could come down?

A. No. (T. v. 19, p. 3377).

209. It is respectfully submitted that his evidence shows that there is a substantial probability that the mother of the O'Reilly girls had been appropriately informed about the police interest in speaking with her daughters, and that she was at the police station. Contact was made through the parent, as well as through the appropriate educational authorities. It is respectfully submitted that there can be no criticism of the approach of the Sydney City Police with respect to the O'Reilly statements on this question of informing the parents or school authorities and indeed quite possible having a parent at the police station while the daughters were being questioned. There is no evidence to suggest that the mother of the O'Reilly girls was refused access to the room where the statements were being taken.

Harriss

210. Patricia Harriss was contacted on June 17, 1971 to speak with the Sydney City Police through her mother, Eunice (T. v. 16, p. 2951). Unlike any other formal statement except for

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that taken from Maynard Chant on June 4, 1971, the evidence is clear that ~~the~~ police interviewing of Patricia Harriss commenced in the presence of Patricia's mother Eunice (T. v. 16, pp. 2953-2955). Patricia Harriss does not recall her mother being present with her but knows that her mother does recall this (T. v. 16, pp. 2795, 2796, 2879, 2925). Patricia Harriss does recall that once she was let out of the interview room to see her mother indicating that her mother had not been in the same room with her (T. v. 16, pp. 2799-2800, 2817, 2867, 2913). Eunice Harriss was waiting outside on a small bench (T. v. 16, p. 2800, 2960). Eunice Harriss states that she left the room where the statement was being taken after an hour or an hour and a half on John MacIntyre's request. Eunice Harriss did this even though Patricia Harriss had been upset "for quite awhile" and had been crying (T. v. 16, p. 2959). Patricia Harriss does not recall indicating to her mother even when let out of the room as to why she (Patricia) was so upset, and Patricia does not recall any effort made on her own or her mother's behalf to be in the interview room together (T. v. 16, pp. 2867-2868). It never entered Eunice Harriss' mind to go back into the room once she left and she did not ask, nor was she asked to do so (T. v. 16, p. 2962). Eunice Harriss recalls that it was very late when she and her brother, who had since arrived, saw Patricia again, at which time they took her home (T. v. 16, p. 2986).

211. It is respectfully submitted that what is crucial here in a decision as to whether or not the Sydney City Police

acted appropriately with respect to parental presence is what Eunice Harriss—as the responsible parent thought in 1971. Eunice Harriss was aware that Patricia had been upset "for quite awhile". Inside Eunice Harriss felt that she wanted to leave the police station with her daughter but at the same time:

...I also felt that at a time like this and something so dreadful having happened, it's best to get it at that moment and that's why I was willing to stay along there with Patricia. (T. v. 16, p. 2959).

Eunice Harriss also felt that Patricia's story was a bit "far-fetched" though it was unusual for Patricia to continue on about the story if it was not true:

It sounded like Hallowe'en to me....It wasn't something that you'd expect to hear about this long coat and the old man and the long hair and - but I - I went with Patricia. I believed her. (T. v. 16, p. 2958; see also T. v. 16, p. 2966).

212. When Eunice Harriss and John MacIntyre left the room MacIntyre asked politely if Eunice "would mind leaving the room" (T. v. 16, pp. 2956, 2992). MacIntyre apparently advised Eunice Harriss that:

Sometimes it works out better this way because he felt Patricia was not co-operating (T. v. 16, p. 2956).

Eunice Harriss acknowledged that she could have told John MacIntyre, whom she knew from when both of them had been children, that she wanted to stay in the interview room because her daughter had been crying, but the way Eunice Harriss saw it in 1971 was that she should co-operate with the police and in the

end it would be to Patricia's benefit (T. v. 16, pp. 2992-2993).

213. — It is respectfully submitted that this evidence demonstrates that John MacIntyre followed appropriate steps and was well within the law applicable at the time in relation to Patricia Harriss. The parent was at first present, and indeed was being a witness to the taking of the statement of Patricia. There were difficulties during which Patricia became upset to the point of tears. Eunice Harriss considered all of this when John MacIntyre asked her politely if she would mind leaving the interview room because it was his impression that Patricia was not co-operating - and we may imply here, not co-operating because of the presence of Eunice Harriss. Without knowing precisely what was going on in Patricia Harriss' mind, that is all John MacIntyre would have had to work with - his own impressions. Eunice Harriss considered that this was a valid approach to dealing with the apparent difficulties, and removed herself from the interview room.

214. Even today Eunice Harriss doubts that it would have been of assistance to Patricia if Eunice had been present throughout the conversations with the police (T. v. 16, p. 2982). Eunice Harriss' concern was not with being present or being outside. Eunice Harriss' concern as expressed at these Commission hearings was with respect to the wish that we could "get to the truth in a kinder way, perhaps" (T. v. 16, p. 2982). The substance of these concerns is dealt with elsewhere but there is nothing in the evidence relating to Eunice Harriss'

presence or absence from the interview room which itself causes any justifiable or lasting concern.

Other Witnesses

A statement was taken from Alanna Dixon on May 30, 1971, when she was fifteen years of age (Exhibit 16 - R. v. 16, p. 24), from Scott MacKay who was sixteen years of age on June 2, 1971 (Exhibit 16 - R. v. 16, p. 31), from Lawrence Paul who was fourteen years of age on June 2, 1971 (Exhibit 16 - R. v. 16, p. 34), and from Barbara Vigneau who was sixteen years of age on June 23, 1971 (Exhibit 16 - R. v. 16, p. 82). All other statements in the investigation which have not been otherwise dealt with in this section are from persons seventeen years of age or greater. Of the statements listed at the beginning of this paragraph, this Commission only has evidence with respect to the Scott MacKay statement on the question of whether or not parents were present - except of course no indication appears on these statements that anyone other than the police officers and the witness were present.

215. Scott MacKay says that he was all alone with the police for approximately four hours on Wednesday, June 2, 1971 (T. v. 4, pp. 653, 666, 668-669). At no time did any police officer offer him an opportunity to have an adult present with him (T. v. 4, p. 669). At the same time MacKay never made any request to that effect (T. v. 4, p. 684). MacKay felt "detained", at least in a psychological sense, but wanted to satisfy the police before he left about what he knew (T. v. 4, p.

685). It is significant that MacKay testified that when he returned home his mother knew where he had been (T. v. 4, p. 685). It is also extremely significant to note that at the time when he was asked to come in for questioning he trusted the police and it was only as a result of discovering what a bad experience he found it to be that he now says he would have liked to have the opportunity to have a parent present (T. v. 4, p. 669). The whole of this evidence would indicate that MacKay's parents knew where he was, and the reason for his attendance there - to be questioned. The decision or feeling now on the part of MacKay that he might have preferred to follow a different course in 1971 does not affect the question of whether John MacIntyre acted appropriately in all the circumstances as they existed and were understood in 1971.

Conclusion

216. This Commission may wish to give serious consideration to any special rules which may be developed to guide police in balancing the objective of detecting crime with the rights of young persons to deal with the authorities in the comforting presence of a friendly relative or adult. When looking at this matter in the context of what happened in 1971, it cannot be said that the lack of a mandatory parental presence during the taking of witness statements was the cause of false evidence given at trial. What this Commission can say is that it is appropriate for the police to contact young persons to be interviewed through their parents - as occurred in this case.

Sometimes it is appropriate to have a parent sit in, particularly if the parent insists, and sometimes this may not be appropriate, particularly if the young person insists on privacy.

217. The difficulty created by an inflexible rule is demonstrated by the "similar fact" evidence which Commission counsel chose to call in relation to Joan Clemens. Essentially that incident involved the questioning of Joan Clemens by John MacIntyre in the presence of Emily Clemens (T. v. 19, pp. 3445-3454) - in different rooms but with an open door between. The questioning commenced but Emily Clemens interrupted it. "I don't know what he wanted her to say but she - she wanted - he just kept throwing the questions at her." (T. v. 19, p. 3457). Joan Clemens was apparently persisting in a denial about an alleged offence of giving liquor to minors committed by Donald Marshall, Jr. Name-calling ensued between the mother and John MacIntyre according to Emily Clemens (T. v. 19, p. 3460). Emily Clemens then sat in on the statement for a period of time and her daughter's denials continued (T. v. 19, p. 3465). Eventually everyone left at the same time (T. v. 19, p. 3468). Emily Clemens was obviously upset because she believed that her daughter's persistent denial was the truth (T. v. 19, p. 3477, 3482). Ultimately Joan Clemens' father went with her to Court and she testified that she had in fact received liquor from Donald Marshall, Jr. (T. v. 19, pp. 3484-3485, 3503, 3504).

218. While the method of interrogation is a separate subject, it is respectfully submitted that in the course of an

investigation the police require the freedom to determine that the presence of a parent may inhibit obtaining the truth from a witness. In this case the only individual of whom it is proved the parent was not at the police station and who may not have otherwise been spoken to by the police was Scott MacKay's mother. John MacIntyre therefore satisfied the obligations upon himself according to the law and appropriate practice in 1971.

I. Failure to Direct the Conducting of an Autopsy

An Autopsy as a Source of Information

219. Testimony from R.C.M.P. Officers indicated that it would be a priority in a murder case to have a post-mortem or autopsy for "an endless line of reasons", including, for example:

...everything from naturally blood samples for alcohol, drug determination, from examination of the stab wounds, the number of wounds, the direction of the wounds in an effort to probably re-enact the crime to determine which direction the person had stabbed from up or down; again the depth so that you could possibly have some idea of what kind of weapon you were looking for. You would be looking for anything under the fingernails or what-have-you to determine if there was an altercation, if there was scratching, hairs. You would probably look for stomach contents in case you had to determine where the victim had been prior, had he eaten at restaurants or, you know, some determination in that manner. It depends on the case whether you would be looking at an endless line of endless pool of evidence.

Joseph Terrance Ryan (T. v. 11, p. 1864)

220. Douglas Wright also testified that he would have been interested in having an autopsy done for the purpose of determining many things, including:

...the cause of death but there's other things, fingernail scrapings, finding hairs and fibres on that person that doesn't belong to that particular person, it belongs to somebody else, this type of thing.

Q. Can you get some indication of the dimensions of the weapon from an autopsy?

A. Oh, yes. Oh, yes.

Q. Would the angle of entry and these sort of things be of interest to the investigator?

A. Yes. Yes.

Q. And would that be the type of procedure that you would expect to be followed by a competent policeman in 1971?

A. Sure.

(T. v. 28, pp. 5261-5262).

Part and parcel of the post-mortem would be to have the deceased's blood tested for alcohol or drugs (T. v. 28, p. 5288). However, Douglas Wright also indicated that an autopsy was not invariable in 1971:

It's a matter of judgment and in '71 - but very much a must that there be one in circumstances such as that and as I indicated previously, any indication of foul play or anything of that nature there would be a post-mortem or an autopsy.

(T. v. 28, p. 5292)

However, Wright testified that the ultimate decision would be left up to the Medical Examiner based upon a recommendation from the police (T. v. 28, pp. 5292-5293).

221. Yet another R.C.M.P. Officer, Murray Wood, who testified to having investigated a homicide in Cape Breton in the Fall of 1971, indicated that an autopsy was "absolutely essential" in a homicide investigation. However, Wood was of the

view that autopsies were performed at the request of either the Medical Examiner or the Crown Prosecutor (T. v. 10, pp. 1815-1816, 1840). Wood was unsure as a police officer and murder investigator of the procedure to follow in arranging for an autopsy. Wood felt it would be normal for the investigating officer to discuss with the Crown Prosecutor the desirability of ordering a post-mortem (T. v. 10, pp. 1835-1836, 1840). The fact that such discussions would occur indicates that autopsies are not invariably ordered.

222. Staff Sergeant Harry Wheaton identified the lack of an autopsy as having hampered his re-investigation in 1982 (Exhibit 19 - R. v. 19, p. 111). However, Wheaton never mentioned the absence of an autopsy when asked in 1983 about instances of improper police practices or procedures (Exhibit 20 - R. v. 20, pp. 8-13), nor in his opinion letter of July 14, 1986 (Exhibit 20 - R. v. 20, pp. 63-65).

Deciding Against an Autopsy

223. Dr. Naqvi was the attending doctor on Sandy Seale when he was brought to the hospital early in the morning of May 29, 1971 (T. v. 14, p. 2509). Naqvi's activities in relation to Seale are documented (Exhibit 53 - R. v. 22; Exhibit 16 - R. v. 16, pp. 159-164) and his opinions and observations have also been exhaustively reviewed (T. v. 14, pp. 2508-2600; Exhibit 13, - R. v. 13, pp. 1-65). As to the performance of an autopsy, Naqvi indicated that in the circumstances of a violent death the body must be released by the Medical Examiner who was Dr. Sandy

MacDonald at the time:

→...he has to okay whether he thinks the autopsy is necessary or it isn't necessary because in this particular case since he had the injuries and they were all - the injuries were documented, that may be - this may be a factor, but generally speaking it is the Medical Examiner who has to okay them and any patient who dies - who dies within twenty-four hours in this kind of a situation, they - it's his responsibility.

(T. v. 14, p. 2562)

Naqvi indicated that it would have been his responsibility as the doctor for the patient to notify the Medical Examiner - as may or may not have been done (T. v. 14, pp. 2562-2563, and see T. v. 14, pp. 2587-2589).

224. Dr. Naqvi was of the view that an autopsy was not necessary to determine the cause of death. Dr. Naqvi considered no other purpose. Even today an autopsy is not an automatic thing and the objective remains to determine the cause of death (T. v. 14, p. 2565-2566). Dr. Naqvi acknowledged that he was not a pathologist (T. v. 14, pp. 2570-2571) and that no specialized tests or examinations are done in the course of surgery which one would anticipate could be dealt with by a pathologist (T. v. 14, pp. 2577-2581, 2583-2586). Naqvi still felt able to express the opinion for the Commission that any surgery would have obliterated Seale's wound to an extent that it would be difficult for a pathologist to later form any opinions about the wound itself in any event (T. v. 14, pp. 2586-2588).

Whether an Autopsy Should Have Been Done

225. Judge D. Lewis Matheson, who worked as assistant prosecutor ~~in~~ 1971, indicated in testimony to this Commission that he was surprised that there was no autopsy report prepared. Matheson raised it with the Prosecutor, Donald C. MacNeil, whose "emphatic" reply was:

So what! We haven't got an autopsy report. If that's the biggest worry with this, I think we can handle that all right.

(T. v. 26, p. 4944)

Matheson also appears to have acknowledged that the reason for no autopsy was because the cause of death was apparent (T. v. 26, p. 4944). Judge Matheson was not asked about the role of the Crown in directing that an autopsy be done.

226. John MacIntyre stated his position with respect to a post-mortem in this case (T. v. 32, pp. 5971-5972). John MacIntyre did not disagree with R.C.M.P. witnesses who suggested that a post-mortem was a standard technique in all homicide cases. However, John MacIntyre testified that having considered that:

- (a) Seale was taken to the hospital;
- (b) Seale lived for twenty hours;
- (c) A specialist was handling the case and would be speaking with the coroner; and
- (d) The attending physician had had no trouble knowing what the cause of death was or what the injuries were,

he decided that he need not press for an autopsy. Responding to "Red" MacDonald's testimony (T. v. 10, p. 1719) that it was the

police who made the decision about the necessity of a post-mortem and would ~~make~~ the request of the Medical Examiner, John MacIntyre explained:

That's if body [sic] is found outside but this chap was taken to the hospital and he died in the hospital and I thought that that was sufficient to be honest with you.

(T. v. 32, p. 5972).

227. Although the views of Dr. Naqvi in relation to an autopsy (which appear to have been relied upon by John MacIntyre) were discounted by some counsel (e.g., T. v. 14, p. 2587) and treated with a level of incredulity by Commission counsel (e.g., T. v. 14, pp. 2599-2600) each of Naqvi's opinions with respect to the usefulness of an autopsy in this case were supported by Dr. Roland Perry - though upon more expert grounds. As to whether there ought to have been an autopsy, Perry stated that:

Well, from the general protocol point of view, yes, but from the point of view of learning anything more about what happened you wouldn't have learned anything more. We know he was stabbed around the bellybutton. On surface anatomy that corresponds to the disc between the third and fourth lumbar vertebrae. Those are the low backbone vertebrae. Dr. Naqvi said in his records that the stab wound in the aorta was just below the renal vein, that's the vein to the kidneys. We know from surface anatomy that the...this corresponds to the disc between the first and second lumbar vertebrae. So you've got the bellybutton wound between three and four, the wound in the aorta between one and two. So clearly the wound...the stab wound was going in a somewhat upward direction. The wound has been altered almost, well, it's been altered

completely because the stab isn't extended up, it's been extended down. The person who would have the best idea as to what the wound looked like obviously would be the people who first saw it, the surgeons, the medical people in the hospital. The person at that time was alive. In the morgue he's dead. Rigor mortis has set in. The body has been sutured. The whole bodily parts, everything has been altered. So, that you're not going to get anything of any substance in a case like this....So this is the type of case where the medical end, again like most homicides, is not very...it's not, ah, a mystery. It's straightforward. It's one single stab wound to the belly. The how it happened is not the problem, the who did it is...was always the problem.

(T. v. 80, pp. 14190-14192).

228. In Perry's opinion nothing could have been determined by an autopsy which would have assisted the police in carrying out their investigation (T. v. 80, p. 14193). Perry based this opinion upon the absence of any notations in the records about other external observations, and the fact that Seale was in hospital for twenty hours before he died during which his body "was altered extensively" (T. v. 80, pp. 14194-14199; 14202-14203). There would have been no urine sample to take. Some eyeball fluid may have been drawn - though certainly it would have been of questionable reliability (T. v. 80, pp. 14203-14204). The idea of securing any reliable evidence through "fingernail scrapings" fell into "the mythical character" (T. v. 80, p. 14199) of autopsies.

229. Another opinion expressed by Dr. Perry, for what it was worth, was that from his review of what Commission counsel

supplied to him, the Medical Examiner was not in fact notified about the death of Sandy Seale. Unquestionably the Medical Examiner ought to have been notified (T. v. 80, pp. 14189-14190). If there was any failure here, it is this one which is determinative.

230. In Dr. Perry's professional opinion, the eagerness of some police officers for a rule of invariable autopsies (as expressed by some R.C.M.P. witnesses before this Commission) is inappropriate and unnecessary:

- Q. Have you ever had a case where you have determined, or one of your medical examiners, that an autopsy is not required and the police insist that one be carried out?
- A. It's happened occasionally but usually the reason for the insistence of the autopsy has no basis in any reasonable request. I've been involved in a few like this where the medical examiner has called and said the police insist in having an autopsy when it's clear from the story that one is not necessary. And I've checked with the police. What they really wanted was want to know whether the guy was drinking. Well, of course, you can check that out without doing an autopsy. This is what they're interested in. So there's usually no real problem there. The only problem is in these cases where, in fact, is all they're wondering was whether the person was drinking and they feel that you can't tell it unless you do an autopsy when it's quite easy to take a blood sample without doing an autopsy.

(T. v. 80, pp. 14181-14182).

If Dr. Perry and other professional medical witnesses are not

persuaded of the need for automatic autopsies, it is scarcely appropriate to fault John MacIntyre for not having an invariable autopsy rule in 1971. His predecessor, Norman D. MacAskill, did not adhere to such a philosophy either (T. v. 17, pp. 3033-3035). 231.

John MacIntyre was not required, from a legal point of view, to ensure that a complete autopsy was done. Policemen are neither medical professionals nor legal professionals. It is respectfully submitted that the investigating police officer has to take the medical evidence as he finds it, and then put it all in the hands of the Crown which has the authority to direct further and better medical evidence if that appears legally necessary or appropriate: e.g., The Queen v. Garrow and Creech (1896), 1 C.C.C. 246 (B.C.S.C.). That is why, we respectfully submit, so many witnesses suggested that one of the two officials capable of ordering an autopsy was the Crown Prosecutor. The other official is the Medical Examiner, who would be sensitive to unanswered physiological questions which arise from physical observation. With respect, that is as it should be.

Conclusion

232. It is respectfully submitted that the most rational theory to draw from the evidence of all of these witnesses is that Dr. Naqvi as the attending physician had an obligation to notify Dr. Sandy MacDonald of the death of Sandy Seale on Saturday, May 29, 1971. Whether Naqvi did or did not, and he probably did not considering that Naqvi instead of MacDonald signed the Death Certificate and Naqvi has no specific note of

speaking with MacDonald, it would have been the responsibility of the Medical Examiner to order an autopsy to be done by one of the pathologists in the area (e.g., by Robert Mathieson - T. v. 14, p. 2590). As R.C.M.P. Officer Murray Wood indicated, autopsies were performed at the request of either the Medical Examiner or the Crown Prosecutor. Donald MacNeil did not feel he needed one. The investigating police officer's role would be limited to discussing and possibly recommending an autopsy to either the Medical Examiner or the Crown Prosecutor. John MacIntyre relied upon the views expressed to him by Dr. Naqvi and therefore did not press for a post-mortem. There is no evidence that even if John MacIntyre had pressed for an autopsy that one would have been done.

233. It is respectfully submitted that in all the circumstances there was nothing improper or incompetent about John MacIntyre relying upon the observations and abilities and advice of a well-qualified surgeon. The fact that Dr. Naqvi did not notify Dr. MacDonald cannot be placed on John MacIntyre's shoulders. In all of this evidence about autopsies, there is no suggestion of any ulterior purpose on the part of anyone in not obtaining an autopsy. As to the consequences of this judgment by John MacIntyre not to press either Donald C. MacNeil or Dr. Sandy MacDonald to order an autopsy, this Commission knows from the consistent conclusions of both Dr. Naqvi and Dr. Perry that there was not really anything to gain from either an investigational or a medical point of view by doing an autopsy in this case. It is

respectfully submitted that this view of the facts and
circumstances should be adopted by this Commission in preference
to that of the R.C.M.P. Officers appearing before the Commission
who suggested that an autopsy was always necessary, and that
somehow the investigating officer had to ensure that it was done.

J. Drawing a Conclusion as to Donald
Marshall's Guilt Without Any Evidentiary
Justification

The Allegation

234. Staff Sergeant Harry Wheaton expressed the opinion in 1983 to the Attorney General's Department through his superior officers that:

...Chief MacIntyre chose to believe the statements he wanted to believe and told the witnesses they were telling the truth and they agreed with him. This, I feel, is improper police practice.

...This case was investigated solely by Chief MacIntyre with some help from Detective Urquhart and was basically solved in one day - the 4th of June, 1971 when statements were taken from Pratico and Chant and the charge then laid and warrant issued. I found Chief MacIntyre to be adamant that Marshall is and was guilty and still refuses to look on the matter in balance. I would submit for your consideration that if a police officer in his drive to solve a crime refuses to look at all sides of an investigation and consider all ramifications, then he ultimately fails in his duty. (Exhibit 20 - R. v. 20, pp. 12-13)

In being questioned about how he would have approached this investigation in 1971 if he had been the investigating officer, Staff Sergeant Harry Wheaton explained:

I...if I were investigating the case, I would have Marshall in mind at the beginning. But then I would look at what he did and so on and listen to his story. Donald Marshall at that time, from my investigation, was known to hang around the Park. He was known to travel with a bit of a rough crowd. He had been before the Courts several times. You would have to take him into

consideration. But you would most certainly do numerous other things and I would think he would be eliminated. (Empasis added) (T. v. 43, p. 7860; see also T. v. 45, p. 8195).

235. There is proper technique involved in identifying a person and then setting out to connect that person with a crime because:

...some criminals leave a signature behind them and you know in your mind that, hey, that's so and so. He does things a certain way. And, in a city the size of Sydney, quite frankly, you can...where you know principally the people about you can...you can fall into that, of...a position of saying that, hey, the cellar window was broken into by you so they propaned torch melting the plastic and they were able to go in through that way. That's a unique methodology of entering a home. You know that Criminal X uses that. You would then zero in on Criminal X and take a look at him. Check where he has been, what was he doing that night...so there is some merit to that technique, yes. But you...in...you would go and you would do that and you would run the avenues out and if you found the man was home and had neighbours in and what have you and he was able to give an alibi and prove his alibi, well, then you would go looking for someone else, you know. (T. v. 43, p. 7859).

Superintendant Vaughan went further and suggested that it is not unusual or uncommon to suspect someone "very early in the game" based simply on proximity (T. v. 12917-12921; T. v. 73, pp. 12965-12967).

General Police Position

236. This Commission has evidence from the notes of David Murray Wood (Exhibit 40) that on Saturday, May 29, 1971,

either Edward MacNeil or Detective MacIntyre advised him that there had been a stabbing at Wentworth Park early in the morning involving two youth - Seale and Marshall - and that:

Feeling at this time, Marshall was responsible. An incident happened as a result of an argument between both Seale and Marshall....only description received from Marshall was a man 45-50 years with grey hair (T. v. 10, pp. 1802-1803).

Wood was not able to say when or how long he had been at the Sydney City Police Station that day (T. v. 10, pp. 1819-1820, 1838). Wood does not think that the view of Marshall's responsibility was communicated by both MacIntyre and MacNeil (T. v. 10, p. 1839). Although Wood recalls that he met with MacIntyre and MacNeil at the same time he is unable to say for certain that that is the way it occurred, and does not know why he would now think that it was a meeting with both at the same time (T. v. 10, p. 1807).

237. The R.C.M.P. telex (Exhibit 16 - R. v. 16, p. 90), the information for which probably came from MacIntyre in part (See Section G, supra), indicates that:

Circumstances presently being investigated by Sydney PD investigation to date reveals Marshall possibly the person responsible however Marshall states he and deceased were assaulted by an unknown male....

Counsel on occasion neglected when putting this document to witnesses to quote the word "possibly" (e.g., T. v. 32, p. 5954; T. v. 52, pp. 9501-9502), but that is as far as this document goes - Marshall was "possibly" responsible.

238. "Red" M. R. MacDonald says that he had no suspicion that Donald Marshall, Jr. was responsible or possibly responsible and no police officer expressed that opinion to him (T. v. 10, pp. 1686-1687). Marshall was not a suspect by the end of Saturday (T. v. 10, pp. 1685-1686), or Sunday if this Commission believes that "Red" MacDonald was not out on Saturday (See Section E, supra). John MacIntyre testified that Donald Marshall, Jr. was not a suspect on May 30, 1971. This appears to be confirmed by the documentation available (Exhibit 16 - R. v. 16, pp. 17, 186-190) which shows that no police caution or warning was given to Donald Marshall, Jr. on Sunday, May 30, 1971 but one was given to Roy Ebsary on November 15, 1971, because at that time a specific accusation against that specific individual had been made (T. v. 34, pp. 6292-6294).

239. It is known, and it is respectfully submitted that it was known, that in the week following the stabbing of Sandy Seale, Donald Marshall, Jr. had been speaking with a number of individuals such as John Pratico, Rudy Poirier, Mary O'Reilly and others. When referred to the nature of the discussion detailed in the statement of Catherine Ann O'Reilly (Exhibit 16 - R. v. 16, p. 75) - regardless of whether this Commission finds that that conversation occurred in this case - R.C.M.P. Officer Joseph Terrance Ryan stated that it would concern him as a police officer to know that a particular individual was making a point of talking to the witnesses and potential witnesses (T. v. 11, pp. 1895-1896). As a police officer of some considerable

experience he explained that his concern would be based on fears of encouragement of perjury, and the possibility that that individual himself, or someone else that the individual might be aiding, was actually involved in some way with the crime (T. v. 11, p. 1896).

240. Murray Wood's notes (Exhibit 40) record that on Sunday, May 30, 1971 both Wyman Young and Edward MacNeil of the Sydney City Police Force were of the opinion that Donald Marshall, Jr. was responsible for the Seale stabbing. Edward MacNeil testified that it would not be unusual for police officers to discuss among themselves who might or might not be a suspect, or to discuss that with the Detectives (T. v. 15, pp. 2621-2622). Wyman Young testified that it would have been unusual to discuss the matter with the R.C.M.P. (T. v. 17, p. 3095).

241. Neither Young nor MacNeil could recall whether or not at that time they themselves held the opinion that Marshall was responsible, unless it was something they had heard around the police station (T. v. 15, p. 2621; T. v. 17, pp. 3095-3096). Wyman Young went further and stated that while he did not have any recollection of anybody investigating the case expressing the opinion to him:

Q. Now you say that you would have to hear that from somebody investigating the case. Would that mean a detective?

A. Well not necessarily someone investigating the case. It could have been the policeman that was on

duty the night of the incident.

— Q. I see.

A. It could have been anybody. I don't recall ever making the statement and I don't recall having the opinion but if I had the opinion, it had to be a second hand opinion because I wasn't investigating the case and I would have no reason to form an opinion of that nature. (T. v. 17, p. 3096).

242. Edward MacNeil acknowledged that the fact of Marshall's presence and involvement in the matter might have been a reason to consider him as a suspect (T. v. 15, p. 2621). Wyman Young only differed from this by saying that the two facts of Marshall's presence and a history of a "few scrapes" would not create a basis for "a strong opinion" (T. v. 17, p. 3097) of murder.

243. Ambrose McDonald testified that he spoke with Donald Marshall, Jr. on Sunday afternoon or evening at the Membertou Reserve, (T. v. 7, pp. 1132-1134, 1205). McDonald would certainly not have had any conversation with Marshall at that time or talked to him about the incident if he had been aware in any way that Marshall was a suspect (T. v. 7, p. 1174). McDonald did say that over that weekend immediately following the stabbing there were rumours through the community that Donald Marshall was a suspect, but he does not attach this to the Police Department (T. v. 7, p. 1131). Richard Walsh, who was also present for this Sunday evening conversation with Donald Marshall, Jr., testified that he was not aware of any suspects at this time (T. v. 8, pp. 1339-1340, 1344-1345), and indeed he felt

that Marshall was as much a victim as Seale at that point (T. v. 8, p. 1342). —It was not until much later in the week that Walsh became aware that Donald Marshall, Jr. was a suspect (T. v. 8, pp. 1344-1345).

244. John Butterworth testified that it was common knowledge that there was a suspect, and that that suspect was Donald Marshall, Jr. (T. v. 11, p. 1969). Butterworth could not recall how he obtained this information other than talk amongst the men in the station (T. v. 11, pp. 1969-1970), and it is important to recall when assessing Butterworth's evidence on this point that he was on days off from the end of the afternoon on Thursday, May 27, 1971, until Tuesday, June 1, 1971 at midnight (T. v. 11, pp. 1968, 1970, 1983). This Commission does not know when Butterworth knew what he says he knew. Butterworth's shift partner, Horace Woodburn (T. v. 20, pp. 3696-3697) was not asked about Marshall's status to his knowledge on June 1, 1971.

245. Howard Dean does not recall any discussion around the police station about whether or not particular people might have been suspects (T. v. 9, p. 1490), but does know that he eventually heard that Donald Marshall, Jr. was a suspect (T. v. 9, p. 1491). As to whether Dean heard this before or after Marshall was charged he could not recall (T. v. 1491-1492). On Saturday, May 29, 1971, John Mallowney was not informed about any possible suspects (T. v. 9, pp. 1561-1562). Norman MacAskill who was Deputy Chief at the time could not recall when Marshall's name was mentioned, and is unsure which day he became aware that

the Detectives had a suspect (T. v. 17, p. 3023).

At Wentworth Park

246. John MacIntyre advised this Commission that he had done a walk-through at the Park with Maynard Chant before taking the May 30, 1971 statement from him (T. v. 32, p. 5996). Maynard Chant testified that at the time he visited Wentworth Park, John Pratico was there as well (T. v. 5, pp. 846-847; T. v. 6, pp. 971-972), but was unsure of the date of that visit (T. v. 5, pp. 847, 880-882, 884). John Pratico testified that he had visited Wentworth Park with John MacIntyre some time before June 4, 1971 (T. v. 12, pp. 2126-2128, 2221). This is confirmed by the documentation, given the comment in Pratico's June 4 statement - "I stopped where I showed you" (Exhibit 16 - R. v. 16, pp. 41, 43). As to who was present at the time when the visit to Wentworth Park took place, Pratico appeared to recall that only John MacIntyre was present there with him (T. v. 12, pp. 2126-2128), but he also testified that he had gone to Wentworth Park with both John MacIntyre and the Crown Prosecutor (T. v. 12, pp. 2078, 2220). Pratico also placed the time of the visit to Wentworth Park as after the June 4 statement but before the Preliminary Hearing in July. There is some hearsay evidence from Margaret Pratico that when she went to the police station on Sunday following her son John, she spoke with John MacIntyre and John MacIntyre apparently told her that:

...Him and John, they're going to have a busy day at the park. (T. v. 13, p. 2264; see also T. v. 13, pp. 2293-2294).

247. It is respectfully submitted that since there is nothing else to independently confirm the time of the visit to the Park area, the most reliable conclusion for this Commission to draw is that John MacIntyre indeed visited Wentworth Park and the Crescent Street area with both John Pratico and Maynard Chant on Sunday, May 30, 1971, prior to obtaining statements from them later that afternoon (Exhibit 16 - R. v. 16, pp. 18-23). It is respectfully submitted that this is evidence of John MacIntyre following appropriate police practice Inspector E. Alan Marshall acknowledged was one of the weaknesses with his own re-investigation was no visit to the scene with a witness who claimed to have been there:

- Q. Did it ever occur to you to go to the park with Jimmy MacNeil and say, "Jimmy show me -
- A. "Show us".
- Q. - "Show me, Jimmy, where this happened"?
- A. No.
- Q. That would've been a good way of testing -
- A. Yes.
- Q. - whether or not MacNeil was worthy of belief or not.
- A. Yeh.
- Q. In fact, a very obvious way of testing, would it not?
- A. Yes, sir.
- Q. Because if he couldn't tell you where these things happened, that would

support your view -

- A. Yeh

Q. - that he was not telling the truth, but if he could tell you where he was, that would support his side.

A. Yes, sir but that wasn't done.
(Emphasis added) (T. v. 31, pp. 5743-5744).

248. With respect to the visit to the Park, Maynard Chant recalls going through the whole incident with the officers, and Chant feels today that the officers were trying to help him understand where he would have to have been in order to see what he related about the incident (T. v. 5, pp. 828-829, 839). For example:

I remember some Officers taking me to the Park and going through the whole incident of what had happened and telling me if I had been standing at such and such you wouldn't have saw this or you had to be standing back. I remember that - I remember, you know, them helping me get a clear sight onto what I was to see. (T. v. 5, p. 839).

It is respectfully submitted that this remark of Chant's is ambiguous and may be interpreted as John MacIntyre telling him what he had seen, or John MacIntyre expressing concern to Chant about what he was relating given where Chant said that he was - in other words - testing Chant's reliability.

249. The first alternative, that Chant was being told where he had to be to see certain things, is inconsistent with the statement he gave later that same afternoon (Exhibit 16 - R. v. 16, pp. 18-21) if one wants to suggest that John MacIntyre was

manipulating Maynard Chant to accuse Donald Marshall, Jr. If that is so, there would have been no reason for John MacIntyre to have waited a week before securing the statement accusing Marshall. The alternative interpretation is, we submit, the more reliable as Maynard Chant himself explained at this Commission:

Q. Do you have any recollection at all of why you changed your route when it came to this [June 4] statement?

A. Well, in order for me to - in order to witness the - the - the - the thing that was committed on that evening I would - by being down at the - this part of the tracks I wouldn't be able to see anything that was happening up over the other side.

Q. Did you figure that out for yourself?

A. Probably. (T. v. 5, p. 872)

As to Pratico hiding in the bushes:

I remember the day that I was there and they were pointing out the evidence. They were pointing out the scene and the way it happened. I remember Mr. Pratico being there. And him being there crouched down beside a bush pretending to do what he was doing there. And I don't know if I gained recollection from that at that time to give this statement the way it is or it was something that I had just - you know, thought up myself. (T. v. 5, pp. 874-875).

However, the most thorough evidence on this point was the following:

Q. Can you tell us to the best of your recollection what took place during this visit [to the Park]?

A. They had said that they wanted to go over the incident or what had happened in the park that night, so I

— — ... went with them and when we got there there was some dress-policemen in uniform marking it out - marking out the distance of where I was on the tracks or approximately where I was on the tracks. They were looking at the lighting situation.

Q. How were they getting the information as to where you were on the tracks?

A. From me.

Q. You were telling them?

A. Well, I wasn't really telling them. I was just there viewing for a few moments and then they'd asked me, "Where would you have been standing at?" I seen that they were going through something with Mr. Pratico and he showed them where he was bent down at. Then there was some implication to say, "Maynard, if you were standing here, you couldn't see very well". I said, "well, I can't really remember if it was this side or down farther or anything like that". I just remember following along with them.

Q. Well, when you say you don't remember whether it was this side or that side, did you at any time suggest to these Officers that you weren't there at all?

A. No.

Q. Did you give the Officers the impression that you were, in fact, there?

A. Yes, I did. (T. v. 5, pp. 897-898).

...

Q. ...Before we leave this visit to the park you indicated, I believe, in a statement that you gave to the R.C.M.P. that you felt that the police were trying to help you rather

than to pressure you during this visit at the park. Is that accurate?

- A. Yes. I felt that I was being helped. I don't feel that I was being actually told what to do or where to stand or anything like that, but, you know, the suggestions that were offered, "Could you have been standing here"? "You would have seen it more clearly". Something like that - to that effect was given, and not to the point that you must have been standing here or anything like that but I felt that they were trying to help me just review what had happened. (T. v. 5, pp. 900-901).

250. John Pratico has this recollection of the walk-through at the Park:

We went by the bushes and they said, "would this be about where you at?", you know. So we point out the spot and showed to me where the body was laying. Which I did not know where the body was laying; but it was showed to me...They described, you know, the scene and where Mr. Seale's body was laying, whereabouts Mr. Marshall would be that type of thing, you know what I mean. (T. v. 12, pp. 2128-2129).

The police also apparently played a trick on him by claiming to have his fingerprints on a beer bottle (T. v. 12, pp. 2130-2131) but Pratico knew that was incorrect (T. v. 12, pp. 2175-2176). Pratico testified that by the time he left Wentworth Park, it was clear in his mind what he was supposed to be saying and what the police wanted him to say:

...What they wanted and actually and persisted on and they intended on it (T. v. 12, pp. 2129-2130).

If John Pratico's evidence is correct about what happened at

Wentworth Park, none of it seems to have appeared in John Pratico's statement of May 30, 1971. Again, as with Maynard Chant, the reliable inference appears to be that the visit to Wentworth Park occurred between noon and 5:00 p.m. on May 30, 1971. That visit to the Park was not used in any way to impress Chant and Pratico with Donald Marshall, Jr.'s guilt.

Other Evidence

251. Murray Wood's notes (Exhibit 40) have been relied upon by counsel as proof that the Sydney City Police and John MacIntyre had their minds made up about Donald Marshall, Jr. on Saturday morning, May 29, 1971. However, Wood's notes contain a further reference on June 3, 1971 which would have been redundant if the May 29, 1971 note is to be taken as a concluded opinion. On June 3, 1971 Murray Wood wrote that:

Four p.m. to six p.m., local athletic club, Pier, contacting informant, Re: Seale murder. Discussion with Sydney City Police Detectives accompanied with Constable Ryan, named Marshall as suspect (Emphasis added).

Wood was unable to say from the note whether it was the informant or the Detectives who named Marshall as a suspect (T. v. 10, p. 1810).

252. There are other significant items of evidence which indicate that John MacIntyre could not have had his mind made up about Donald Marshall, Jr.'s responsibility for the stabbing of Sandy Seale early in the investigation. First, there is the evidence considered in detail above with respect to the initiatives which John MacIntyre was responsible for making in

relation to the involvement of a white Volkswagen. Leo Mroz, and therefore no doubt other constables, and the R.C.M.P. would not have been directed to seek out a white or light-coloured Volkswagen with foreign plates if MacIntyre had decided that Marshall was responsible (Section E, supra).

253. There is also the evidence of Debbie MacPherson who, while being interviewed on Thursday, June 3, 1971 in the presence of her brother and uncle found that John MacIntyre was "suggestive" (T. v. 4, p. 714). MacIntyre interviewed her for an hour or an hour and a half. The points about which MacIntyre was being suggestive were "things that I didn't see that maybe I should have seen or something" (T. v. 4, p. 714):

Well, for instance a man in a trench coat which I had no recollection of at all but it was suggested more or less that I did see him, but I didn't.... (T. v. 4, p. 714).

MacPherson also claims to have signed a statement that afternoon (T. v. 4, pp. 715-716), and obviously this statement would not have included any confirmation about seeing the man in a trench coat. The "trench coat" reference compares with the "topcoat" reference in the statement of George Wallace MacNeil and Roderick Alexander MacNeil (Exhibit 16 - R. v. 16, pp. 26-27), a "suitcoat" in Maynard Chant's May 30, 1971 statement (Exhibit 16 - R. v. 16, p. 18-21), and a "long blue coat" in Donald Marshall, Jr.'s statement (Exhibit 16 - R. v. 16, p. 17). Thus, Debbie MacPherson's evidence shows John MacIntyre pressing a witness as late as June 3, 1971 to confirm at least a portion of Donald

Marshall, Jr.'s story - and indeed a central portion given that it involved an attempt to identify the actual suspected perpetrator of the offence.

254. Despite all the suppositions and inferences one might make based upon nothing but the available documentation and John MacIntyre's recollection, the argument that John MacIntyre knew from the start that Donald Marshall, Jr. would be his quarry cannot withstand this evidence of Debbie MacPherson. If John MacIntyre had been so negatively directed and motivated as some counsel have suggested during the course of the Commission hearings, any definitive statement by Debbie MacPherson that she saw no man in a "trench coat" in or near the Park on Friday night, May 28, 1971, would certainly have been speedily written down and the written record of it not lost or mislaid as appears may have been the case.

255. There is further evidence about John MacIntyre's state of mind with respect to this investigation on June 3, 1971. Murray Wood's partner, Joseph Terrance Ryan, testified specifically on the question of whether he recalled John MacIntyre as having had his mind made up about this stabbing. Ryan went with MacIntyre but without Wood to New Waterford on June 3, 1971 between 8:00 p.m. and 12:30 a.m. (Exhibit 41). The trip to New Waterford was "to determine if there was anyone in New Waterford who may be able to give him information as to the identity of someone in the Park that evening" (T. v. 11, p. 1861). Ryan pursued this task on his own again the next day (T.

v. 11, p. 1862 - Exhibit 41). In conjunction with the information that he and his partner Murray Wood had received earlier in the week with respect to the investigation of a white or light coloured Volkswagen, Ryan had not been of the view that John MacIntyre was working on this investigation with a closed mind (T. v. 11, pp. 1885, 1894). Ryan also considered, in conveying his recollection, the Sunday morning telex (Exhibit 16 - R. v. 16, p. 90).

The Basis for Marshall Becoming a Suspect:

A Lack of Confirmatory Evidence

256. As has been discussed elsewhere (Sections E and G, supra), the first days of the investigation were taken up with attempting to determine who was in the Wentworth Park and Crescent Street area on the Friday night/Saturday morning when the stabbing occurred, searching the Park and Crescent Street area for a weapon or other real evidence which could be connected with the crime, interviewing such witnesses as did appear (Exhibit 16 - R. v. 16, pp. 15, 17-40), and seeking R.C.M.P. co-operation with respect to the description, related occurrences, and the light coloured Volkswagen (Exhibits 40 and 41). Other than the May 30, 1971 statement of Maynard Chant and the May 30, 1971 statement of Donald Marshall, Jr., there was nothing, in Staff Sergeant Harry Wheaton's words, by which Marshall "would be eliminated" (T. v. 43, p. 7860). No trace of the two men described by Donald Marshall, Jr. or by George Wallace MacNeil (Exhibit 16 - R. v. 16, pp. 2627) had been discovered. There was

no trace of the men described by Chant or Pratico. Even if they existed, the only witness who connected the two particular men described by Marshall to the stabbing was Donald Marshall, Jr. (Exhibit 16 - R. v. 16, p. 17).

Donald Marshall, Jr.'s Story

257. Donald Marshall, Jr. was known to the police through a number of matters (Exhibit 16 - R. v. 16, pp. 106-108). Donald Marshall's story was bizarre in the sense that it had priests from Manitoba stabbing Seale because he was black after a friendly conversation about cigarettes, women, and bootleggers.

258. There is evidence before this Commission that during his contact with John MacIntyre after the stabbing, Donald Marshall, Jr. had not been entirely forthcoming (T. v. 7, pp. 1134-1136). Marshall himself was not even forthcoming to Ambrose MacDonald about why he had not been forthcoming to Chief MacIntyre (T. v. 7, p. 1177). While Ambrose McDonald had not been aware of any animosities between "the boys on the Reserve" and John MacIntyre (T. v. 7, p. 1134), Bernard Francis who was present at the time apparently stated that:

The boys out here won't tell MacIntyre anything. They don't like him. (T. v. 7, p. 1133).

259. It is respectfully submitted that it would be reasonable for this Commission to conclude that given John MacIntyre's familiarity with Donald Marshall, Jr.'s involvement with the law in the months preceding this event that John MacIntyre would have averted to the possibility that Donald

Marshall, Jr. was not being completely forthcoming about the events of the ~~the~~ Friday night/Saturday morning. That this is a reasonable consideration for this Commission is based on evidence of two persons who knew Donald Marshall, Jr. in 1971 as well as anybody.

260. Bernard Francis testified that when he sat in on Donald Marshall, Jr.'s first interview with his lawyers that Donald Marshall, Jr. acted typically for a native person by saying nothing more than was absolutely necessary and the responses which were given were not even satisfying to Bernard Francis (T. v. 22, pp. 3966-3968). Could it have been any different for John MacIntyre on May 30, 1971? Francis also advised this Commission in relation to a comment attributed to him in a later Parole Report that although he had never called Donald Marshall, Jr. "an excellent liar":

I thought that in this particular case, he wasn't telling the whole truth. I felt that way, in all honesty, - ...that he wasn't telling the full truth. (T. v. 22, p. 3987, but see T. v. 22, pp. 4009-4010).

261. Roy Gould also described Donald Marshall, Jr. in 1971 as so quiet that you would "have to almost dissect information from him":

He's not the person that would divulge a lot of information or even talk about incidents. (T. v. 21, p. 3802).

When asked whether Donald Marshall was a secretive person, Gould would only say that Marshall was "quiet", but then offered:

I could put it to you this way, he was

never that honest with me about everything. (T. v. 21, p. 3857).

262. Simon Khattar candidly expressed the position that when Marshall related to him for the first time essentially the same story which Marshall had given to John MacIntyre (Exhibit 16 - R. v. 16, p. 17), it struck Khattar strange and:

Q. Did you believe him?

A. I had my doubts. I didn't say, "I don't believe you". I had my doubts. (T. v. 25, p. 4691).

Khattar advised that Rosenblum had a similarly sceptical reaction to the story related by Donald Marshall, Jr. (T. v. 25, p. 4695).

263. It is respectfully submitted that in the absence of spoken words, police investigators must deal with impressions gained through experience of dealing with citizens in the course of their daily work. All the police officer has besides the words used by a witness speaking to him, and the tone in which they are expressed, is the experience of assessing the story for reliability according to the police officer's experience. It is respectfully submitted that in this case the objective impressions which would have been given by Donald Marshall, Jr. throughout the weekend of May 29-30, 1971, were sufficient to give John MacIntyre reason to consider that Donald Marshall, Jr. had not been completely forthcoming and honest with him. Yet John MacIntyre pursued the leads given to him by Donald Marshall, Jr. and the other weekend witnesses. The objective impression given to MacIntyre initially would have been a reasonable factor for him to have reconsidered later in the week when the

information given by Marshall was not being supported through any other evidence.

264. Staff Sergeant Harry Wheaton also considered this aspect of the matter:

Q. The Chief Justice asked you what steps you would have followed had you been confronted with that situation that night. Would the steps that you would have taken been any different had you known about the robbery?

A. Yes, I, to me, then, it would seem more, I suppose, Marshall would have been more credible to me. His story would have been more credible. (T. v. 43, pp. 7880-7881; and at pp. 7968-7969).

265. The Courts admit evidence today as they did in 1971 of an accused person's pre-charge statement as to alibi, lack of involvement or identity. When tendered by the Crown, such evidence may be used for the purpose of demonstrating an accused person's consciousness of his own guilt by proving the assertions false. This is common in circumstantial cases. How a jury deals with such evidence is, of course, up to the jury.

266. Mr. Justice Brooke in R. v. Burdick (1975), 27 C.C.C. (2d) 497 (Ont. C.A.), at pp. 505-506 explained that:

It is contended that it was wrong to tell the jury in effect that if you find the evidence of identification by the Rilett family to be true, then it follows that the accused lied and so the jury was entitled to draw the inference of guilt from that lie.

It is, I think, important to realize that in the passage under consideration, the learned trial Judge did not say or imply

to the jury the fact that they rejected the alibi or preferred to believe the - evidence of the Rilett's witnesses to that of the other witnesses, particularly Wilson and Ryder, as to the accused's movements at the specified time was the basis upon which they could draw an inference of guilt. The specific instruction was with respect to the denial that he was at the Rilett home, which denial was made by the appellant to Mrs. Rilett and others shortly after the deceased's departure.

Certainly, if the jury were satisfied beyond a reasonable doubt that the appellant was at the Rilett home that evening, they must have also been satisfied to the same degree that the appellant had deliberately lied when he denied that fact to Mrs. Rilett and others. In these circumstances it was important to instruct the jury as to the evidentiary value, if any, of that fact.

In my view, they should have been told that if they had a reasonable doubt that the appellant had made a false statement as to his identity because of youthful embarrassment or fear of adult authority, the fact that he made the false statement as to his identity was of no probative value. On the other hand, if they were satisfied beyond a reasonable doubt that he had made the false statement as to his identity not because of such or similar causes but rather deliberately and to conceal his identity from authority, then the fact of his so doing could be treated as evidence of his consciousness of guilt.

Accordingly, I think the charge was not incorrect in the circumstances but it was incomplete to the extent that I have stated. ...

The importance of this evidence and the direction by the learned trial Judge is plain. The fact, if viewed as evidence of consciousness of guilt, was a significant link in the case against the

appellant, particularly as there was no evidence of motive whatsoever. (Emphasis added).

Mr. Justice Dubin pointed out in the same case at p. 516:

In my respectful opinion, the learned trial Judge's instruction to the jury that they could treat the accused's denial as evidence of his guilt was too badly stated. It was a question of fact for the jury and not a question of law. Before the jury could draw an inference of guilt, a careful instruction was required as to the circumstances under which such inference could validly be made. Regard would have to be had to the age of the accused, and the occasion upon which he denied his presence at the residence of the deceased. It is also to be observed that his denial was supported by the evidence of two Crown witnesses, whose evidence was unshaken.

It was only if the jury were satisfied that having regard to all the circumstances, the accused deliberately lied, and that they were satisfied that his lie was indicative of his sense of guilt, that they could infer from the lie a consciousness of guilt and consider it as evidence of guilt.

267. Mr. Justice Houlden also commented at p. 518:

Proof of a lie told out of Court may be direct evidence amounting to affirmative proof of guilt: R. v. Chapman et al., [1973] 2 All E.R. 624 at p. 629. If an accused makes a false statement on a vital issue such as his whereabouts at the time of the commission of an offence, "a lie of that kind is cogent evidence of guilt": per Davey, J.A., in R. v. Sigmund, Howe, Defend and Curry, [1968] 1 C.C.C. 92 at p. 101, 60 W.W.R. 257. If the jury were satisfied that the appellant was the caller, then they might (not must) have treated his denial as evidence of guilt.

268. Mr. Justice Martin in the earlier decision of R. v.

Davison, DeRosie and MacArthur (1974), 20 C.C.C. (2d) 424 (Ont. C.A.), at p. 430 perhaps stated the matter most succinctly after reference to White v. The Queen, [1956] S.C.R. 709, 115 C.C.C. 97:

The learned trial Judge did not, in my opinion, in the passages in the charge referred to above, make clear to the jury the distinction between proof that the alibi advanced is false in the sense of being concocted and the mere rejection by the jury of the evidence of alibi because they believed that evidence to be untruthful, although not proved to be false. Proof of the falsity of the alibi may constitute affirmative evidence of guilt. The mere rejection of the evidence of alibi because it is disbelieved is not affirmative evidence of guilt and has only the effect of removing it from consideration as a barrier to the acceptance of the case for the prosecution.

269. This law existed in 1971 as it exists today. In the gathering of evidence it would be appropriate for a police officer to consider the possibility that a statement recounting an innocent presence at the scene of a crime might not be true and that some inference should be taken from that. Although Donald Marshall, Jr.'s statement taken on May 30, 1971 was never used for the purpose does not alter the fact that it was a reasonable ground for consideration in 1971, particularly if John MacIntyre had some sense that Donald Marshall had not been totally forthcoming to him. It is not any fault of John MacIntyre that this kind of evidence is investigated and produced from time to time in the Courts of this country. It was permissible evidence to consider pursuing in 1971 given all the

other circumstances.

Grounds for Suspicion

270. It is respectfully submitted that by the end of June 3, 1971 there were several matters directing John MacIntyre's attention back toward Donald Marshall, Jr., and appropriately so. Nothing had come to the attention of the police which could confirm that the two men described in the MacNeils' statements were involved in the particular stabbing. No other leads from information supplied by other witnesses were pointing in any direction with respect to Donald Marshall, Jr.'s involvement or non-involvement. Donald Marshall, Jr. had been in difficulties or conflicts with the law over the previous several months. Donald Marshall, Jr.'s disposition was probably such that it conveyed the impression to John MacIntyre that the whole recounting of events had not been given. Ultimately, Donald Marshall, Jr. was the only other known person to have been involved in the incidents surrounding the stabbing. Thus, what faced John MacIntyre on June 3, 1971 was that it would be appropriate to consider Donald Marshall, Jr. as a suspect who, after a week of investigation, had not been eliminated as a suspect as one might have expected. It is respectfully submitted that even Staff Sergeant Harry Wheaton in those circumstances would have had to continue to consider that Donald Marshall, Jr. was possibly the person responsible (T. v. 43, p. 7860).

June 4 - John Pratico

271. Neither John Pratico nor Maynard Chant stated

positively that there was any further contact with the police between being in Wentworth Park and giving statements on May 30, 1971, and June 4, 1971 when both were interviewed again. With respect to his statement on June 4, 1971 John Pratico was either taken to the police station or went there himself (T. v. 12, p. 2061) and recalls that after being at the police station only a few minutes he was taken in to give his second statement (T. v. 12, p. 2062) to John MacIntyre and William Urquhart. In summarizing what happened, John Pratico stated:

They got me to go to the police station. I went up there and we sat and there was Sergeant MacIntyre and we were talking. He asked a few questions and we - I answered to the best of my ability. I felt a little like the heat was put on me a bit. (T. v. 12, p. 2061).

When asked to be more specific, Pratico indicated to this Commission that he was twice told by John MacIntyre that all the police wanted was the truth (T. v. 12, pp. 2064-2065). Between these two requests for the truth Pratico says that it was mentioned that he "could be going to gaol", and that he discussed with MacIntyre what had happened in Wentworth Park (T. v. 12, pp. 2064-2065).

272. John Pratico now claims that he then gave his statement of June 4, 1971 and signed it (Exhibit 16 - R. v. 16, pp. 43-45) because he was scared, his mind was not clear, he had emotional problems, and he felt that he could not take the pressure (T. v. 12, p. 2066). However, despite close questioning by Commission counsel and counsel for Donald Marshall, Jr. it is

not clear that the police ever identified Donald Marshall, Jr. for him as having done the stabbing (T. v. 12, pp. 2066, 2129). Indeed, as questioning by counsel for Donald Marshall, Jr. established, John MacIntyre did not even suggest that a knife was involved (T. v. 12, p. 2129) but that certainly appears in the statement that John Pratico signed.

273. Another point to consider from John Pratico's evidence is that he considered that he had been spoken to "kind of roughish" as if "like I wasn't being believed", and being threatened with jail, at the time of his first statement on May 30, 1971 (T. v. 12, pp. 2056, 2180, 2191). John Pratico does not associate any requests for the truth at the time of the first statement, even though he specifically remembers two incidents during the course of the second statement. Still, Pratico did say that he felt the second interview was twice as rough as the first (T. v. 12, pp. 2180-2181).

274. It is respectfully submitted that John Pratico's assertions about the interview with John MacIntyre on June 4, 1971 can not be accepted as credible for various reasons. As evidenced by Exhibit 47, John Pratico experienced difficulties with his perceptions in 1971 - particularly with respect to being victimized by the Native population. John Pratico now says that what he told John MacIntyre was not true (T. v. 11, p. 2033). However, he did not tell his mother in 1971 that the statement was not true (T. v. 12, p. 2068), nor did he tell Oscar Seale that it was untrue (T. v. 12, pp. 2161-2162), and indeed told the

Seales that what he had told the police in 1971 was true. John Pratico also did not tell John Butterworth that the story he had told to MacIntyre on June 4, 1971 was untrue (T. v. 12, pp. 2082-2083, 2204). Even since Pratico has recanted, he has resiled from that recantation, although he would not admit to that directly at these Commission hearings (Exhibit 21 - R. v. 21, p. 75; T. v. 12, pp. 2165-2167; Exhibit 17 - R. v. 17, p. 6). John Pratico made no complaint of threats and pressure from the police until it appeared that the investigation was being re-opened (Exhibit 99 - R. v. 34, p. 50)

275. John Pratico's threats of jail, and the fact that John Pratico states that he was under pressure by the heat being put on him a bit, are not credible to the extent that it suggests any positive wrongdoing by John MacIntyre. John Pratico had given a written statement to the Sydney City Police and signed it on May 30, 1971, but now claims that it is not the same statement that appears with his signature in the Commission documents (Exhibit 16 - R. v. 16, pp. 22-23; T. v. 11, pp. 2051-2053). Pratico did acknowledge that at the time his mind was not "all that good" and that he was "shook up over the whole thing" and:

Possibly I didn't know what I was signing. (T. v. 11, pp. 2052-2053).

Earlier he had been confident enough to tell this Commission that he had signed a statement on May 30, 1971 which said that he did not know anything (T. v. 11, p. 2051).

276. It is respectfully submitted that in any situation where John Pratico is challenged to take responsibility for

particular events or happenings he refuses to do so and will attempt to attribute blame to some other party. In effect, John Pratico seeks always his best interest first. He refused to be embarrassed with his own unreliability and attempted to claim to this Commission that counsel for John MacIntyre himself should be blamed for pressuring John Pratico during a very restrained cross-examination (e.g., T. v. 12, pp. 2150-2151, 2181, 2212-2214, 2215-2216). There is no independent basis to consider that the blame which John Pratico attributes to John MacIntyre with respect to the giving of the second statement is true in any respect.

June 4 - Chant

277. Once John Pratico had identified Donald Marshall, Jr. as having stabbed Sandy Seale in his June 4, 1971 statement, the Sydney City Police were in possession of sufficient evidence to lay a charge of murder against Donald Marshall, Jr. with respect to the death of Sandy Seale: Criminal Code, supra, s. 212. MacIntyre believed Pratico (T. v. 33, pp. 6141-6142), as did Urquhart (T. v. 52, p. 9523). However, in order to test the reliability of Pratico's statement, the Sydney City Police needed to speak again with Maynard Chant who had proffered himself as an eyewitness to the stabbing as committed by someone other than Donald Marshall, Jr. Both Chant's May 30, 1971 statement and Pratico's June 4, 1971 statement could not stand together. One of them at least had to be unreliable.

278. John MacIntyre could not honestly decide that he

had reasonable and probable grounds to swear an information of murder against Donald Marshall, Jr. until he had checked to determine that what Maynard Chant was saying was the truth. John MacIntyre was not entitled at any time to simply disregard either Pratico's or Chant's statement because, as was stated in Chartier v. Attorney General for Quebec, supra, at p. 26:

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....

It is respectfully submitted that this is why John MacIntyre went to Louisbourg on June 4, 1971 to speak with Maynard Chant again.

279. Chant's June 4, 1971 statement is crucial to this Commission as it was to the 1971 investigation of the death of Sandy Seale because it is this statement which confirmed Pratico's identification of Marshall, given by the witness who had claimed each previous time he had spoken with the police that he had seen everything (Exhibit 16 - R. v. 16, pp. 6-7, 18-21). We have dealt elsewhere in this Brief (Section H, supra) with who was present at the Maynard Chant statement in Louisbourg. Here it is appropriate to deal with the substance of the discussion which occurred on June 4, 1971 at Louisbourg.

280. The way Maynard Chant recalled the June 4, 1971 interview at Louisbourg was that in the presence of himself and MacIntyre and another police officer and Wayne Magee and Larry Burke and his mother, MacIntyre explained that the statement

given on May 30, 1971 by Maynard was believed not to be true, and did Maynard know anything else (T. v. 5, pp. 852-856). MacIntyre asked Maynard whether he had seen "anything" (T. v. 5, p. 856).

Maynard replied that:

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

MacIntyre must have known from the occurrence reports (Exhibit 16 - R. v. 16, pp. 6-7) that even if Maynard had lied in his first formal statement on May 30, 1971, that he had asserted some involvement on the night of the offence and had actually been in touch with Constable Walsh at the scene. Quite properly then MacIntyre again asked, according to Chant:

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

Chant says that he and MacIntyre went back and forth with this, with MacIntyre being very persistent and loud while Maynard maintained his refusal "more or less to say that I just didn't want anything to do with it anymore and I didn't see anything" (T. v. 5, pp. 856, 858-859).

281. Chant states that the following things were told to him by John MacIntyre:

(a) Maynard was on probation and by lying was in serious trouble and could go to jail as a result of lying the first time (T. v. 5, p. 856);

(b) Maynard could get two to five years by not telling the truth (T. v. 5, pp. 860-861);

(c) Maynard was told that the police had a witness who had told a story and said that he saw Chant there (T. v. 5, p. 855).

Chant testified that as a result of these things he was so upset that he had begun to cry, and his mother had seen him cry (T. v. 5, pp. 862-863).

282. Beudah Chant testified that she was with Maynard in the Town Hall when the interview began (T. v. 20, p. 3537), and confirmed nothing of what Maynard Chant has told this Commission about what happened up to the time she left the room:

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

Beudah Chant did not remember any two to five years (T. v. 20, p. 3541), and in fairness to Maynard's recollection he believed that that reference may have come up after she left (T. v. 5, p. 862). In response to a leading question from Commission Counsel, Beudah Chant did state that it was mentioned that Maynard could be charged "if he was lying" (T. v. 20, pp. 3541-3542). Beudah Chant did testify that while it was not mentioned in her presence she now attributes Maynard's delay in recanting to a fear of perjury impressed upon Maynard at the Town Hall. (T. v. 20, p. 3555). That would have to be based on something that she has been told since. Maynard testified before this Commission that the actual word "perjury" had not been literally said at all by the police at the time of the second statement (T. v. 5, p. 865), despite allegations which have been made to the contrary.

283. What Beudah Chant does remember from both before going to the Town Hall and at the Town Hall was admonishing her

son to tell the truth and impressing upon him the seriousness of the matter ~~with~~ which he had become involved. Indeed, Maynard himself testified that both of his parents were showing real concern with him and his involvement in this matter by June 4, 1971 (T. v. 5, pp. 848-849). Beudah Chant testified that she herself discussed the fact with Maynard that he was on probation in relation to this incident:

I remember telling him "Well, Maynard, if you're not telling the truth, you'd better tell the truth because this is very serious and, you know, you might get in trouble yourself if you - " because he was on probation and he said he was telling the truth. (T. v. 20, p. 3532).

Beudah Chant said that this comment of hers was made on Sunday, May 30, 1971. We leave it to the Commissioners to determine how concerned she would have been then when the matter raised itself again on June 4, 1971.

284. It is respectfully submitted that there is no cogent support in Beudah Chant's evidence for anything that Maynard Chant asserts was done that afternoon up to the point of his mother leaving the room. Indeed, Beudah Chant did not even confirm Maynard's assertion that he had begun to cry and that his mother had seen him cry (T. v. 5, pp. 862-863; T. v. 20, p. 3541). With respect to any question about raising of voices, John MacIntyre walking around, or any acts of an intimidating nature at all, Beudah Chant has no recollection at all (T. v. 20, pp. 3555-3556). So far as Maynard being told that there was another witness, the only thing that Beudah Chant could relate

this to was the advice of the police officer who picked her and Maynard up ~~at home~~ (T. v. 20, p. 3534) - Wayne Magee (T. v. 20, p. 3628).

285. Wayne Magee's recollection indicates that MacIntyre began the June 4, 1971 interview by advising Beudah Chant that he wanted the truth from Maynard, and this prompted Beudah to exhort her son to tell the truth (T. v. 20, pp. 3630-3631). Magee recalls no raising of voices by anyone (T. v. 20, pp. 3635, 3644-3645). Magee does not recall any mention of probation, jail, or the two to five years (T. v. 20, pp. 3650-3651). Magee could not recall Maynard crying at any time, and indeed Maynard Chant appeared co-operative throughout (T. v. 20, pp. 3637-3638, 3646). Magee's evidence relates to the whole time of taking the statement.

286. It is respectfully submitted that up until the time when Beudah Chant may have left the room, there were no threats or other instances of intimidation of Maynard Chant. Beudah Chant would not have left if she believed that the police were scaring Maynard into telling a story (T. v. 20, pp. 3555-3556). Wayne Magee does not recall Beudah Chant leaving after being there at the start of the statement (T. v. 20, pp. 3633-3634, 3644). Beudah Chant is positive that she left (T. v. 20, pp. 3539-3540, 3547), as was Maynard (T. v. 5, p. 857).

287. Chant makes no new allegation about intimidation arising after his mother left the room, except perhaps with respect to the "perjury" which he later said had not been

literally said by the police at the time of the second statement (T. v. 5, pp. 862, 865). Chant says that MacIntyre repeated to him that Maynard was in an awful lot of trouble, the statement given the first time was not true, he was on probation, and that Maynard could do time as a result of that (T. v. 5, p. 866). It will be recalled that all of these things, according to Maynard, had been mentioned when his mother was in the room, and were things which his mother on at least one occasion had herself impressed upon him - except in relation to doing time. It is significant that Beudah Chant's only sense about jail in relation to the Louisbourg Town Hall statement was that Maynard could be charged "if he was lying", and both MacIntyre and Beudah Chant both made plain that they were seeking the truth from Maynard on that day.

288. For these reasons, it is respectfully submitted that any allegation that Maynard Chant's June 4, 1971 statement was given as a result of improper pressure by John MacIntyre is simply not supported by credible evidence. Whether or not perjury and two to five years may have been mentioned by the Crown Prosecutor or some other person at some other time during the course of 1971 is not important. What is important from John MacIntyre's point of view and the reasonable and probable grounds which he was seeking to develop with respect to the Seale murder investigation, is that it is not possible for this Commission to conclude in our submission that such threats were made before or during the June 4, 1971 statement. Maynard Chant adverted to

this himself under examination by Commission Counsel:

--I didn't want to make any implications that it - that the things that were done, were done in a, in a concealed way to try to - for the police department in Sydney to try to conceal something. As far because there was a lot of opposition that time to say that it was the police's, they were totally responsible for the action and I didn't want to give any reference to that....(T. v. 5, pp. 861-862).

commenting on his 1984 C.B.C. Discovery evidence that he could not remember if the police actually mentioned two to five years. Indeed, if, as some counsel allege, John MacIntyre has his mind made up on Saturday, it is extremely strange that he did not pressure Chant to this conclusion on Sunday instead of waiting until there were five people to observe his pressure.

289. It is respectfully submitted that the appropriate conclusion of this Commission with respect to Maynard Chant's evidence of intimidation and improper pressure would be the same as the conclusion reached with respect to Maynard Chant's evidence during the 1982 Appeal Division Reference:

Mr. Chant has by now changed his story so many times that, in our opinion, no weight can be placed upon his evidence either at the trial or now. To the extent that his testimony cannot be relied upon to support the position taken by the appellant, however, it can no longer be of much assistance to the Crown should a new trial on the original charge ever take place. (Exhibit 4 - R. v. 4, p. 129).

290. The final point worth considering with respect to Maynard Chant's June 4, 1971 statement is how the statement was

actually taken down and what information it was based upon. If Beudah Chant left while Maynard Chant was still claiming to have seen nothing, John MacIntyre had less than half an hour to take Maynard Chant's June 4, 1971 statement which, so far as substance is concerned, is a little more than three legal size pages long (Exhibit 16 - R. v. 16, pp. 50-53; T. v. 20, p. 3453). This is consistent with Chant saying that the statement went reasonably quickly once he decided to begin recounting a story.

291. Turning to how the material in the statement appeared there, Chant says that he asked the police what the person in the Park had said that Maynard had seen (T. v. 5, p. 866). Chant is unable to remember any response from the police to this question of his (T. v. 5, p. 870), and the police never showed Maynard anything (T. v. 5, p. 866).

292. Chant essentially wanted to give a statement following along the lines of his first statement (T. v. 5, pp. 871-873) and he introduced material such as knowing the dark-haired fellow from dances in Louisbourg "to make the story believable" (T. v. 5, p. 878), which he was in the habit of doing (T. v. 6, p. 999). Chant could not be specific but indicated that detail could have been dreamed up, gathered from observations at the Park, on some issues he might have sought some help and on other details he just has no idea of where it came from (T. v. 5, pp. 846-847, 878, 880-882, 884; T. v. 6, pp. 967ff).

293. Wayne Magee testified that John MacIntyre did

supply Maynard Chant with assistance with respect to locations, but this did not involve suggestions about what Maynard had seen (T. v. 20, pp. 3639-3650). The one crucial point on which Maynard Chant has been consistent since 1971 is that at no time did the Sydney City Police ever tell him that the person who actually stabbed Sandy Seale was named Donald Marshall (T. v. 6, pp. 934-935; Exhibit 1 - R. v. 1, [Trial Transcript, p. 36]).

294. The suggestion was made that the Sydney City Police, and John MacIntyre in particular, suggested facts to Chant which would give his statement a ring of truth. It is respectfully submitted though that the questions were asked of him on the basis that if Chant could not recall any other source for the information it must have come from the police (e.g., T. v. 6, pp. 967ff). However, and this is instructive for this Commission, Chant was not to be driven to that excuse. On some issues Chant did not recall where the information came from and would not go further than that (e.g., T. v. 6, p. 968), on other issues that the information came from observation in the Park area when there with the police and Pratico (T. v. 6, pp. 969-970) and which we know was probably on May 30, 1971 - in plenty of time for Maynard Chant to have the details in his mind on Friday, June 4, 1971. Chant acknowledged that some details in the statement could have been made up (T. v. 6, p. 973). As to the knowledge about John Pratico hiding in the bushes, Chant testified that he saw that with his own eyes when he went to the Park (T. v. 5, pp. 874-875). However, Chant guessed and then

agreed that the police had told him that "that particular dark haired fellow" had been in the Park hiding behind a bush (T. v. 6, pp. 970-974). It is respectfully submitted that such an answer is not compelling or persuasive.

295. What John MacIntyre did find compelling and persuasive on June 4, 1971, were the similarities in the story which came from Chant and the identification of Donald Marshall, Jr. as the perpetrator of the murder (T. v. 33, pp. 6177, 6179). John MacIntyre did not believe that these witnesses had been prompted, and they certainly had not been prompted by him (T. v. 33, pp. 6177-6178). The other alternative, as put by Commission counsel, was that John MacIntyre believed that the witnesses were telling the truth (T. v. 33, p. 6177). John MacIntyre did not rise to the suggestion that perhaps Pratico and Chant got together on their stories without MacIntyre's knowledge (T. v. 33, p. 6181):

Yeh, I didn't know of any, you know.

Reasonable and Probable Grounds

296. Reasonable and probable grounds involve a logical, deductive thought process where the steps taken are not unreasonable. The steps taken in the thought process must be fair, honest, and not capricious or arbitrary. It is respectfully submitted that the evidence clearly demonstrates that John MacIntyre had an honest belief in the guilt of Donald Marshall for the death of Sandy Seale based upon the full conviction, based upon reasonable grounds, of the existence of a

state of circumstances which, assuming them to be true, would lead a prudent and cautious man to the conclusion that the person charged was probably guilty of the crime imputed to him. Given that both Chant and Pratico had told him that they had seen Donald Marshall, Jr. stab Sandy Seale, and John MacIntyre had an honest belief that this was their true recollection of the events as they occurred on May 28-29, 1971, on their face they indicate that Donald Marshall, Jr. was guilty of murder. Indeed, John MacIntyre would not have been permitted under law to disregard those statements from Chant and Pratico unless there was some valid reason for concluding at that time that Chant and Pratico were unreliable. It is respectfully submitted that on the whole of the evidence it cannot be said that John MacIntyre drew a conclusion as to Donald Marshall's guilt without any evidentiary justification. This final point was dealt with by Judge Matheson in his evidence:

- Q. Did you question at all the process whereby two young people would initially give statements which did not implicate Mr. Marshall, and then on a later date both gave statements which implicated Mr. Marshall?
- A. I believe we had - we had - we asked the officers about it and in particular Sergeant MacIntyre, and I don't recall that we quizzed him about the process but he assured us that he had questioned them on one occasion and got one answer when he questioned them on the second occasion he got another and a different answer and I'm - I sincerely believe to this day that Detective MacIntyre believed that his second answer was true, MacNeil did, and I did. (T. v. 26, p. 4947).

K. Conducting of Interviews with Young
Persons Involvement Prompting, Threats,
Intimidation, and Even Physical Violence
For the Purpose of Influencing their
Evidence

Pratico and Chant

297. In the previous section (Section J, supra) we have dealt at length with the June 4, 1971 statements of John Pratico and Maynard Chant. We have respectfully submitted to the Commissioners that the threats of imprisonment which both Chant and Pratico refer to have not been established upon all the evidence as having occurred. Certainly if the threats had been made and were the only reason why Chant and Pratico gave statements to the Sydney City Police with information provided by the Sydney City Police on material points, then there may have been no claim that reasonable and probable grounds existed to believe that Donald Marshall, Jr. had committed the offence of murder in the death of Sandy Seale. However, as has been submitted, reasonable and probable grounds did exist for John MacIntyre to lay the charge. The accusations of Chant and Pratico about a threat of jail have not been supported by cogent or other evidence.

Robert Patterson

298. Robert Patterson's name, and the fact that he was drunk, was mentioned in two statements taken in the course of this investigation (Exhibit 16 - R. v. 16, pp. 17, 64), and in one other statement was named as a person with some information

about people running and screaming in the Park (Exhibit 16, R. v. 16, p. 22). Patterson's name appears on a list of people to be interviewed (Exhibit 16, R. v. 16, pp. 135-136, 139), but the evidence of John MacIntyre and William Urquhart was that the Sydney City Police were unable to locate Patterson in 1971 (T. v. 33, pp. 6010-6021; T. v. 52, pp. 9548-9563; 9565-9567).

299. Patterson testified before this Commission and confirmed that he was "pretty loaded" on the night of the stabbing, fell asleep on one of the benches in the Park, and had seen nothing (T. v. 55, pp. 10014, 10016). Robert Patterson did not know about the stabbing until after Donald Marshall, Jr. was charged a week later (T. v. 55, p. 10018), despite the fact that he was apparently working for a grocery store in Sydney at that time and spending most of his free time at Wentworth Park or at the pool hall (T. v. 55, pp. 10009, 10012-10013). He and Donald Marshall, Jr. were friends.

300. Robert Patterson testified at this Commission that the Sydney City Police, and in particular William Urquhart and John MacIntyre, did indeed find him in 1971 (T. v. 55, p. 10019). Patterson says that John MacIntyre handcuffed him to a chair and then MacIntyre began questioning (T. v. 55, p. 10020). Patterson appeared unsure as to whether one or two sets of handcuffs had been used (T. v. 55, pp. 10062-10064). When Patterson denied seeing what happened in the Park, MacIntyre started screaming, came around the desk and pulled Patterson's hair, pushed Patterson's chair up against the wall, and started

slapping Patterson around in the head and face for ten or fifteen minutes, stopping from time to time to say:

Now, do you admit it? (T. v. 55, pp. 10020-10021).

On cross-examination the ten minutes became twenty, the chair was "kicked across the room", Patterson's head was banged on the desk, and he was punched with a closed fist in the stomach, side and rib cage (T. v. 55, pp. 10054-10056). Patterson meanwhile was screaming but "not really" loudly (T. v. 55, p. 10056).

301. William Urquhart, who had left, returned to the office with a typed three page statement. MacIntyre and Urquhart attempted to secure Patterson's signature but Patterson refused. As a result, both MacIntyre and Urquhart left and then returned again. MacIntyre "started slapping me around again" for anywhere from two to three hours, "maybe a little longer" (T. v. 55, p. 10022). On cross-examination, "It could have been four hours" (T. v. 55, p. 10060). However, Patterson says that over the whole course of the interview he was manhandled for "maybe fifteen minutes", which was pretty well all the time that Urquhart was out of the room the first time (T. v. 55, p. 10061).

302. Cross-examination further established according to Patterson that he was actually interviewed for an hour or an hour and a half prior to Urquhart leaving the room for the first time (T. v. 55, p. 10062). The only other significant point in Patterson's narration was that he described the Detective Office as one room without a stenographer (T. v. 55, p. 10052).

303. Eventually the handcuffs were undone and Patterson

was told to "get the hell out" (T. v. 55, pp. 10022-10023). Patterson complained to no one (T. v. 55, pp. 10023, 10025-10026, 10066-10067), even though this had been an absolutely unique experience in his life up to this time.

304. Patterson's allegation is also startlingly unique at these Commission Hearings. We submit that his evidence should be given no weight:

Q. Had you ever before been interrogated by the Sydney Police or any police and been physically abused?

A. Not that I can remember. (T. v. 55, p. 10023). (Emphasis added)

However, Patterson also testified as follows:

Q. Had you ever been manhandled at any other time by the Sydney Police other than that occasion?

A. No.

Q. Or by any other police?

A. Oh, yes.

Q. Have you been manhandled on many occasions by police?

A. Many occasions.

Q. Many occasions?

A. Many occasions. That's why there's so many people in jail in Ontario. (T. v. 155, pp. 10046-10047).

...

Q. Against the Toronto Police although you say you were manhandled on virtually every occasion on which you were charged in the Toronto area?

A. Ninety-five per cent of the time,

yes. (T. v. 55, p. 10051).

These included severe manhandlings (T. v. 55, p. 10047).

Patterson added that MacIntyre and Urquhart had a reputation for this kind of thing (T. v. 55, p. 10072). According to Michael Whalley there has never been a complaint about this or any other kind of misconduct by MacIntyre or Urquhart (T. v. 62, pp. 11123-11124), and Whalley also indicated that complaints were effective (T. v. 62, p. 11194). Patterson had no marks on his face or chest from this encounter with MacIntyre and Urquhart, and while he said his hands were red from the handcuffs the skin was not broken (T. v. 55, p. 10065).

305. It is respectfully submitted that Robert Patterson's evidence as given to this Commission should not be believed. Patterson has a lengthy criminal record for dishonesty (Exhibit 120). Some of the offences in his record relate to contacts that he would have had with the Sydney City Police when first embarking upon his criminal career. Patterson was reluctant before this Commission to discuss the depth of his current or more recent criminal career (T. v. 55, pp. 10043, 10068). It is respectfully submitted that Patterson is an unsavoury character whose evidence should not be trusted - particularly when it itself is internally inconsistent despite the vigour with which the allegations are made.

306. It is respectfully suggested also that the story about attempting to get Patterson to sign the statement that had already been typed out is inconsistent with all other statements,

original or typed version, taken by John MacIntyre or William Urquhart and which appear in the documents before this Commission. That would make a statement stand out. What possible advantage could MacIntyre and Urquhart expect to gain from a typewritten statement that could not be gained from a handwritten one? Patterson himself recalled that there was no stenographer present in the Detective Office at the time.

307. We would ask the Commissioners to give Patterson's evidence close scrutiny, on guard about accepting any evidence from a person with Patterson's lengthy history of dishonesty, and we submit that this Commission will come to the conclusion that Robert Patterson's evidence can not be accepted, even in the absence of any opportunity for answer by John MacIntyre.

Patricia Harriss

308. Patricia Harriss was interviewed on June 17, 1971 and June 18, 1971 (Exhibit 16 - R. v. 16, pp. 63-68). Considerable stress was laid upon her evidence by some counsel as proof that John MacIntyre would refuse to accept evidence or statements from witnesses which would tend to exculpate Donald Marshall, Jr. It is respectfully submitted in response that such assertions go beyond, and indeed far beyond, the actual evidence given by Patricia Harriss at these Commission hearings. It is also respectfully submitted that when this Commission assesses the whole of her evidence the only real complaint and difference of opinion which Patricia Harriss and her mother have with John MacIntyre is that Patricia Harriss feels that the procedures used

in obtaining a statement from Patricia were not proper.

309. — — Patricia Harriss' recollection of the events of June 17-18, 1971 is highly selective and therefore this Commission must rely more on Eunice Harriss. Eunice Harriss testified that the Sydney City Police contacted her and she brought Patricia to the Sydney Police Station, at which time they were interviewed by John MacIntyre and William Urquhart (Section H, supra; T. v. 16, pp. 2796, 2951-2955, 3000). Both MacIntyre and Urquhart were present while Harriss was giving her first 8:15 p.m. statement (T. v. 16, pp. 2924, 2954). If this is so, it is the only statement which is in evidence before this Commission which had John MacIntyre present but not actually transcribing the statement which was being taken.

310. Eunice Harriss says that for the first hour or hour and a half that she and Patricia were at the police station William Urquhart was attempting to take a statement from Patricia Harriss. However whenever Patricia related that part of her recollection involving "two men" (Exhibit 55), William Urquhart would crumple the notepaper, toss it to the floor, and start again saying:

"There wasn't two men there, Patricia";
or

"Come on now you didn't see two men"; or

"Tell us now, who else did you see"; or

"Well, you didn't; you couldn't have" (T.
v. 16, pp. 2957-2958).

The starting of a statement, crumpling it up and starting again

was a sequence which occurred about twelve times (T. v. 16, pp. 2955, 2957, 2959). Patricia Harriss' recollection of this portion of the evening was that the police officers told her that the two men story was not proper:

Patricia, you didn't see that. There wasn't two men there, was there, Patricia. (T. v. 16, p. 2799; see also 2875).

311. Patricia Harriss felt that she was under a lot of pressure throughout the evening:

I remember being very frustrated, upset, going over a lot of facts, a lot of names, a lot of statements being taken and torn up and starting all over again. (T. v. 16, p. 2797).

Whenever a statement got to the two men "we would have to start over again because that wasn't proper, that wasn't right...It wasn't correct." (T. v. 16, pp. 2798-2875). At some point a fist was pounded on the desk - though not as loudly as Commission counsel demonstrated (T. v. 16, pp. 2800-2801). Harriss claims that in 1971 she was a very confused 14 year old (T. v. 16, p. 2926). Harriss recalls giving what is now regarded as the first statement (Exhibit 55; T. v. 16, p. 2798). Patricia Harriss says this was a true statement (T. v. 16, p. 2937).

312. Despite the efforts of the Sydney City Police, and "mainly...the two police officers" - Urquhart and MacIntyre (T. v. 16, pp. 2817-2818), Harriss kept up for quite a few hours saying that there were two men but she was crying and "very frightened, very, very frightened", and:

I think I got a little angry. I remember

being allowed out for a moment, my mother being there, and she offered me a kleenex --and I was very upset. I was angry with my mom as well...I think I was angry at the world having to go through such a -- such a time....I had no idea. I went down there thinking well there must be some -- I really didn't know what it was all about. (T. v. 16, p. 2799).

Harriss recalls that at some point during the evening she may have met with Terry Gushue, her boyfriend, and both spoke for a moment (T. v. 16, pp. 2819, 2865, 2913). This contact lasted for a couple of minutes and they were alone, and this is the only time that Patricia Harriss recalls discussing the night of the stabbing with Terry Gushue (T. v. 16, pp. 2862-2865).

313. Eventually after virtually continuous questioning, Patricia Harriss says that she departed from the statement which she originally gave (Exhibit 55) and gave a statement which would satisfy the police (T. v. 16, p. 2937). Harriss places the responsibility for her agreeing with things that she shouldn't have agreed on MacIntyre and Urquhart (T. v. 16, pp. 2817-2818).

314. Eunice Harriss confirmed to this Commission that she observed Patricia being questioned, and notes being made on pages which were not as large as the statement forms (e.g., Exhibit 55) which Eunice Harriss had in front of her while testifying (T. v. 16, pp. 2959-2960). Eunice Harriss also confirms the persistent back and forth about the two men. Eunice Harriss confirmed that Patricia eventually began to cry and break down from the tension and pressure of the situation (T. v. 16, pp. 2956, 2959, 2991-2992). The sobbing may well have been going on for half an hour

when Detective MacIntyre asked Eunice Harriss to step outside the room. During this time Eunice Harriss had not seen any pounding of the table - though Urquhart may have had his hand come down on the table (T. v. 16, p. 2991).

315. Eunice Harriss sat outside the interview room where Patricia was and observed Terry Gushue arrive at the police station and observed him go into the interview room with Patricia alone for a few minutes as both Urquhart and MacIntyre had left the room (T. v. 16, pp. 2961-2962, 2964). This Honourable Commission will note that there was no soundproofing of the interview rooms in the Detective Office of the old Sydney City Police Station (T. v. 17, pp. 3059-3060).

316. It is respectfully submitted that Patricia Harriss' evidence is not reliable. Harriss claims now to be able to recall and identify that John MacIntyre questioned her in 1971 (T. v. 16, pp. 2796, 2829). In 1984 Patricia Harriss sat through a Discovery examination in the presence of John MacIntyre and was unable to recall him as involved (T. v. 16, pp. 2829-2833; Exhibit 13 - R. v. 13, pp. 146,166). In 1987 Patricia Harriss could not recall counsel for John MacIntyre who had questioned her at the Discovery (T. v. 16, p. 2850). Indeed, Patricia Harriss could not even recall how long the questioning for the Discovery had taken (T. v. 16, p. 2852). Harriss did not know John MacIntyre in 1982 when she spoke with Frank Edwards (T. v. 17, p. 5). She did not know who John MacIntyre was in 1971 either (T. v. 16, p. 2796). Patricia Harriss does not know which

officers were present at the time of the last interview of the night (T. v. 16, p. 2930). Patricia Harriss cannot even recall signing her own statement that night although her signature does appear on it (T. v. 16, p. 2802).

317. With respect to events in 1971, Harriss' recall was hazy as well. Harriss could not recall when she first started going out with Terry Gushue (T. v. 16, pp. 2856-2857). Harriss did not find that thing "too important myself" (T. v. 16, p. 2859). At the same time, even though the events at the police station on the night of June 17, 1971 had been important to her, she could not recall talking to her boyfriend about it (T. v. 16, pp. 2860-2862). Patricia Harriss says she did not recall and did not know that Terry Gushue had given a written statement that night (T. v. 16, p. 2862). Harriss does not recall going to the police station or even walking in the door of the police station (T. v. 16, p. 2866).

318. Harriss did not recall much of the second statement and offered that she wasn't "too responsible" when she "sort of gave up" and gave that statement (T. v. 16, pp. 2869-2870). Patricia Harriss also could not recall how Sandy Seale's name got into the statement because she did not know him at all and had never seen him before (T. v. 16, p. 2870), even though she has given sworn evidence to the complete opposite effect (Exhibit 13 - R. v. 13, p. 111). Patricia Harriss' explanation of this was that the facts to which she swore at the Reference were really "more like a dream to me" - even though she was, so she says,

telling the truth to the best of her ability (T. v. 16, pp. 2871-2872). --

319. Patricia Harriss could not recall her mother being present with her while she was being interviewed (T. v. 16, p. 2879). When asked whether the fist on the table or raising of voices occurred from the moment she went to the police station Harriss stated:

A. No, I don't imagine, no.

Q. When you say you don't imagine, do you really recall?

A. No. (T. v. 16, p. 2880).

320. Harriss could not recall giving evidence at the Preliminary Hearing (T. v. 16, p. 2882). Her evidence at the Preliminary Hearing did not refresh her memory at all (T. v. 16, pp. 2882-2885). Harriss had no recollection either of any other interviews with the police other than on June 17-18, 1971 but even so:

I have said before that I wasn't quite sure how many times. I was never quite sure why I was saying that. But today, I really couldn't say. I do remember this quite vaguely because it was a hard time. (T. v. 16, p. 2886).

Harriss had no idea why she gave evidence at Trial about holding Donald Marshall, Jr.'s hand.

321. Patricia Harriss told Staff Sergeant Harry Wheaton in 1982 that Terry Gushue had been "browbeaten by the police" (Exhibit 13 - R. v. 13, p. 102). When asked why she signed a statement which contained that sentence she stated that:

A. Maybe because that short, brief moment that we had together where I was upset.

Q. Are you suggesting that Terry Gushue told you that he was browbeaten by the police at that time?

A. I'm not saying that he told me that. I might have - I think what I'm saying that he was also upset.

Q. He was also upset?

A. Yes.

Q. You - is that what you believe he told you, that he was also upset?

A. Not that he had told me, that I could - I could see that he was upset.

Q. And you translated what you observed into the fact that he was browbeaten by the police?

A. Well, more than if I - The reason why I was upset was probably the same reason for him being upset.

Q. Yes. But you just interpreted that upset as being due to a browbeating by the police?

A. Yes. (T. v. 16, p. 2896).

322. Patricia Harriss was examined about her criminal record:

Q. ...Have you ever had occasion to be in difficulty with the police?

A. No, nothing of any importance or anything.

Q. Have you ever been charged yourself?

A. Again years ago for a small shoplifting charge.

Q. And by years ago, can you help me on

that? What does that mean?

- A. Oh, dear, I don't know how many years ago. It's awhile back.

MR. MACDONALD:

My Lord, we might as well take just about a five minute break to check some back-ground information.

...

BY MR. MACDONALD:

- Q. Now I'd asked you if you had had difficulty with the police and you said "yes, there was a shop-lifting charge." and that was in July of 1978, was it not?
- A. I have no idea.
- Q. But it was some time ago.
- A. Yes.
- Q. And you were fined for that offence.
- A. Yes.
- Q. Now were you also in around the same time charged with driving a motor vehicle -
- A. Yes.
- Q. - while impaired?
- A. Yes.
- Q. And you were fined for that?
- A. Yes.
- Q. And approximately a month later charged with - still driving or driving a motor vehicle while you were disqualified.
- A. Yes.

Q. You recall - and you were fined with that?

A. Yes.

Q. And within the last year, were you also charged with a Possession charge?

A. Yes.

Q. And you were convicted or -

A. Yes.

Q. - you were fined for that?

A. Yes.

Q. Thank you....(T. v. 16, pp. 2827-2829).

Patricia Harriss was questioned further as to her reasons for not admitting her criminal record:

Q. He [Mr. MacDonald] asked you what difficulties you had with the law and it's my recollection that you only acknowledged one problem before and that was an incident of some shoplifting some years ago and you could not recall when?

A. Yes.

Q. Mr. MacDonald then requested an adjournment?

A. Yes.

Q. And there was a fifteen minute adjournment and did anyone talk to you during that fifteen minute adjournment?

A. My mother.

Q. Did she discuss your evidence with you?

A. No, it was just that we felt it was

--- kind of a shame that I have to bear [sic] my soul about incidents that I'd rather not talk about.

Q. And did your mother tell you or bring to your attention that there were other incidents that you had not told Mr. MacDonald about?

A. No.

Q. I see. Do you have any explanation as to why you did not tell Mr. MacDonald about these other incidents?

A. No.

Q. None at all. Okay. Had you forgotten about them?

A. No.

Q. They were in your mind, were they?

A. Yes. (T. v. 16, pp. 2853-2854).

...

Later, by other counsel:

Q. Miss Harriss, I show you a piece of paper with your name appearing at the top and it indicates section 235-2 CC June 3rd, 1978, and it recites "two hundred dollars in [sic] costs, in default thirty days." And then goes on and lists three other matters.

A. Yes.

Q. That is an accurate record of your involvement with the Law to date?

A. Yes, I would imagine.

MR. MURRAY:

My Lords, if that may be marked as an exhibit - 57. (T. v. 16, pp. 2934-2935).

And yet later again, on re-examination by Commission counsel:

- - Q. Just a couple of questions, Miss Harriss, and very briefly to do with your minor skirmishes with the Law. I think the questions that were directed to you were perhaps directed to your involvement in the Sydney area. Did you have any difficulties with the Law outside Sydney?

A. No.

Q. The reason for the questioning is that I have an indication that there was a minor theft charge in Toronto in 1976; does that assist your recollection?

A. In '76.

Q. Yes, in August of 1976?

A. In Toronto - yes, I think that was with Sharon Newman, yes. A friend of mine.

Q. And that did involve you?

A. Yes. (T. v. 16, pp. 2943-2944).

323. It is respectfully submitted that these references are conclusive that the sworn evidence of Patricia Harriss is not a reliable basis upon which to make firm findings about others and other events. Miss Harriss' treatment of her criminal record, which she was quite aware of but decided that she did not want to talk about even though under oath is, we submit, direct evidence of her unreliability when it comes to matters of substance. This Commission can not know what other matters Patricia Harriss did not wish to talk about and so remove by omission from her evidence.

324. It is respectfully submitted that while Patricia

Harriss may have been persistent with respect to the two men, she ultimately-signed a statement which indicated that she had not seen the two men, consistent with the statement of Terry Gushue who had also been with her on May 28, 1971 at all relevant times (Exhibit 16 - R. v. 16, pp. 69-73). Harriss now claims that the first statement she gave (Exhibit 55) was the truth. However, at her mother's suggestion Patricia Harriss in 1971 went to see a lawyer for advice about what to do and the lawyer asked if Patricia was telling the truth and she agreed. Patricia understood the question from the lawyer to be whether she had told the police the truth. The lawyer advised her that if she told the truth there was nothing to worry about. The lawyer also discussed perjury with her. Despite being sworn at the Preliminary Hearing, the Trial and since at the Appeal Division Reference, she has admitted telling untruths each time. (T. v. 16, pp. 2897-2901). It is respectfully submitted that Patricia Harriss' evidence is of too uncertain truth that this Commission can not rely upon it.

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

Disclosure in 1971

325. This Commission heard some conflicting evidence with respect to disclosure to Defence Counsel in 1971. This Commission heard from one of the lawyers who represented Donald Marshall, Jr. at the Preliminary Hearing and Trial in 1971 - Simon Khattar, Q.C. Khattar's experience as a Crown Prosecutor and as a Defence Counsel was that he did not expect disclosure of statements, let alone contradictory statements from the Crown (T. v. 26, p. 4783). Khattar also indicated that approaches were certainly not made to the Police officers directly (T. v. 26, pp. 4791, 4794):

Q. And as the Commissioners brought to your attention this morning, there was certainly no discussion - direct discussion between Defence Counsel and the police officers.

A. That's correct.

Q. They didn't come to you and you didn't go to them.

A. That's correct....We didn't go to the police. (T. v. 26, pp. 4831-4832).

Earlier Mr. Khattar explained in response to a question from Commissioner Evans:

Q. Do you know - Quite apart from your own office practice, were you aware of any practice in the - those who operate in the Criminal Bar in Sydney as to whether they would consult with

the Police or with the Crown to obtain statements?

A. My - My recollection, and I checked this with Mr. Rosenblum within a month before he died to try and get our best recollection, was that it was the practice and I also must say that I checked with other lawyers who have been in practice at the same time with respect to that practice of not getting statements from the Police or checking with the Prosecuting officers and they agreed that at the time of the Marshall trial that was the practice that you did not get statements from the Police or the Prosecutor.

Q. So you stayed some distance away from both the Crown and the Police and the Crown witnesses?

A. Yes. That's right....(T. v. 26, p. 4794)

326. Arthur Mollon is a Sydney lawyer practising with Nova Scotia Legal Aid who was articling during the time that the Marshall trial was ongoing (T. v. 29, p. 5418). Mollon and the late Vincent Morrison were defending a murder case at the time which was being prosecuted by Donald C. MacNeil. Mollon indicated with respect to disclosure that:

...even when I was articling with the late Mr. Justice Morrison and - because he did extensive criminal work as well. My practise has been that anything I wanted from the Crown if I was defending someone that I called the Crown Prosecutor and indicated to them that I was defending a person, they would provide - if they had the material there they'd provide me with what they had. They would give me the background or statements if I requested statements, I got them. It was complete cooperation is what - how I would describe it with the

Crown. (T. v. 29, p. 5421).

In particular, in the murder case that Mollon was discussing:

We knew what the case was and we had no problems with the Crown. They told us - we knew exactly what the Crown was going to - who they were going to call. Pretty well what they were going to say and what the theory of the Crown would be. (T. v. 29, p. 5422).

...And I always made it a practise to find out from the Crown everything that I could find from them. And I had absolutely no problem with Mr. MacNeil. If I'd call them - no there wasn't a situation where [sic] Mr. MacNeil would call me and offer stuff; but any time I asked him for other things or went to his office, it was always full cooperation. (T. v. 29, p. 5423).

Mollon had no difficulty approaching Crown witnesses, but did not do so in every case (T. v. 29, p. 5424). Certainly copies of the statements - typewritten - were provided on request, and if counsel wanted to see the handwritten one that would be made available as well (T. v. 29, p. 5439), including unsigned statements (T. v. 29, p. 5440).

327. It is respectfully submitted that it is clear from Simon Khattar's evidence and from Arthur Mollon's evidence that any issues of disclosure were resolved with the Crown and not by direct contact with the police. However, Arthur Mollon did testify that he would, on occasion, interview Crown witnesses, which may have included police officers from time to time. Neither counsel suggested any burden upon the police to initiate contact with Defence Counsel to make disclosure.

328. Judge Matheson testified that contrary to Simon

Khattar's evidence Mr. Rosenblum as a matter of practise would ask "what was coming and I would disclose appropriately", making statements of witnesses available to him on request (T. v. 26, pp. 4948-4949). The Crown would not volunteer information unless they felt it was of significance to the Defence - such as "something a police officer told me confidentially in the Crown office" (T. v. 26, pp. 4926-4927). This was Donald C. MacNeil's practise as well (T. v. 26, p. 4925).

329. It is respectfully submitted that upon all of this evidence there can be no conclusion that there was any expectation in 1971 that the Police would initiate disclosure to Defence Counsel, but neither is there any evidence that Defence Counsel would approach the police directly for information about the case. That would be done through the Crown, although certainly the Defence Counsel would not have been precluded from interviewing a police officer if the police officer was willing to be interviewed. Thus, if it was a matter of having had information about John Pratico's mental situation, or knowing about the conflicting statements given by the witnesses, it appears that that may have been disclosed if Defence Counsel had asked and there was in fact information to give.

330. Of course, the realistic and practical limitations on disclosure in 1971 would not justify misleading information being given to representatives of the Defence either by the Crown or by the police. The only suggestion that this may have happened was referred to in the evidence of Bernard Francis.

Francis was apparently told by Roy Gould (but Gould could not confirm this) in about June, 1972, that the knife used in the stabbing of Sandy Seale had been found (T. v. 22, p. 3973). Francis called the City Police and asked for MacIntyre (T. v. 22, p. 3974). Despite being familiar with MacIntyre's voice (T. v. 22, p. 4013) Francis could not state that he had been speaking with MacIntyre. Francis asked if there were any new developments in the case and Francis was told that there were not (T. v. 22, p. 3974). Francis had identified himself (T. v. 22, p. 3974). It is respectfully submitted that none of this evidence given with respect to disclosure or perhaps misleading disclosure can be considered a fault attributable to John MacIntyre.

Police Disclosure to the Crown

331. Obviously any safe guards in the criminal justice system served by disclosure as between the Crown and the Defence would be nugatory if there was incomplete disclosure by the Police to the Crown. Counsel for Donald Marshall, Jr. has asserted without a basis in the evidence that the first John Pratico statement:

...that was the statement that was suppressed, that never received the light of day at the trial. (T. v. 29, p. 5409).

Counsel for Donald Marshall, Jr. also suggested that John MacIntyre concealed the first statement of Patricia Harriss from the R.C.M.P. in 1971 (T. v. 31, pp. 5711-5712):

Q. Well, surely that's not the mark of an honest man, to conceal the evidence that would support MacNeil's statement and confirm to you the

truth of the task you were
investigating, is it?

332. Simon Khattar, Q.C. and Judge Matheson both had experience working as prosecutors with John MacIntyre. Simon Khattar was a part-time Crown Prosecutor in Richmond County in the 1950's for five years, and then in Cape Breton County during an illness of the regular Crown (T. v. 25, p. 4684). In relation to the Marshall matter, Khattar was asked to comment on matters based upon his experience of having been a Crown working with John MacIntyre:

- Q. ...Now, when you heard the evidence of people like Chant and Pratico and knowing that Sergeant MacIntyre was the investigating officer would you have assumed that he would have taken statements from those people?
- A. Yes.
- Q. But you didn't ask for copies of those?
- A. That's correct.
- Q. Thank you. And further you would have assumed that Sergeant MacIntyre would have given those statements to the Prosecutor?
- A. Prosecutor. Yes. In my practise, I got statements from the police all the time and everything that they had (Emphasis added) (T. v. 25, p. 4715).

Khattar expanded on this later:

- Q. When you were working as Crown in the - in the 1960's, was your experience - You said on Friday you got the full - all the statements when you were working as a Crown?
- A. The police provided me as the

Prosecuting officer with all of their information, all their statements.

Q. Now when you say "all their information", what else did they give you? Was it occurrence reports?

A. Yes.

Q. And would they give you oral briefings?

A. In addition to their statements, they'd say "We've talked with them, and over and above what you have here, this is what took place."

Q. There were no formal Crown sheets in those days, I take it.

A. No. (T. v. 26, p. 4832).

333. Commission Counsel spent considerable time with Judge Matheson on the matter of disclosure from police to Crown:

A. ...The police officer in charge of the investigation would keep the - would keep the main file. By that I mean, if there was a statement of the accused, if there was a statement of a witness, if there were pieces of evidence, he would bring them to the office and we would review them. Usually when he came, he came prepared with copies that he could leave with us. We would review them and when we had done so, the copies would be placed in our files and the originals and any exhibits would go back with the officer in charge of the file to the police station from which he had come.

Q. Do I take it from what you said, that you would, in fact, review the original statements in the police file?

A. Yes. (T. v. 26, p. 4914).

Specifically with respect to the Sydney City Police, the

following was said:

- - Q. Do you recall if there was any difference in the degree of disclosure, the type of information that would be provided to you by the different police forces?
- A. No. Generally speaking, I would say no. Naturally, the Sydney City Police Force had a larger Detective Unit. I think that - I think that perhaps we considered that as compared to some of the Town Units, we perhaps got - had things in better shape coming from them than [sic] we might have from Sydney Mines or one of the out-of-town places. (T. v. 26, p. 4915).

The Crown might first receive the police file at various times, and with respect to a more serious charge there would be opportunity for the Crown to review the file before the information was laid. Statements and evidence obtained after a charge was laid would routinely be brought to the Crown without request (T. v. 26, pp. 4916-4917). Liaison with the police was primarily through the responsible Detective (T. v. 26, p. 4917).

334. Commission Counsel asked specifically about disclosure in connection with John MacIntyre (T. v. 26, p. 4918). Matheson of course had had contact with John MacIntyre from both Defence and Crown points of view since 1957 (T. v. 27, p. 5101). Commission Counsel asked:

- Q. Still talking generally, sir, and we'll get to the Marshall case a little later. In your experience as a Prosecutor, did you have occasion to prosecute cases, and I'm thinking again of major cases, in which Detective MacIntyre was the investigating officer?

A. I guess I'm sure of that, sir, yeh.

Q. Do you remember, sir, the type of disclosure that Detective MacIntyre would make to you as a Prosecuting Officer in respect to the police file?

A. I never had occasion to think that - that there was any lack of disclosure from Sergeant MacIntyre. (T. v. 26, p. 4918)

Indeed, Matheson was satisfied that on the occasions that he worked with John MacIntyre full disclosure of all materials taken by him was given to the Crown during the course of his investigation (T. v. 27, p. 5101). Matheson could not recall a case of inadequate or incomplete disclosure by the police to himself or other prosecutors in the area (T. v. 26, pp. 4918-4920).

335. With respect to the Marshall case in 1971, Matheson was out of the Crown Prosecutor's office from May 19 until June 22, 1971 (T. v. 26, pp. 4939-4940). When he returned to the office he immediately became involved in the Marshall matter as an assistant to Donald C. MacNeil and read the file (T. v. 26, p. 4941). Matheson recalls from reading the file that Chant and Pratico had given statements "which were not consistent with what we came to believe as the truth of the matter" (T. v. 26, p. 49, 43). Matheson had several other concerns as well, and pursued them with Donald MacNeil and the police (T. v. 26, pp. 4945 ff). After some initial uncertainty as to his recollection, Judge Matheson referred to his notes from the Preliminary Hearing

(Exhibit 16 - R. v. 16, p. 155) and stated that:

- - Now, having seen that, I think that my comments in the notes refreshes my mind enough that I'd now say I probably was aware that Patricia Harriss had made inconsistent statements, and if I used the words "good witness today," that would probably indicate that she had given the story that was the most recent one she had given us and the one we had expected her to give (T. v. 26, pp. 4960-4961).

Matheson was shown the first Patricia Harriss statement (Exhibit 55), but that did not assist his recollection:

My own note refreshes my memory...the statement itself doesn't. (T. v. 26, p. 4962).

Since Matheson had not interviewed or been present when Patricia Harriss was interviewed he felt that the only way he could express the opinion he did in the Preliminary Hearing notes "would be in relation to some statement that I had read" (T. v. 26, p. 4963).

336. Matheson also indicated that he had been aware that John Pratico had been at the Nova Scotia Hospital after the Preliminary but prior to trial, and he heard this from Donald C. MacNeil (T. v. 26, p. 4972). Indeed, Matheson believes that Pratico's hospitalization was "commonly known" and certainly the Crown office made not attempt to keep it a secret (T. v. 26, p. 4973).

Conclusion

337. It is respectfully submitted that upon the whole of this evidence there has been no proven failure to disclose on the

part of anyone, and certainly not any failure to disclose on the part of John MacIntyre to the Crown at any stage prior to the trial in 1971 of Donald Marshall, Jr. There was no expectation that John MacIntyre or any other police officer would take it upon himself to make disclosures directly to the Defence, particularly in view of the fact that the Crown retained a discretion not to disclose if disclosure of the information could harm the public interests or lead to interference with a witness (T. v. 26, pp. 4920-4943; T. v. 27, pp. 5102-5104). There is no evidence that the disclosure given by John MacIntyre to the Crown in 1971 was anything other than full and complete disclosure. There can also be no suggestion that John MacIntyre ever made any misleading disclosure to the Crown, Defence or indeed to Mr. Francis. Thus, we respectfully submit that this allegation is unfounded.

M. Failure to Interview Donna Ebsary

November, 1971 Re-investigation

338. After Donald Marshall, Jr. was convicted by the Nova Scotia Supreme Court on November 5, 1971, John Joseph MacNeil persuaded his brother Jimmy to go to the Sydney Police for the purpose of relating the fact that Jimmy had been present at the time of the stabbing of Seale and that it had not been done by Donald Marshall, Jr. but rather by Roy Ebsary (Exhibit 16 - R. v. 16, p. 171; T. v. 3, pp. 456-457). A third brother, David, also went to the Sydney City Police Station (Exhibit 16 - R. v. 16, pp. 174-175; T. v. 28, pp. 5313-5314, 5317). All three brothers gave written statements (Exhibit 16 - R. v. 16, pp. 171-180).

339. While the MacNeil brothers were still at the Sydney City Police Station, Assistant Crown Prosecutor Lew Matheson had been notified of the developments in the case. Matheson arrived at the Police Station within five minutes of the notifying telephone call (T. v. 27, pp. 5008, 5009). Matheson was given the Jimmy MacNeil statement and sat down alone with Jimmy MacNeil to confirm the new eyewitness account of the stabbing (T. v. 27, pp. 5010-5014). Matheson did not believe Jimmy MacNeil but did feel that what Jimmy MacNeil had related to the police "could be true" (T. v. 27, pp. 5014-5015), and therefore the matter could not rest:

...what was most compelling at the time was people were in and out. The fact that James MacNeil had come forward and made a statement was known, at that

point, to my knowledge among enough people that I feared that somebody would -- get to...Ebsary family and - alert them -- that they were going to be confronted with this. I didn't want to - them to have time to prepare a story that wasn't true. And I felt that the quicker they were confronted the better and I felt that had to be regardless of anything else that had to be done that night. (T. v. 27, pp. 5015-5016).

Matheson therefore asked the police, including John MacIntyre, to "go and round-up the Ebsary family wherever they were. To isolate them and to confront them with MacNeil's story and to record their answers." (T. v. 27, p. 5016, also 5017).

340. Matheson remained at the Police Station:

And eventually the police came back in and they said that they had talked to the Ebsarys' and presumably all of them, and that they had said that MacNeil's story was untrue. And at that point it was getting quite late and I felt that it was absolutely essential that I communicate to the office in Halifax what had transpired. (T. v. 27, p. 5017).

341. By this point in time, Deputy Chief Norman MacAskill had also become involved. When Matheson asked about Roy Ebsary's wife, MacAskill:

...described her as, I think, the anchor of the household and he didn't think that she would be a party to involving her children in covering up an offense of -- this magnitude. (T. v. 27, p. 5018).

341. The Sydney City Police had taken statements from Roy Ebsary, his wife Mary Ebsary, and their son Greg Ebsary (Exhibit 16 - R. v. 16, pp. 181-194). In none of those statements is there any reference to the daughter Donna Ebsary.

The evidence before this Commission was that so far as Mary Ebsary knew, ~~her~~ daughter Donna had already gone off to bed by the time her husband Roy had come home on the night of the stabbing (T. v. 24, p. 4555).

342. When Mary Ebsary went down to the Police Station on November 15, 1971 she had no indication prior to being interviewed about what the Police wanted (T. v. 25, pp. 4568-4569). Mary Ebsary had come from work and did not know that Donna Ebsary was in a car parked outside the Police Station (T. v. 25, pp. 4578-4579). When Mary Ebsary talked with her daughter later, Donna made no mention of the particular incident which had been under discussion at the Police Station (T. v. 25, p. 4579), and indeed, Mary Ebsary has not had any discussions with her daughter Donna as to what Donna may have seen the particular night of the stabbing of Seale (T. v. 25, p. 4614).

343. Greg Ebsary testified before this Commission that in 1971 he was more of an acquaintance than a brother to Donna Ebsary (T. v. 25, p. 4630). On the night of November 15, 1971 Greg and Donna went to pick up Mary Ebsary at work and discovered that she had been taken to the Police Station, so drove there (T. v. 25, pp. 4640-4641). Greg Ebsary went into the Police Station and ended up giving a statement, leaving Donna outside (T. v. 25, p. 4646). Greg Ebsary had no idea whether the police were aware that Donna Ebsary was outside (T. v. 25, p. 4646). Unless Greg Ebsary told them that Donna Ebsary was outside the Sydney City Police on the night of November 15, 1971 would have had no idea

where Donna Ebsary was. Greg Ebsary did not even come into contact with ~~his~~ mother at the Police Station, and the family never discussed it later (T. v. 25, pp. 4646-4647). Donna Ebsary never confided in Greg about what she allegedly saw on the night of the stabbing of Sandy Seale (T. v. 25, p. 4650).

Involving the RCMP

344. After the three Ebsary statements were taken, Lew Matheson contacted Robert Anderson in Halifax as his next superior (T. v. 27, p. 5019). Matheson related to Anderson what had occurred and that both Roy Ebsary and Jimmy MacNeil were willing to take polygraphs (T. v. 27, pp. 5019-5020). Matheson also mentioned to Anderson the concern that the investigation should be done by another police department (T. v. 27, p. 5020). Matheson indicated that Anderson's response was that:

...he didn't have any further suggestion as to what might be done that night. He told me that he would get back to me about the other matters that I put to him. I don't recall receiving a call the next day. But early the next day I was aware, how I became aware I don't know, that - that Inspector Marshall of the R.C.M.P. and a polygraph operator were coming, I think, the following week to - to do an investigation (T. v. 27, p. 5020).

Matheson fully expected that this investigation would go beyond Roy Ebsary and Jimmy MacNeil (T. v. 27, pp. 5020-5022). Robert Anderson has a generally consistent recollection, but much less specific than Matheson (T. v. 50, pp. 9136-9138).

345. The fact is indisputable that the R.C.M.P. were directed to reinvestigate the Marshall case on the basis of the

MacNeil allegation, and that this assignment was made sometime after the evening of November 15, 1971 but before November 17, 1971 - because Inspector E. A. Marshall was already on the scene in Sydney on November 17, 1971 (Exhibit 16 - R. v. 16, p. 196). The direction to Inspector Marshall from Donald Wardrop was to "go and look into it" (T. v. 37, p. 6745), which meant going into the whole matter, talking to everyone involved and "of course" acting entirely independently of the Sydney Police Department (T. v. 37, pp. 6745-6746, 6765-6768, 6773-6774, 6776). E. Alan Marshall confirmed these points of Wardrop's evidence (T. v. 30, pp. 5606-5607). Marshall agreed that he had in fact gone to Sydney on November 16, 1971, as is indicated in his report (Exhibit 16 - R. v. 16, p. 204; T. v. 30, p. 5610). At that point the Seale murder investigation had passed out of the hands of the Sydney City Police into the hands of the R.C.M.P.

Conclusion

346. There does not appear to be any evidence before this Commission that in 1971 the Sydney City Police were aware of Donna Ebsary's existence, except for a passing reference in Jimmy MacNeil's statement (Exhibit 16 - R. v. 16, p. 176). Mary and Greg Ebsary testified that they never knew that Donna Ebsary knew anything about what had happened on the night of the Seale stabbing at the Ebsary home, so there is no reason for the Police to have known or had any suspicion. One could speculate the Sydney City Police did informally ask about Donna - the daughter - and Mary Ebsary told them, as she told this Commission, that

Donna had already gone to bed by the time that Roy came home that night.

347. In any event, the directions received by the Sydney City Police from Crown Prosecutor Matheson were to interview the Ebsary family before the Ebsarys had a chance to develop some story which would avoid the thrust of Jimmy MacNeil's allegations. In addition to the allegation that Roy Ebsary had stabbed Sandy Seale, MacNeil had suggested that Mary and Greg Ebsary had pressured him not to talk about the events of that evening - itself indicating a possible criminal offence and thus justifying the warnings which appear on all Ebsary statements (Exhibit 16 - R. v. 16, pp. 183, 188, and 193). Jimmy MacNeil had not included Donna Ebsary in these latter allegations.

348. If Donna Ebsary ought to have been discovered and interviewed in the course of re-investigating the Seale stabbing, it was not the primary responsibility of the Sydney City Police to ensure that this was done. It is respectfully submitted that the only reason that John MacIntyre took the investigation as far as he did, by interviewing the Ebsarys, was that Matheson directed that speedy action be taken that night instead of delaying those interviews until the R.C.M.P. could arrive on the scene and take the investigation over.

349. We respectfully submit that the evidence of what happened from the time of the MacNeils arrival at the Sydney City Police Station on November 15, 1971, until the R.C.M.P. investigator arrived on the scene November 16, 1971, placed no

obligation upon John MacIntyre or anyone else with the Sydney City Police to search out and find Donna Ebsary to discover what she knew. The daughter had not been implicated in any of the threats related by Jimmy MacNeil, and no one has suggested that her evidence became stale because she was not interviewed on November 15, 1971 when Inspector Marshall could have interviewed her as early as the next day. Interviewing Donna Ebsary and all the other Ebsarys was a job for Alan Marshall to pursue in any event, regardless of John MacIntyre taking a statement from her or not (T. v. 31, p. 5673). Thus, it is respectfully submitted that there can be no criticism of John MacIntyre in relation to the 1971 re-investigation for any failure to interview Donna Ebsary on November 15, 1971, or at any other time.

N. Interference with the 1971 Re-
investigation and Failure to Disclose
Information Received During the
Investigation to Representatives of the
Accused.

The Allegations

350. The suggestion has been made before this Commission that John MacIntyre failed in his duty as an honest and competent police officer by not disclosing to Defence counsel information which prompted the re-investigation in 1971, or any information which came to light as a result of the re-investigation in 1971. It is respectfully submitted that no such positive obligation existed on John MacIntyre, or indeed on any other police officer, to take active steps to keep Defense counsel informed of new information with respect to the case. Indeed, it is respectfully submitted that the evidence discloses a directive of the Crown to the Sydney Police to not disclose this information at the same time as the re-investigation was being turned over to the R.C.M.P.

351. A further suggestion has been made that John MacIntyre exercised some undue influence over the direction of the 1971 re-investigation and thereby made a substantial contribution to its inadequacy. It is respectfully submitted that John MacIntyre's involvement in Inspector E. A. Marshall's re-investigation was minimal and at all times well within the bounds of propriety. Any failures to disclose what Jimmy MacNeil and Roy Ebsary had said must rest with the Crown. Any failures to conduct a full and proper re-investigation in 1971 must rest

with judgments made by Inspector E. A. Marshall, and the weight which was attributed by Marshall and others to the results of Eugene Smith's polygraph testing. We will deal with the second allegation first.

The 1971 Re-investigation

352. As indicated in the previous section of this Brief, Inspector E. Alan Marshall arrived in Sydney on November 16, 1971, having been directed to look into the Seale murder case by Donald Wardrop (T. v. 30, p. 5610). Wardrop encouraged Marshall to take all the time he needed with the re-investigation, expecting that Marshall would do a thorough investigation (T. v. 37, p. 6745), talking to everyone involved, acting independently of the Sydney City Police, and even including a walk-through in Wentworth Park with Jimmy MacNeil (T. v. 37, pp. 6745-6746, 6756, 6773-6774). This was Inspector E. A. Marshall's understanding as well (T. v. 30, pp. 5607-5610; 5615-5617; T. v. 31, pp. 5704-5706, 5708-5709). To the extent that Marshall testified that he was only doing a review, he had to acknowledge that a review would have become a re-investigation had he adverted to a number of issues which were apparent as a result of information which came forward after the conviction of Donald Marshall, Jr. (T. v. 30, pp. 5607, 5609; T. v. 31, pp. 5704-5705).

353. The first thing that E. Alan Marshall did was to meet with John MacIntyre and have a discussion about the case (T. v. 30, pp. 5610-5611). MacIntyre provided a transcript and some statements, and appeared confident that he had the right man (T.

v. 30, p. 5611). Marshall feels sure that he received the statements-which are referred to in his 1971 Report (Exhibit 16 - R. v. 16, pp. 204-207; T. v. 30, pp. 5612-5613), but today is unable to speak with any precision as to what he received (T. v. 31, p. 5752). In addition, Marshall would have received a copy of the Preliminary Hearing transcript and some trial evidence as quoted in Judge Dubinsky's jury charge (T. v. 30, pp. 5613-5615). Marshall did not ask for the entire file at that time (T. v. 30, pp. 5615-5616). Marshall explained that he thinks he really had it in his mind at that time to "try the polygraph", "...rather than go full-bore into a total review of the case" (T. v. 30, p. 5616):

I thought that by using the polygraph it would knock the thing on the head pretty quick.

Inspector Marshall had some personal concern that his re-investigation of the case be "most expeditious" (T. v. 31, p. 5736).

354. Marshall testified that he accepted the materials from MacIntyre and MacIntyre's word that what was being conveyed was "the crucial material related to the eyewitnesses" (T. v. 30, pp. 5615, 5617). Marshall was made aware by MacIntyre that there had initially been some difficulty with Chant and Pratico (T. v. 30, p. 5618; T. v. 31, pp. 5683-5685). Marshall did not think too much about that because "it has been my relatively common experience - relatively common experience, to experience people who are initially not forthcoming or not ingenuous and as a

matter of fact I think it was not more than two years before this that ~~Corporal Smith~~ and I were involved in a murder case when the exact same thing happened...." (T. v. 30, p. 5618). Marshall is sure that he discussed Jimmy MacNeil with MacIntyre (T. v. 30, pp. 5621, 5623-5624). MacIntyre may have told Marshall about Roy Ebsary's conviction (T. v. 30, pp. 5627-5629) but most definitely Ebsary was discussed (T. v. 30, p. 5642). MacIntyre showed Inspector Marshall the jacket that Donald Marshall, Jr. had been wearing [this would have had to occur at the Courthouse (T. v. 32, pp. 5810-5812)] and they discussed the possibility of Donald Marshall, Jr.'s wound having been self-inflicted (T. v. 30, pp. 5629-5631).

355. Inspector Marshall also visited Wentworth Park with John MacIntyre, but could not recall whose car was taken and thinks it was daytime (T. v. 30, p. 5620). Marshall has no other recollection about that visit to the Park except that having been stationed in Sydney a few years previously, he felt familiar with the "focus of the place" and only wanted to check the lighting standards (T. v. 30, pp. 5620-5621).

356. Inspector Marshall testified that after his initial meeting with John MacIntyre, he neither spoke nor saw MacIntyre until after the polygraph examinations had been conducted. This next meeting would not have taken a long period of time (T. v. 31, p. 5731), and would have consisted in dropping materials back off with the Sydney City Police before going to Halifax to write his report (T. v. 30, pp. 6559-6560).

Allegedly Influencing the Re-investigation

357. -- In addition to John MacIntyre, Inspector Marshall consulted during his re-investigation with Sergeant McKinley who was the officer in charge at Sydney's R.C.M.P. General Investigation Section, Eugene Smith who did the polygraph, and to some extent with Crown Prosecutor Donald C. MacNeil. Inspector Marshall's recollection was such that even though certain things must have been discussed with MacIntyre, Marshall did not always recall exactly what he had been told (T. v. 31, p. 5687).

358. Commission Counsel insinuated that John MacIntyre in his discussions with Inspector Marshall had promoted the theory that Marshall and Seale entered the Park bent on robbing someone - words which eventually appeared in Marshall's 1971 report as a "consensus of opinion" (Exhibit 16 - R. v. 16, p. 206). Inspector Marshall explained:

I can't find the - Jesus, I wrote that and I must have wrote it for a reason.

Q. If it's not in the material - If it's not in the material that you have, sir -

A. Yeh.

Q. - could it be that it's just as a result of a discussion with John MacIntyre?

--
-- A. Undoubtedly.

Q. Again, you've told this many times that you took what John MacIntyre said at his word?

A. Yes, sir. (T. v. 31, pp. 5695-5696).

A number of other points from Inspector Marshall's 1971 Report

were attributed by Inspector Marshall to John MacIntyre (T. v. 31, pp. 5697-5703) in a similar manner.

359. The point was made by Commission Counsel (T. v. 31, p. 5676-5678) that the theory of a robbery and altercation was much more plausible and therefore attractive to Inspector Marshall than what had been presented at trial and in the May 30, 1971 statement by Donald Marshall, Jr. Inspector Marshall attributed this theory to John MacIntyre and Roy Ebsary's November 15, 1971 statement (T. v. 31, pp. 5694-5695). This point was also established by counsel for Oscar Seale, but in somewhat different terms:

Q. Did John MacIntyre tell you that in his view Sandy Seale and Marshall were down in the Park intent on robbing somebody?

A. Well, we - we - my report says we came to that consensus and I think that's probably what happened.

Q. He would have given you that information?

A. I believe so (T. v. 31, p. 5773)

The point of Commission Counsel was that there was no basis to say that Marshall and Seale had entered Wentworth Park with the idea of robbing someone, whether or not a robbery eventually occurred. This was obviously, we submit, a matter of inference taken from Roy Ebsary's November 15, 1971 statement in conjunction with what Jimmy MacNeil had to say (Exhibit 16 - R. v. 16, pp. 178-180, 188-190).

360. After Inspector Marshall's initial meeting with

John MacIntyre there was no further consultation with John MacIntyre. — Inspector Marshall did have contact and discussions with Sergeant McKinley, Eugene Smith and Donald C. MacNeil, in addition to both Ebsary and MacNeil. Inspector Marshall now attributes the robbery theory and inferences based on a robbery theory to John MacIntyre because in Inspector Marshall's report he speaks of "the consensus of opinion" (Exhibit 16 - R. v. 16, p. 206).

361. It is respectfully submitted that a "consensus" is not something which is descriptive of Inspector Marshall accepting John MacIntyre's word as to what the inferences should be from the evidence available. Therefore, for Inspector Marshall to attribute the inference to MacIntyre and MacIntyre alone is not reliable.

362. Counsel for Donald Marshall, Jr. took the opposite tack, emphasizing points which that counsel alleges MacIntyre did not show or tell Inspector Marshall about (T. v. 31, pp. 5711-5715), proffered by this counsel as evidence of concealment. Counsel for Donald Marshall, Jr. also suggested through questioning that John MacIntyre had knowingly misrepresented the evidence and thereby mislead Inspector Marshall (T. v. 31, pp. 5715-5729). However, Inspector Marshall's evidence elsewhere conclusively suggests that he was not interested in having the full file given to him to peruse, and so never asked for it.

363. Inspector Marshall testified that he was not blaming John MacIntyre for his own failure to carry out a

thorough review of the case - instead the fault lies on the shoulders of Inspector Marshall himself (T. v. 31, pp. 5729-5730). Marshall did not feel that he was in Sydney to rubberstamp MacIntyre's investigation and did not expect that MacIntyre's opinions as a result of the jury verdict less than two weeks previously would have been changed as a consequence of seeing Jimmy MacNeil (T. v. 31, p. 5734).

364. We respectfully submit that the R.C.M.P. were expected to conduct an independent investigation - independent of the Sydney City Police Force. While some consultation would be appropriate with the officers doing the initial investigation, conclusions and inferences from the evidence were Inspector Marshall's and the R.C.M.P.'s alone. Any "consensus" would reasonably have been consensus among R.C.M.P. officers involved such as McKinley and Smith. This was emphasized by Inspector Marshall's own counsel at these hearings - that McKinley, Smith and Marshall did not disagree among themselves as to the assessment and opinion of the people that Inspector Marshall had seen (T. v. 31, pp. 5795-5796, 5804-5805).

Appropriate Involvement

365. There can be no doubt that when Jimmy MacNeil came forward in 1971 that John MacIntyre and the Sydney City Police had an obligation to receive what information he claimed to be able to give, and this was done. John MacIntyre and the Sydney City Police also had an obligation to take the direction of the Assistant Crown Prosecutor and pursue the securing of information

from the Ebsary family as soon as possible so as to protect against the Crown's reasonable concern that the Ebsary family would have a chance to develop some explanation of Jimmy MacNeil's accusation unless immediately confronted. As indicated in the previous section of this brief (Section M, supra) this further investigation was conducted in the context of a direction from the Crown not to disclose this sudden turn of events to anyone. That direction appears to have been communicated to David William MacNeil (T. v. 28, p. 5317).

366. Douglas James Wright is a highly qualified investigator who had done a number of re-investigations himself (T. v. 28, p. 5263). Wright expressed the opinion that the only way to do a re-investigation would be to approach it like a brand new investigation and do all of the various things that one would hope had been done in the first place (T. v. 28, p. 5265). However, the re-investigator would also appropriately discuss the initial investigation with the police officers who had carried it out:

I have, you know. And I again, I've done quite a few of them myself in my day and going back quite a few years, yes, you'd discuss it with them. You don't get carried away too much with what they tell you sometimes because you're re-investigating it. You should go into it with an open mind. You would certainly discuss it with them, by all means, yes.

Q. Would you do that before or after you carried out your own investigation?

A. You'd probably have a chat with them before and maybe even during and after, eh. (T. v. 28, pp. 5266-5267).

367. As this Commission well knows, the procedure discussed ~~by~~ Douglas Wright was in fact the approach followed by Staff Sergeant Harry Wheaton - whose first step in the 1982 re-investigation was to have a "rather lengthy" meeting with John MacIntyre (T. v. 41, pp. 7514, 7517 ff). Significantly, Wheaton explored with MacIntyre at this meeting what MacIntyre's impression of the potential new information was (T. v. 41, p. 7519), just as Inspector Marshall had explored MacIntyre's impression of Ebsary and MacNeil. Therefore, this Commission may conclude that there was nothing inappropriate in MacIntyre discussing the case with Inspector Marshall in November, 1971, and indeed that would be expected. What the outside investigator takes away from such a discussion is the responsibility of the outside investigator, not John MacIntyre's responsibility at all except perhaps that there should be no intentional misleading of the outside investigator. There is no evidence of sufficient cogency, given Inspector Marshall's uncertainty in recollection, to assert that there was any active and knowing misrepresentation by John MacIntyre of the case which he had investigated.

Discussion With Defence

368. It is now an appropriate stage to return to the first alleged complaint about John MacIntyre in relation to the 1971 re-investigation. It has been suggested that if John MacIntyre were honest and competent he would have taken it upon himself to disclose to the Defence the startling information which had been received on November 15, 1971. John MacIntyre had

caused the Crown to become involved to give direction on the night of ~~November~~ 15, 1971, before Roy Ebsary had been interviewed. From the arrival of Prosecutor Matheson, the case was under the direction of Matheson, who was in turn concerned about getting direction from his own superiors. Matheson did make a direction that the Ebsarys be interviewed, and made a direction that Jimmy MacNeil's report not be disclosed at that time (T. v. 27, pp. 5015-5016).

369. It is respectfully submitted that direct communication about the investigation between the Sydney City Police and Defence Counsel initiated by the Sydney City Police would not have been appropriate, nor expected.

370. One of the defence counsel at Donald Marshall, Jr.'s trial in November, 1971, and who was no longer retained after that date apparently, stated that from his experience as a Crown Prosecutor and as a Defence Counsel, he did not even expect disclosure of contradictory statements given by witnesses from the Crown (T. v. 26, p. 4783). Approaches certainly were not made to the Police Department directly (T. v. 26, pp. 4791, 4794). This point was hammered home:

Q. We've already gone over this ground a number of times and I don't wish to tire you with it but I take it from your extensive experience with the criminal law in Cape Breton, that in your experience both as a Crown and as a defence, there was no disclosure between the two sides in a criminal case.

A. At - during the 1971 period, right.

Q. And as the Commissioners brought to your attention this morning, there was certainly no discussion - direct discussion between defence counsel and the police officers.

A. That's correct.

Q. They didn't come to you and you didn't go to them.

A. That's correct.....

Q. ...Any access you had to the police or any information in the file would be through Donald MacNeil, in 1971?

A. Any?

Q. Any access that you had to information was through Donald MacNeil?

A. That would be the only source, yes. I don't recall getting any information period. But you asked any information that I would obtain would be through Donald MacNeil, I -

Q. He was in charge.

A. - Wanted to qualify it by stating that I don't recall getting any information.

Q. Yes, and he was in charge? He was the one in charge.

A. Yes. We didn't go to the police. (T. v. 26, pp. 4831-4832).

It is respectfully submitted on the basis of this evidence that there was certainly no expectation on the part of Defence counsel for initiative disclosures by the Police. Given the state of the law with respect to Crown disclosure in 1971, this should scarcely be surprising: e.g., R. v. Lalonde (1974), 5 C.C.C. (2d) 168 (Ont. H.C.J.). Consider also: Todosichuk v. MacLenahan,

[1946] 1 D.L.R. 557 (Alta. S.C.). No complaint against John
MacIntyre ~~can~~ be sustained on this ground.

O. Failure to Pursue Offer of David Ratchford to Interview Donna Ebsary

Background --

371. John MacIntyre was not very closely involved with the incident of David Ratchford allegedly coming forward in 1974 with information about Donna Ebsary which could have disclosed that Roy Ebsary may have washed blood off a knife on the night of the stabbing of Sandy Seale. However, it was felt appropriate to deal with the matter in this submission because David Ratchford made a specific point of including John MacIntyre in his allegations.

The Event:

David Ratchford's Version to this Commission

372. David Ratchford testified that in February or March of 1974, Donna Ebsary came to him one evening and told him that her father had killed Sandy Seale, and that she had seen him wash what she thought was blood from the end of a knife (T. v. 24, pp. 4392-4393; 4395-4397). Ratchford testified that the next morning he and Donna Ebsary approached the Sydney Police Department, and asked for MacIntyre and Urquhart by name (T. v. 24, pp. 4401, 4453). Ratchford testified that he knew what MacIntyre and Urquhart looked like - even though he had had no prior contacts with them, and said on other occasions that he did not know them (T. v. 24, pp. 4402-4403, 4464).

373. When Ratchford visited the Police Station he was with Donna Ebsary (T. v. 24, p. 4401). Only Ratchford spoke, and he only spoke with William Urquhart (T. v. 24, p. 4404). John

MacIntyre was inside a cubicle behind Mr. Urquhart and later in the course ~~of~~ the five minute conversation came out towards Ratchford and Urquhart (T. v. 24, pp. 4404, 4449, 4466-4467). John MacIntyre was in plain clothes at the time (T. v. 24, p. 4465). MacIntyre was about six to eight feet behind Urquhart, who was about three feet away from Ratchford. MacIntyre later came within about three feet of Urquhart and thus would have heard about the last 75% of the conversation (T. v. 24, pp. 4451-4452, 4455, 4468). Indeed, David Ratchford does not think that John MacIntyre knew initially of his presence or why Ratchford was there, and stated that it was "quite possible he may not have understood what the conversation boiled down to." (T. v. 24, p. 4468):

Q. So it may very well be then that John MacIntyre didn't even know why you were there?

A. There's that - that's a very strong possibility sir, yes. (T. v. 24, pp. 4468-4469).

374. William Urquhart is alleged to have politely told Ratchford that a number of people had already been in to talk about the case, and the Sydney City Police did not want to hear anything that Donna Ebsary had to say, and the case was closed (T. v. 24, pp. 4404, 4483). At that point, David Ratchford and Donna Ebsary left and had further contact with Cst. Gary Green. There is no further mention of John MacIntyre in relation to this whole affair.

Ratchford's Unreliability

375. — — David Ratchford was uncertain about dates and thus it is respectfully submitted that this incident cannot be fixed in time reliably - at least on the basis of Ratchford's evidence (T. v. 24, pp. 4408, 4422, 4423, 4426, 4428-4430, 4436 ff, 4497-4498). According to David Ratchford's evidence he contacted Cst. Gary Green the same day that he and Donna went to the Sydney City Police and as a result Green also went down to the City Police. Green puts the time as the fall of 1974 (T. v. 38, p. 7083). However, Green's evidence is that when he went to the Police Station a remark was made about Donna Ebsary having left home (T. v. 38, p. 7089). This Commission knows through other evidence that Donna Ebsary never left home until 1978 or 1979 (Exhibit 15 - R. v. 15, pp. 298, 300, 316, 355; T. v. 25, p. 4582). Green was no longer in Sydney at that time (T. v. 38, p. 7076).

376. David Ratchford initially testified that John MacIntyre was in plain clothes, like a Detective. However, this Commission knows that by 1973 John MacIntyre was Deputy Chief of the Sydney City Police and from the date of his appointment to that position was always in uniform. Rather than sticking with his recollection, David Ratchford pointed out that he did not say that he was sure that the two officers were in plain clothes - he was only sure that it was MacIntyre and Urquhart whom he met (T. v. 24, p. 4465).

377. Ratchford said that he went to the police station with Donna Ebsary. Donna Ebsary has never confirmed, and indeed

on more than one occasion has denied, that she went to the Sydney City Police Station with David Ratchford at any time (Exhibit 15 - R. v. 15, p. 298, 306, 332, 357). Ratchford acknowledged that he had told the R.C.M.P. in 1982 that he had telephoned the Sydney City Police and spoken, he believed, with William Urquhart, but that was the extent of his contact with the City Police on this matter (Exhibit 74).

Conclusion

378. It is respectfully submitted that there is so little here to give any indication that John MacIntyre was aware or at some time was made aware of Ratchford's mission to the Sydney City Police station that this Commission would be unable to conclude that there was any opportunity, let alone a failure, for MacIntyre to pursue an offer for the Sydney City Police to interview Donna Ebsary about the Seale murder in 1974.

P. Failure to Permit, and Aggressive
Opposition to, Leaves of Absence for
Donald Marshall, Jr. While in Prison

1978

379. Parole Service Officer Kevin Lynk was assigned to prepare a Community Assessment in relation to Donald Marshall, Jr.'s "future management" in March of 1978 (Exhibit 69, pp. 1-2). Kevin Lynk was directed by Diahann McConkey to speak with Chief John MacIntyre specifically as "the Detective involved in the investigation of the murder events" (Exhibit 69, pp.2). Lynk and MacIntyre met, and MacIntyre gave his views that it was not a good idea to have Donald Marshall, Jr. back in the community:

...Basically because he [MacIntyre] feared reprisals, either against the witnesses or the black community against Jr. Marshall or whatever. (T. v. 40, p. 7413).

380. Lynk did not go into any detail with MacIntyre but took it upon himself to suggest that MacIntyre's attitude "was not good" towards Donald Marshall, Jr. himself (T. v. 40, p. 7414). Lynk also suggested that the Sydney City Police were "generally against parole itself" anyway (T. v. 40, p. 7416).

381. Kevin Lynk's negative comments were not based on any continuing familiarity with this particular case (T. v. 40, p. 7434). Lynk acknowledged that while he put in his report that MacIntyre had concerns about reprisals from the black community,

Lynk did not think that this was a significant or important concern. He personally did not cause any investigation to be made to determine whether or not there would be such reprisals - even though Marshall's family indicated that those concerns had existed at the time of the original investigation (Exhibit 69, p. 4; T. v. 40, pp. 7438-7439). Lynk also acknowledged that it was not an unreasonable concern on the part of John MacIntyre given the equal significance that he attached to such concerns by inserting comments from Pius Marshall (T. v. 40, p. 7440).

1981

382. Archie Walsh was another Parole Service Officer who had occasion to meet with John MacIntyre in 1981 concerning a community assessment in connection with a proposed leave of absence for Donald Marshall, Jr. Walsh also spoke directly with John MacIntyre about the case, (T. v. 40, p. 7462). MacIntyre expressed the view to Walsh that Donald Marshall, Jr. "definitely shouldn't be coming back" in light of concern about the safety of witnesses who were still in the area (T. v. 7464-7465). Walsh had never had occasion to speak with the Sydney Police Department in connection with leave for a murder inmate (T. v. 40, p. 7467). Walsh reviewed Kevin Lynk's earlier report. Walsh found MacIntyre's s-concerns valid, and stated that if he had been asked to recommend, he would have recommended the denial of an unescorted temporary absence on the basis of concerns expressed to him by John MacIntyre for the safety of people (T. v. 40, p. 7469). Walsh came to this conclusion even though it was his

impression that the Sydney City Police were "primarily negative" towards parole in any event (T. v. 40, p. 7467).

Conclusion

383. It is respectfully submitted that the sum of this evidence is that without doing a great deal of investigation, and without experience in cases of murder in Sydney, these Parole Service Officers were prepared to express the opinion that John MacIntyre and the Sydney City Police were generally more negative towards parole than other police forces. However, Kevin Lynk did not find John MacIntyre's concerns unreasonable. Archie Walsh found Chief MacIntyre's views valid. It is respectfully submitted that this Commission can really take this evidence no farther in light of the fact that John MacIntyre's concerns did have a reasonable basis in fact from occurrences in 1971 concerning violence (e.g., Exhibit 69, p. 3; T. v. 21, pp. 3807-3811, 3880-3882; T. v. 22, p. 4012, 4063-4065; T. v. 23, 4170, 4214, 4258-4262), as well as with respect to witness interference (Exhibit 48-R. v. 22, pp. 20 ff; T. v. 6, pp. 1111-1114; T. v. 26, pp. 4933, 4970-4972).

Q. Failure to Cooperate With,
Misdirection and Obstruction of, R.C.M.P.
- - - Reinvestigation in 1982

The 1982 Reinvestigation

384. The 1982 Reinvestigation by the R.C.M.P. was set a foot by a letter from Mr. Stephen Aronson to Sydney City Police Chief John MacIntyre (Exhibit 16 - R. v. 16, p. 220), as a result of which John MacIntyre contacted Crown Prosecutor Frank Edwards and Inspector Donald Scott of the R.C.M.P. and arranged a meeting at Frank Edwards' office for February 3, 1982 (T. v. 65, p. 11712). Frank Edwards estimated the length of the meeting as half an hour to forty-five minutes (T. v. 65, p. 11713), while Donald Scott estimated that the meeting lasted at least an hour (T. v. 50, p. 9206), and John MacIntyre recalls that it was longer than that (T. v. 34, p. 6349).

385. John MacIntyre advised that he wanted to set out the background of the Marshall case given the letter he had received from Stephen Aronson, Donald Marshall's lawyer (T. v. 65, p. 11715). John MacIntyre indicated at that time that the main evidence had been two teen-age boys who were eyewitnesses, and that each of these boys had given two statements (T. v. 65, p. 11715). MacIntyre "gave us copies of witness's statements" (T. v. 50, p. 9204). MacIntyre advised about what he knew about the new information - how Ebsary's name had come up in November, 1971, and the results of that, and also commented about a connection between the apparent source of the new information, Mr. Sarson, and Donald Marshall, Jr. (T. v. 50, p. 9205; T. v.

65, pp. 11715-11717).

386. - - - Towards the end of the meeting, John MacIntyre asked that the R.C.M.P. "look into the complaint and I understood reinvestigate the matter" (T. v. 65, p. 11717; T. v. 50, p. 9205). Inspector Scott's impression at the end of the meeting and when he turned the matter over to Staff Sergeant Harry Wheaton:

...it was my opinion to him that he would go check out this story and that would be the end of it. (T. v. 50, p. 9206).

Although Edwards does not recall any conversation on the point, his expectation was that:

...the R.C.M.P. would take it and do whatever they were going to do with it and when they finished, they would, let me know what they had found and seek advice on where I should go from there. (T. v. 65, p. 11718).

387. Inspector Scott left the meeting with some statements, but knew that he did not have all of the statements (T. v. 50, p. 9206). Scott does not recall which statements he received except to guess that they were "the chief witnesses". Scott was not under the impression that he had everything and he did not ask for the entire file (T. v. 50, p. 9207).

388. - - - Staff Sergeant Harry Wheaton testified that he was assigned to the case on February 3, 1982 by Donald Scott (T. v. 41, p. 7508). At the time of assigning the matter to Wheaton, Scott expressed the opinion to Wheaton that the investigation "shouldn't take me too long to do" (T. v. 41, p. 7509). Wheaton was given a number of statements by Scott - "less than ten I

would say" - but besides the two eye-witnesses:

- There were a number of other statements
- there that, sort of extraneous, I...they just didn't make any sense of why they were there and I wondered why they were there. They were sort of peripheral witnesses I felt, who may have been in the Park at the time. (T. v. 41, p. 7513).

Wheaton arranged to meet MacIntyre the following day, as indeed they did over a "rather lengthy" period of time (T. v. 41, p. 7514).

The Appropriate Approach to a Reinvestigation

389. Douglas James Wright was familiar with internal reinvestigations in the R.C.M.P. (T. v. 28, p. 5263). He proceeded to give the following opinion which no other witness at the Commission Hearings differed significantly from, if at all:

Q. When you were reinvestigating, even your own cases, do you approach it as if it's a brand new investigation or do you -

A. Personally I - personally I think that's the only way you can do it.

Q. And you would do all the various things that you would have hoped would have been done in the first place?

A. That's right.

-- Q. And so if we -

A. I can't see you going into a reinvestigation with restrictions on what you are reinvestigating. You know, if your [sic] going to reinvestigate something, you reinvestigate it. So it's an open - it's an open door.

Q. If you went back to the hypothetical case we just talked about, and you were called in to reinvestigate some months after the initial one, would you follow - try to follow the same type of procedure to the extent you could. I appreciate you couldn't secure the scene but you certainly could do interviews of witnesses. You could talk to the residences [sic] and these sort of things?

A. Sure.

Q. You would expect to do all of that?

A. Sure.

...

Q. In a reinvestigation, would you discuss the initial investigation with the police officers who had carried it out?

A. I have, you know. And I again, I've done quite of a few of them myself in my day and going back quite a few years, yes, you'd discuss it with them. You don't get carried away too much with what they tell you sometimes because you're reinvestigating it. You should go into it with an open mind. You would certainly - certainly discuss it with them, by all means, yes.

Q. Would you do that before or after you carried out your own investigation?

A. You'd probably have a chat with them before and maybe even during and after, eh.

Q. Would you want to review the various statements they would have taken?

A. Possibly.

Q. Okay, whether you did or not, would you yourself want to interview and take statements from anyone who was a

witness or who was an alleged witness to the crime?

--- A. You probably would or if there was a statement from that person previously, you might take that statement and go back and reinterview the person based on that statement?

Q. Go back and reinterview based on the statement?

A. Yes.

Q. But you would have a face-to-face with that witness at sometime?

A. Oh, sure. (T. v. 28, pp. 5265-5267).

It is respectfully submitted that this is the straight forward professional opinion of a highly professional investigator, and it is respectfully submitted that this Commission should give great weight to his opinion.

The 1982 RCMP Reinvestigation

390. It is respectfully submitted that with the reinvestigation in 1982 as with the reinvestigation in 1971, while it was appropriate for John MacIntyre to discuss the matter with the new investigator, and convey impressions about the case, all responsibility for the investigation rested with the new investigator. It is respectfully submitted that the key to an independent investigation would be the immediate securing of the complete investigation file to use as the basis for an entirely new investigation. It is respectfully submitted that Douglas Wright's opinion did not mandate reinvestigation by piecemeal checking out of a series of statements, and then seeking more information from the original investigation to check out. It was

the responsibility of the R.C.M.P. to carry out the kind of independent investigation described by Douglas James Wright. This was certainly Frank Edwards expectation as well. (Exhibit 17 - R. v. 17, pp. 2, 6).

391. Instead of proceeding with its own complete and independent new investigation, the R.C.M.P., and particularly Staff Sergeant Harry Wheaton, continued to return to John MacIntyre throughout the investigation for source material and to get MacIntyre's response to what some of the 1971 witnesses were saying (e.g., meeting of February 26, 1982 - Exhibit 17 - R. v. 17, pp. 4-5; T. v. 65, pp. 11735-11736). Such an approach to a reinvestigation lost any purpose which the transfer by John MacIntyre to the R.C.M.P. was designed to achieve - independence and a fresh look.

392. On Friday, April 16, 1982 Frank Edwards spoke with Gordon Gale in the Department of the Attorney General and was advised that MacIntyre had produced statements which Frank Edwards had not known about earlier (T. v. 66, pp. 11776-11778; Exhibit 17 - R. v. 17, p. 7). Frank Edwards was not able to say that there had been any discussions prior to April 16, 1982 about urging the R.C.M.P. to secure the complete file. It was Frank Edwards' suspicion:

...that Chief MacIntyre may have been trying to steer the investigation to some extent and the significance of him keeping the file, given that suspicion, would be that as long as he kept the file, he could have some link to the investigation that was going on. (T. v. 66, p. 11779).

The fact is that by that time Staff Sergeant Harry Wheaton nor Donald Scott had asked for the complete file. It is respectfully submitted that Frank Edwards' concerns are understandable and justify why indeed Douglas James Wright talks about an entirely new investigation when doing a reinvestigation rather than basing the reinvestigation on the views of the initial investigator who may quite understandably have concluded views about what has occurred in the past.

393. Staff Sergeant Harry Wheaton cited the failure of John MacIntyre to produce certain statements during the course of the reinvestigation as evidence that John MacIntyre knowingly misled Staff Sergeant Harry Wheaton (T. v. 42, p. 7698). Frank Edwards had Staff Sergeant Harry Wheaton's testimony on the point read to him and replied:

I agree with the first part that we were misled. The "knowingly" misleading connotes to me that there's a suspicion that MacIntyre knew that Marshall was innocent but still wanted him found guilty. And if that connotation is correct, then I don't accept that, no.

Commission Counsel sought to lead Mr. Edwards further:

- Q. Do you still believe that from the beginning Chief MacIntyre attempted to feed just the information necessary to lead to a predetermined result?
- A. Yes, I felt that and feel that John MacIntyre felt that there was really much to - do here about something that had been decided in Court and that there was only one result a proper investigation could reach. And I think his mind-set, and perhaps

I'm speculating now, but I believe
his mind - it was such that, you
know, he couldn't see it any other
way. (T. v. 66, p. 11782).

Conclusion

394. The evidence referred to is sufficient to indicate the nature of the problem here. By not immediately commencing their own new and independent investigation based upon a thorough review of the complete Sydney City Police file, the R.C.M.P. and Staff Sergeant Harry Wheaton were failing to recognize why John MacIntyre had felt it appropriate for the matter to be investigated by the outside force. John MacIntyre had his conclusions based upon his own investigation in 1971, buttressed by the jury verdict in November, 1971, and his views of the case had understandably become fixed. He honestly believed on the basis of these things that Donald Marshall, Jr. was guilty.

395. It is respectfully submitted that the R.C.M.P. in 1982 failed to ensure from the beginning the integrity of their own investigation by minimizing any potential for involvement by someone with predetermined, albeit honestly held, views. This Staff Sergeant Harry Wheaton could have achieved by the simple expedient of securing the complete file through request either on February 3, 1982 or on February 26, 1982, or indeed at any other time. Staff Sergeant Harry Wheaton and the R.C.M.P. should not be permitted to claim that they were "knowingly misled". Any misdirection of the 1982 reinvestigation through a continuing consultation with a police officer whose views had been determined in 1971 was the result of contact maintained by the

R.C.M.P. and failure to initially seize themselves with the matter on a ~~basis~~ of strict independence.

396. It is respectfully submitted that this conclusion is justified on the basis of Frank Edwards' view as expressed to this Commission:

Q. You then said you told him you were disappointed that they still didn't have all of the file from the Chief.

A. Yes.

Q. He said, Inspector Scott, "They couldn't be sure of getting it all that way." What does that mean?

A. That...

Q. Getting it all what way?

A. That, you know, you would have to ask Inspector Scott if you haven't already. I can remember when I got off the phone that day and just pondering that, what did he mean by that? I don't know. Again, you know, my feeling was that what I was getting was a statement by the, by Inspector Scott which was really just a verbalized excuse, if I can put it that way, that my feeling throughout was because it was another police department involved, this matter was being handled with kid gloves. (T. v. 66, p. 11809)

It is respectfully submitted that those "kid gloves" permitted Staff Sergeant Wheaton and others to unfairly allege that John MacIntyre had misled them when in fact the cause of any problem was the failure of Wheaton and Scott to discharge their appropriate responsibilities by getting the complete file as early on in the investigation as possible.

R. Perjury Before the Royal Commission
Hearings in December, 1987.

397. Perhaps the most serious and sensational of the allegations made about any one or anything at these Commission hearings was Staff Sergeant Harry Wheaton's allegation of perjury against John MacIntyre on the basis of testimony which John MacIntyre had given to the Commission in December, 1987.

Q. I put to you, Staff Wheaton, that Chief MacIntyre under oath here denied a number of times having slipped any statements or anything onto the floor. Are you suggesting that his testimony is incorrect?

A. I'm suggesting, I'm not suggesting, I'm stating the man perjured himself.

Q. Before this Commission.

A. Before this Commission.

Q. In respect of taking the statement of Patricia Harriss and putting it on the floor.

A. That is correct, sir, yes. (T. v. 42, pp. 7751-7752);

and later, after a lunch break:

Q. Again, testifying this morning, sir, you made a rather serious charge when you indicated your belief that Chief MacIntyre had perjured himself before this Commission.

A. That is correct, sir, yes.

Q. It would be a serious charge.

A. That is right, sir.

Q. Would I be correct in saying that if that is true that is a criminal offence?

A. That is a criminal offence, yes, sir.

Q. When did you first form that opinion?

A. In Sydney after hearing Chief MacIntyre's evidence on the last morning of the Inquiry and earlier the day before, I believe it was, he gave it in evidence. It came out again in his evidence on Friday, the last day of the Inquiry in Sydney.

Q. Yes. Did you discuss your opinion with Corporal Davies?

A. Yes, I did, as well as Corporal Davies' lawyer, Mr. Boudreau, and asked them if, on behalf of his client, if he would have any problems with me pursuing the matter with the Crown Prosecutor in Sydney and he advised me that he would not, and it was his legal opinion that perjury had been committed.

Q. I see. And was it your opinion as a police officer that a charge should be laid?

A. Yes, sir.

Q. Did you lay a charge?

A. Not to date, however, I have had some consultation with the Crown Prosecutor in Sydney and I have submitted a report to my superiors. (T. v. 42, pp. 7755-7756).

398. It is our submission that a meeting took place on the afternoon of Friday, April 16 at MacIntyre's office wherein, inter alia:

(a) MacIntyre gave to Wheaton the unsigned statement of Patricia Harriss (T. v. 66, p. 11791);

(b) MacIntyre gave to Wheaton the 1971
—statements of Greg and Mary Ebsary (T. v.
66, p. 11791, Exhibit 17 - R. v. 17, p.
8);

(c) "It was casual, "oh by the way" sort
of, Herb noticed Chief slip some
information on the floor et cetera. And
when I said "Well, what was that about?"
and he said "Oh, it was just something
related to Thomas Christmas or
transcripts that he ..." There was no
particular concern about it. It was
something that I, when he mentioned it to
me, I picked him up and said "What was it
about?" But any concern that I
experienced was allayed by his response."
(T. v. 66, p. 11793).

It is further submitted that a meeting took place on April 26 at
John MacIntyre's office at which time John MacIntyre handed over
the balance of his file material to Wheaton pursuant to the order
of the Attorney General.

399. The situation which thus presented itself to this
Commission was that one witness with one factual recollection of
a particular event accused another witness, who put forward a
different version of the same event, of lying intentionally for
the purpose of misleading this Commission.

400. This Commission quite properly noted at the time of
Wheaton's accusations that it was premature when all evidence had
not been heard to be coming to conclusions about whether anyone
had committed perjury or told an untruth under oath (T. v. 42, p.
7757). Now that all the evidence on the matter in dispute which
this Commission will be receiving has been taken, it will be
necessary as part of the fact-finding process to determine what

evidence of what witnesses to believe or to reject.

401. _____ Counsel for Donald Marshall, Jr. has characterized the incident of the document or documents on the floor as concealment. This counsel has also asserted that the particular document or documents so concealed were exculpatory, and has secured agreement from a witness that this was a corrupt act (T. v. 47, p. 8659).

The Undisputed Facts

402. On April 20, 1982 a letter was written by the then Attorney General to John MacIntyre, and the Mayor of Sydney, pursuant to s. 31 of the Nova Scotia Police Act directing that the following items be delivered from the possession or control of the Sydney City Police to Staff Sergeant Harry Wheaton of the Sydney Sub-Division of the R.C.M.P.:

...all warrants, papers, exhibits, photographs and other information or records in your possession or under your control dealing with the Donald Marshall, Jr. case commencing with the initial investigation in 1971.

(Exhibit 16 - R. v. 16, pp. 221, 222).

403. No serious suggestion exists that any of the exhibits introduced into evidence in 1971 were in possession of the Sydney Police in 1982. The evidence before this Commission is that once introduced at trial the exhibits would have remained in the possession of the Prothonotary of the Supreme Court in Sydney, and forwarded to Halifax on November 26, 1971 (Exhibit 85). As to what happened to the exhibits from there the record appears to be silent, but there is certainly no evidence that

these exhibits found their way back into the possession of the Sydney Police. In any event, the practice was to dispose of exhibits on judicial order (T. v. 32, pp. 5809-5812). This Commission does not appear to have that order.

404. In response to Attorney General How's letter, John MacIntyre gathered together the required material (e.g., Exhibit 16 - R. v. 16, pp. 215-216 and generally Exhibit 88), and made an appointment for Wheaton to come and pick the material up (T. v. 42, p. 7741). The meeting was scheduled for the afternoon of April 26, 1982. Wheaton had already been given the signed Patricia Harriss statement by MacIntyre on February 26, 1982 (T. v. 44, p. 8032).

Wheaton's Version To This Commission

405. Wheaton testified he contacted Corporal Davies prior to going to the Sydney City Police Department and showed him Attorney General How's letter. Wheaton wanted a witness when he received the materials (T. v. 42, p. 7741). Wheaton picked Davies because:

- (a) He was there, and
- (b) I considered him to be a very competent police officer (T. v. 42, pp. 7741-7742)

but Wheaton would have taken Corporal Carroll had Carroll been there. Davies and Wheaton went to the office of the Chief of the Sydney Police which was approximately eight feet by twelve feet. Wheaton introduced Davies and indicated that the purpose of the visit was to pick up the file in accordance with the order

of the Attorney General. MacIntyre was expecting Wheaton, but remained seated behind his desk. Wheaton says that he seated himself facing the desk on the right-hand side while Corporal Davies sat facing the desk on the left-hand side, front on (T. v. 42, p. 7742).

406. MacIntyre produced an index of three pages (T. v. 43, p. 8106) which he had had prepared (Exhibit 88). A fourth page was prepared by Wheaton (T. v. 43, p. 8107). From the lower left-hand drawer of the desk MacIntyre withdrew two brown accordian-type file folders and placed them in front of Wheaton on the desk. The procedure followed from that point was that MacIntyre would draw one or two or a group of documents out of the file folders and any individual envelopes which were inside the files, determine what the particular item was, and describe it orally. At that point MacIntyre would hand the papers to Wheaton and Wheaton would initial Exhibit 88 to indicate that he had received the item (T. v. 42, pp. 7742-7743). Wheaton also made notations on Exhibit 88, which he showed to MacIntyre, in the nature of minor corrections or additions to better define what was being turned over. These appear on pages 2 and 4 of Exhibit 88. This process took about an hour and a half to complete. John MacIntyre was invited to sign indicating agreement that Wheaton had received all of the listed documents, and MacIntyre did (T. v. 42, pp. 7743-7744).

407. As far as Wheaton knew, he had received everything that had been in the file folders (T. v. 42, p. 7744). Wheaton

specifically asked MacIntyre whether Wheaton had everything and MacIntyre ~~said~~ that Wheaton did. MacIntyre even gave Wheaton the file folders (T. v. 42, p. 7744).

408. Wheaton described MacIntyre's demeanour throughout this encounter as very formal (T. v. 42, p. 7745). Wheaton does not think that MacIntyre was specifically asked for any statement of Patricia Harriss (T. v. 42, p. 7747). There was some other discussion about MacIntyre's 1971 investigation (T. v. 42, pp. 7762 - 7766).

409. After receiving the items turned over by John MacIntyre, Wheaton placed some in his briefcase and some in the briefcase of Corporal Davies. Corporal Davies left, Wheaton followed. A step or two out the door Corporal Davies turned and said:

Staff, you didn't get everything. He slipped one piece of paper or something on the floor, a piece of paper on the floor. (T. v. 42, p. 7749).

Wheaton turned back to MacIntyre, may have taken a step or two again, and said:

Chief, Corporal Davies tells me you slipped something on the floor. (T. v. 42, p. 7749).

MacIntyre stared at Wheaton for some time "eye to eye", and then turned and said one of the following remarks, or words to the effect of one of the following remarks:

Well, you may as well have all of it.; or
You may as well have everything. (T. v. 42, p. 7749).

MacIntyre walked towards the desk and on the right-hand side from the point of view of sitting behind the desk, MacIntyre picked up a piece of paper from the floor under the desk (T. v. 42, pp. 7749-7750). MacIntyre "was flustered, he was red in the face", apparently repeated what he had already told Wheaton about having everything, and gave Wheaton whatever it was (T. v. 42, p. 7750).

410. Wheaton took what was handed to him by MacIntyre, turned and walked out with Corporal Davies who had also returned to the office. Wheaton did not look at what he had been given, but continued to hold it in his hand. On the drive back to the R.C.M.P. office Wheaton did read the document "and found that it was a partially completed statement of Patricia Harriss on the 17th of June, 1971 written by William Urquhart, I believe it was." (T. v. 42, p. 7750). This was an original (not typed) statement, and Wheaton has "absolutely no doubt" as to which statement it was (T. v. 42, p. 7751).

411. Wheaton also testified that Corporal Davies advised him that Davies had observed MacIntyre slip the document to the floor, pick it up with his left hand, reach over, and put it down underneath the right-hand portion of the desk (T. v. 42, p. 7751). Wheaton did not see this and suggested as the reason that he probably had his head down looking in the index trying to find something (T. v. 42, p. 7751).

412. Following receipt of the file, and in particular the material which had been put on the floor, Wheaton returned to his office at the Sydney Subdivision, "and I had conversation

with Inspector Scott relative to the slipping of the statement on the floor principally." (T. v. 42, p. 7772). At this time, Wheaton also made notes about the incident (T. v. 42, p. 7772), referring to Exhibit 90B.

Herb Davies' Version

413. Corporal now Sergeant, Herb Davies was in charge of the Customs and Excise Section of the R.C.M.P. in Sydney from 1978 until October 6, 1982 (T. v. 47, p. 8641). Normally Davies would take notes if it was an investigation of his own "or if it was something that I felt I should document" (T. v. 47, p. 8641), but he has no notes in relation to this meeting. Since the date of the matter under consideration here, Davies had spoken with Staff Sergeant Harry Wheaton, a lawyer for the CBC in a civil proceeding involving John MacIntyre, as well as the officers assigned to assist R.C.M.P. witnesses appearing at this Commission (T. v. 47, p. 8643). Davies had spoken with Staff Sergeant Harry Wheaton during John MacIntyre's testimony before the Commission in Sydney (T. v. 47, p. 8656), and further discussed it the Monday morning following (T. v. 47, p. 8658). Wheaton and Davies also discussed their evidence, the date of April 16, 1982, and did so to "refresh" their memory (T. v. 47, p. 8686). Davies added somewhat defensively that this was not "unusual".

414. Davies testified that he had no independent recollection of the exact date when he accompanied Staff Sergeant Harry Wheaton to John MacIntyre's office to pick up files (T. v.

47, p. 8644). Having discussed the matter with Staff Sergeant Wheaton (T. v. 47, pp. 8686-8687), Davies feels through reference to Exhibit 88 on which the date of April 26, 1982 appears, and the letter from the Attorney General with the date April 20, 1982 (Exhibit 16 - R. v. 16, p. 221), that the date of the meeting would have to be April 26, 1982 (T. v. 47, pp. 8644-8645). With respect to the letter in particular, Davies was questioned as follows:

- Q. Did you see that letter before you went to the Sydney Police Station?
- A. Yes, sir I did. Staff Sgt. Wheaton read that letter to me and then I also wanted to have a look at it myself. I read it before I left Sydney. (Emphasis added) (T. v. 47, p. 8645)

Davies said that in particular he remembers reading the date on the letter and could not have seen an undated draft (T. v. 47, pp. 8687-8688). Although Davies had never seen such a direction to a police Chief:

...I must say when I left Chief MacIntyre's office, I figured that was the end of it. (T. v. 47, p. 8646)

It did not cross Davies' mind that an offence had been committed (T. v. 47, pp. 8703-8704).

415. - - Davies testified that he only ever attended one meeting at the office of Chief MacIntyre, and "as a matter of fact, that particular morning" Wheaton introduced Davies to MacIntyre and they shook hands. Two questions later when asked what time of day the meeting occurred, Davies stated:

If I recall correctly, it was in the afternoon of April 26th, 1982. (T. v. 47, --p. 8647).

416. Davies confirmed that the only persons present were MacIntyre, Wheaton, and himself (T. v. 47, p. 8647). When Davies and Wheaton arrived, MacIntyre offered Wheaton his chair but Wheaton refused. Wheaton sat instead as he had testified (Exhibit 109; T. v. 47, p. 8648). Davies, however, put his position at the end of the desk and towards MacIntyre "so that when looking across I could observe Chief MacIntyre" (T. v. 47, p. 8648), and as a result see MacIntyre's hands and lap (T. v. 47, p. 8679). Davies was to be there "as an observer" (T. v. 47, p. 8649).

417. To Davies the meeting appeared to have been pre-arranged, but he did not know by whom. When Wheaton and Davies arrived, MacIntyre had the files and after Wheaton and Davies were seated, MacIntyre began to go through the files and passed the various documents across to Wheaton (T. v. 47, p. 8649). MacIntyre would look at all documents first, read off the names and say what it was. As each was handed to Wheaton, or later, Wheaton initialled for all of the documents (T. v. 47, pp. 8650, 8694). The meeting "could have been an hour or so" (T. v. 47, p. 8651). Davies, like Wheaton, recalled two file folders - but Davies would not say that Wheaton's notes were incorrect by indicating a single file folder (Exhibit 90B; T. v. 47, pp. 8688-8689).

418. Davies then continued as follows:

There was only one time when I observed the Chief had a document in his hand that -- this document did not go to Staff Sergeant Wheaton.

Q. Where did it go?

A. The Chief took that document in his left hand and placed it down on the floor, now, I will say I could not see the document when it hit the floor, but I could see Chief MacIntyre take it in his hand and drop it.

Q. Would you describe it as an accidental or deliberate dropping?

A. In my opinion it was deliberate.

Q. He took it in his left hand. Did he drop it immediately down or did he throw it under? Describe in a little more detail.

A. Okay. This particular document came from a manilla file folder that Chief sort of had partially on the desk and partially on his lap. And he took the document from that and he might have leaned just a little bit and dropped it on the floor. I couldn't see when it hit the floor, but I could see when it left his hand.

Q. Did you, did the Chief observe the document before he did this?

A. Yes, he did sir. He read it before he threw it on the floor. (T. v. 47, pp. 8649-8650).

This event occurred close to the end of the meeting but Davies did not interrupt because the meeting "was running so smooth" despite what Davies perceived as bit of tension between Wheaton and MacIntyre (T. v. 47, p. 8651).

419. After Wheaton received what he thought was all of the file, Wheaton apparently asked on at least two occasions:

Now, Chief, do we have it all? Do we have it all? (T. v. 47, p. 8652)

John MacIntyre replied in the affirmative. Davies and Wheaton left but Davies stopped Wheaton just outside MacIntyre's door and said:

Staff you didn't get the complete file. The Chief dropped a document on the floor. (T. v. 47, p. 8652)

Wheaton went right back into MacIntyre's office, followed by Davies. Wheaton advised MacIntyre about what Davies had told him "concerning him dropping a document on the floor", at which time MacIntyre went behind his desk, picked up the document and made a remark to the effect:

I might just as well give you it all. (T. v. 47, p. 8652)

420. Davies acknowledged that if he recalled "correctly" typing was done during the meeting that Chief MacIntyre at least took to the door of the office for his secretary (T. v. 47, pp. 8680-8681). Davies acknowledged that he was trying to forget about what Wheaton's recollection of this was, and stated that if Wheaton had not raised the point of typing, Davies would still think that there had been some (T. v. 47, pp. 8680-8681). This typing was done close to the end of the meeting, but Davies does not know why or what the piece of paper being typed was (T. v. 47, pp. 8681-8682). The inventory of documents (Exhibit 88) had all been prepared "upon our arrival" and was not dictated after Davies and Wheaton arrived (T. v. 47, p. 8683). Davies still assumes the document which was typed was Exhibit 88 (T. v. 47, p.

8697).

421. —Sergeant Davies did not recall any discussion on any other topic at all involving Marshall at the meeting (T. v. 47, pp. 8684-8685). When pressed on his recollection of events other than the paper on the floor, Davies at one point responded:

The only thing I'm saying is that when I went to Chief MacIntyre's office is that it was after April 20 (T. v. 47, p. 8689)

in the middle of a series of questions about manilla file folders. Davies does not recall any discussion as referred to in Wheaton's notes, and indeed throughout his evidence did not adopt anything from Wheaton's notes (T. v. 47, pp. 8691-8693) but neither did he disagree specifically with them. Davies could not even recall whether Wheaton signed for statements as he received them (T. v. 47, p. 8694). There was no typing, and no notations made by Wheaton on Exhibit 88 after the document on the floor had been picked up (T. v. 47, p. 8705).

422. After the final document was handed over there was no further conversation, and no looking further under the desk. Davies had only seen MacIntyre "drop one document. I didn't know how many pages there were to it or anything at that particular time. One document." (T. v. 47, p.8654). Davies now feels quite certain it was one page (T. v. 47, p. 8691) though he did not know when it went on the floor.

423. Davies said he glanced at the document in Wheaton's hand as he drove back and could not recall if it was an original or a photocopy (T. v. 47, p. 8704). Wheaton kept the document in

his hand while Davies drove himself and Wheaton back to R.C.M.P. Headquarters, and Wheaton read the statement to Davies:

...but I will say the statement didn't mean anything to me. I wasn't involved in the investigation so I didn't know what it was all about. (T. v. 47, p. 8654)

Davies never filed any report about this incident (T. v. 47, p. 8658).

424. This matter did not cross Davies' mind again for four years, but when that was pointed out Davies retreated and said:

I perhaps thought about it maybe...yes, and perhaps discussed it. (T. v. 47, pp. 8661-8662).

With respect to his one other involvement in the R.C.M.P. re-investigation involving a search at Roy Ebsary's house to search for clothing with Constables MacQueen and Hyde, Davies also had no notes and could not recall whether he met anyone, and if he did could not recall who it was, could not recall whether a forced entry was involved, and indeed could not even recall what kind of dwelling it was (T. v. 47, pp. 8669-8672). As to the date of that other involvement, Davies acknowledged that he had had to have his memory refreshed by the R.C.M.P. co-ordinators for these Commission Hearings (T. v. 42, pp. 8672-8673).

Wheaton's Version According to His Notes

425. There are three exhibits with this Commission which purport to be Staff Sergeant Wheaton's notes concerning the 1982 re-investigation. A typed version of the notes was introduced as

Exhibit 90. The photocopy of Wheaton's handwritten notes were labelled as ~~Exhibit~~ 90A. Wheaton's original handwritten notes were marked as Exhibit 90B. The typed version of the notes also appears in Exhibit 99 (R. v. 34, pp. 1-3). It is respectfully submitted that the typewritten version of the notes, wherever they appear, are unreliable and misleading (T. v. 44, p. 8109). Any further references to the notes therefore, will be references to the photocopy of the original handwritten notes (Exhibit 90A).

426. Wheaton's handwritten notes contain the following notations all contained on one separate page (Exhibit 90A, p. 12):

16 Apr 82

Interview 3: 45 pm Chief MacIntyre Cpl. Davies myself. Chief produced Brown Accrdion file folder. containing approx 4 Minalla file folders as well as a numer of envelopes. Chief was asked. Four or five times for any other statements from Patricia Harris last statement given.

Hand written statements of Bill Urquhart on Harris showed. numerous only one read Cpl Davies see them placed on floor. asked numerous times why Pratico no explanation No comment on Line up. No comment on Pratico re witness. Definitely did not interview Ebsary wife or son after murder on 15th. Total Corresp 31 (f) pieces.

Wheaton's evidence is that the date of the note should be "26 Apr 82" - his own error (T. v. 42, pp. 7704 - 7710). Wheaton testified "From refreshing my memory by going through my police reports, et cetera, I believe that date to be incorrect and it should read the "26th of April"...I put a "1" instead of a "2"

sir...by reading the reports that I had written back in 1982 and following ~~the~~ paper trail that came from the Attorney General's Department" (T. v. 42, p. 7704). Wheaton indicated to this Commission that the possibility that he could be wrong about the "Incorrect" date was:

Very, very slight, I think, but I'm human. (T. v. 42, p. 7709; see also evidence at p. 7708)

427, The notes would have been made the very afternoon of April 26, 1982, after discussion with Corporal Davies (T. v. 42, pp. 7710, 7772). Wheaton also acknowledged that the notes were written based on "collective thinking" - for example, at the meeting on April 26, 1982, Wheaton did not ask for any other statements from Patricia Harriss four or five times (T. v. 42, p. 7746). The four or five times would have referred to the course of the investigation. The note concludes with a response, apparently attributable to MacIntyre, about not interviewing Ebsary's wife or son after the murder on 15th (presumably of November, 1971), even though Wheaton acknowledged to this Commission that MacIntyre had given the R.C.M.P. those very statements of Mary and Greg Ebsary taken by MacIntyre, shortly before to April 19, 1982, (the date Wheaton showed the 1971 statements to Greg Ebsary) (T. v. 42, pp. 7712-7723; T. v. 44, p. 8012-8117). MacIntyre's name is apparent on the face of both the original and typewritten copies of the November, 1971, statements taken from Mary and Greg Ebsary (Exhibit 16 - R. v. 16, pp. 181-

185, 191-194).

428. --It is noteworthy that Wheaton was as categorical after the pointing out of an obvious inconsistency as he had been to the opposite effect before being referred to the inconsistency (e.g., T. v. 42, pp. 7712, 7720). A most illustrative response from Wheaton was received in the course of discussing the inconsistency of his testimony with respect to the Mary and Greg Ebsary statements:

Yes, to the best of my knowledge five minutes ago, but you've just shown me things that would indicate that I had a statement, yes, I don't...It would certainly appear if I took a statement from Gregory Ebsary on the 19th and shown in statements of the Sydney City Police, it would certainly indicate to me that these were statements that were taken by [sic] in 1971, and that I would have had them in my possession (Emphasis added) (T. v. 42, p. 7715).

Wheaton's continuing insistence upon the inappropriate dating of the note was primarily based on his recollection that at the time of the meeting with MacIntyre he had the letter from the Attorney General's Department and he knows that he showed it to Corporal Davies, and the Chief [MacIntyre] had also received the letter from the Attorney General (e.g., T. v. 42, pp. 7714, 7726-7727, 7731).

429. Wheaton's explanation concerning the comment (one statement given to Staff Sergeant Wheaton already) that appears beside Patricia Harriss' name on p. 4 of Exhibit 88 is less than satisfactory (T. v. 44, p. 8125). If this comment referred to the signed Patricia Harriss statement, why was a similar comment

opposite Gushue's name, as statements of both Harriss and Gushue were given ~~to~~ Wheaton on February 26th? (T. v. 44, p. 8125; also 8178).

430. No satisfactory explanation was advanced by Wheaton as to why the statements of Mary and Greg Ebsary were not in the hands of the R.C.M.P. on April 15th, but were in Wheaton's hands on April 19th (when he interviewed Mary Ebsary) unless Wheaton met with MacIntyre on April 16th as we contend (T. v. 44, p. 8129-8132).

Wheaton's Version to Inspector Scott

431. Superintendent Donald B. Scott recalls being shown the first Patricia Harriss statement (Exhibit 55). Scott could not say whether that statement was shown to him prior to or subsequently to the Attorney General's letter of April 20, 1982 (T. v. 50, pp. 9262-9263). Scott did remember a story about hiding the statement under the desk and believes that Wheaton specifically identified the Harriss statement as the one being hidden, but other than that, had no further personal recollection (T. v. 50, p. 9263).

432. On the basis of leading questions from Commission Counsel about whether Wheaton had indicated that the statement had been purposely put under the desk, Scott replied:

As I remember it, it had been dropped on the floor. (T. v. 50, p. 9263).

Commission Counsel persisted:

Q. Did he indicate to you whether or not that was accidental or was done on purpose?

A. He thought it had been done on
-- purpose.

Q. Did you talk to Corporal Davies about
this?

A. I don't believe I had any
conversation with Corporal Davies on
that. (T. v. 50, pp. 9263-9264).

Scott acknowledged that he did not report this incident to his
superiors when he had the opportunity (T. v. 50, pp. 9283-
9286). As to Wheaton's story itself, Scott was of the view:

I was getting most of this second hand.
It was the opinion of the investigator
that he was trying to hide it. I wasn't
there. I didn't see it. (T. v. 50, p.
9284).

Wheaton's Version to Frank Edwards

433. Wheaton testified - "I know I reported it to Frank"
(T. v. 44, p. 2145). Frank Edwards was "definite" and unshaken
on the date of April 16 as the date Wheaton got the Patricia
Harriss statement in issue (Exhibit 55) (T. v. 66, p. 11791).
The definitiveness of Edwards' recollection was confirmed by his
own notebook (Exhibit 17 - R. v. 17, pp. 9, 38-39). Frank
Edwards' recollection was that Wheaton advised him on Saturday,
April 17, 1982, in a casual "oh, by the way" manner that the
previous afternoon at the Sydney City Police office, Herb Davies
had noticed MacIntyre "slip some information on the floor" (T. v.
66, p. 11793). Wheaton had no particular concern about this but
Edwards sought further information. Wheaton allayed any further
concern by replying that it was "just something related to Thomas
C. Christmas or transcripts" (T. v. 66, p. 11793). Wheaton

confirms he did receive a document relating to Christmas (T. v. 45, p. 8244) though not disclosed in Exhibit 88.

434. Neither Wheaton nor Davies told Edwards that the material slipped on the floor by MacIntyre had been the June 17 statement of Patricia Harriss (T. v. 66, p. 11793). Indeed, Edwards recalls, again confirmed in his notes, that he was already in possession of the June 17 statement of Patricia Harriss on April 19, 1982 (Exhibit 17 - R. v. 17, pp. 10, 41 - T. v. 66, pp. 11794-11795). Mr. Edwards went further and stated that if such a report had been made to him by Wheaton about any attempted concealment of the Patricia Harriss June 17 statement subsequent to the direction of the Attorney General, Edwards would personally have recommended that John MacIntyre be charged with obstruction of justice (T. v. 66, p. 11795; T. v. 45, p. 8253).

435. Further review of the testimony of Frank Edwards indicates that the obtaining of the Patricia Harriss statement of June 17 did not coincide with the demand for the full file which was a matter of extreme concern to Frank Edwards (T. v. 66, pp. 11795-11796). The full file was only sought on April 26, 1982.

436. Frank Edwards' notes were not dependent upon Wheaton's notes (T. v. 66, p. 11792), as Wheaton had suggested (T. v. 42, pp. 7710 ff). Certainly, Edwards' April 19, 1982 notes were made on that very day, contemporaneously with the event of receiving Patricia Harriss' first statement (T. v. 66, p. 11806). Edwards also has a note made on Monday, April 19,

1982 about a telephone call received that same day from Inspector Scott. At that time concern was expressed by Scott that the late obtaining of the June 17 Harriss statement was illustrative of a general holding back by the Sydney Police in 1982 (Exhibit 17 - R. v. 17, pp. 11, 41-42; T. v. 66, pp. 11808-11809).

Wheaton's Version to Michael Harris

437. In the preparation of his book, Justice Denied, Michael Harris interviewed Harry Wheaton on several occasions, and on several occasions the statement on the floor issue was mentioned. Before testifying, Michael Harris had not reviewed the tapes of his interviews with Wheaton, but was able to recall that Wheaton had suggested, and this was Wheaton's opinion that:

Chief MacIntyre had concealed some information that Staff Wheaton and his partner had need to complete the documentary side of their investigation into the re-investigation in the Marshall case . (T. v. 83, p. 14482).

Harris believes that it involved one of Patricia Harriss' statements and thought it was the first statement. The document had been dropped on the floor and "kicked under a desk" (T. v. 83, p. 14483). Wheaton apparently cited this incident to Michael Harris as "an example of lack of cooperation" (T. v. 83, p. 14483). Apparently the way Wheaton left it with Michael Harris was that the incident could have involved an accidental dropping or an attempt at concealment (T. v. 83, p. 14489). Wheaton did not see it as an attempt at obstruction. The matter was so "interpretive" that Harris did not even feel it worthwhile to bother trying to interview Herb Davies about it. (T. v. 83, p.

11490).

438. -- As to the date of this incident, Harris believed that Wheaton mentioned that it occurred at a time when materials were being picked up in response to an Order from the Attorney General. However, Michael Harris himself did not feel that he could assist this Commission with any precision about when Wheaton said the event had taken place chronologically (T. v. 83, pp. 14483, 14489).

Wheaton's Version to Sergeant Carroll

439. Sergeant Carroll testified that he recalled being told by Wheaton that:

That documents, a document, or documents had been dropped on the floor and in an effort to be concealed under the desk of Chief MacIntyre when they went down to take possession of the City Police file. That Sgt. Davies then, Corporal Davies, he had witnessed that maneuver and they had gone back in the office and asked for everything that he had at which time Chief MacIntyre produced the document from the floor.

Q. Was it your understanding from what you were being told that the document had deliberately been placed on the floor to hide it ?

A. That was the opinion that I drew from the...from the facts as related by Staff Wheaton (T. v. 48, pp. 8841-8842).

440. Carroll could not really give any assistance with respect to the date of this incident (T. v. 48, pp. 8842, 8843; T. v. 49, P. 8961), and Carroll had no notes in his notebook about the incident (T. v. 48, p. 8848). As to what document it

was, Carroll believed that it was a Patricia Harriss statement, but could only guess that it was the uncompleted one (T. v. 48, pp. 8846 - 8847). Indeed, Carroll acknowledged to Commission Counsel that he could not really say whether Wheaton had told him what document had been on the floor, but believes that six years ago Wheaton had told him and he knew then, but he does not know today (T. v. 48, p. 8847).

441. Carroll did state that he did not take any initiative when he assumed control of the file on April 27, 1982, to investigate of the Sydney Police for interfering in the investigation at all. However, Carroll was confident in assuming that Wheaton would have been discussing such obstruction on a fairly regular basis in his reports and that "other people in Halifax" would have been aware as Inspector Scott was aware (T. v. 48, pp. 8845-8846).

Exhibit 88

442. Both Wheaton and Davies testified that Exhibit 88 was already prepared upon their arrival but both also testified about typing having occurred during the course of their meeting. What seems to appear from Exhibit 88 and ancillary documents (e.g., Exhibit 88A)?

443. -It appears from the first three pages of Exhibit 88 that there is a complete listing of materials which were known about by Chief John MacIntyre, including not only the occurrence reports which had been filed at the time of the stabbing by individuals such as Constables Walsh, Mroz, and Howard Dean, but

also material which had been in the possession of William Urquhart (the Dan Paul note). Significantly, there is no mention anywhere in Exhibit 88 of any notes by "Red" M. R. MacDonald. At the bottom of the third page are two apparent signature lines which have not been used, together with a blank April date in 1982. These first three pages are numbered at the top (except for the first page), and the first and second pages indicate a continuation of the document. No such indication appears on page three, and the fourth page is not numbered as page four. This would indicate that, as testified by Staff Sergeant Harry Wheaton and Corporal Davies, further typing was done while the meeting of April 26, 1982, was in progress.

444. Before proceeding to the fourth page and a discussion of it, it is worthy of note that Staff Sergeant Harry Wheaton initialled for every described category of documents on the first three pages. The only extra notations which appear on these first three pages (other than those of James Carroll which we know were made subsequently), were as follows:

(a) The addition of Noseworthy's name at the top of page 2 in reference to interview notes (Exhibit 16 - R. v. 16, p. 15);

(b) The fact that the George Wallace MacNeil and the Roderick Alexander MacNeil statement was a joint statement, "2 in 1";

(c) The fact that the statements received from Mary Patricia O'Reilly, Catherine Ann O'Reilly and Raymond Rudolph Poirier were "original" statements.

445. It is respectfully submitted that this Commission may gather ~~from~~ the face of Exhibit 88 that the typed words sometimes refer to "typewritten copies of statements" (Exhibit 88, p. 1), sometimes specifically to "original statements" (Exhibit 88, p. 2), and sometimes simply to "statements" (Exhibit 88, p. 2). We know from Staff Sergeant Harry Wheaton's own investigation that he interviewed Greg and Mary Ebsary while in possession of their 1971 statements on April 19, 1982 (T. v. 42, pp. 7712-7723). We also know that he did not receive the originals of those same statements until April 26, 1982. Exhibit 88 also indicates that Wheaton received on April 26, 1982 "copies of statements" of the Greg and Mary Ebsary statements.

446. Frank Edwards' notes (Exhibit 17- R. v. 17, p. 7) reveal that on Friday, April 16, Gordon Gale advised him that (earlier in that week) John MacIntyre had visited Gale and had produced statements from "Ebsary's wife, son and daughter" (sic) which were "opposed to what they were saying now." Edwards' notes further state:

After call with Gale, phoned Wheaton who confirmed that they had known nothing about earlier statements by Ebsary's wife and family" (Emphasis added).

On Saturday, April 17 Wheaton called Edwards to advise that Wheaton and Herb Davies had gone down to see Chief MacIntyre late Friday p.m. and had spent a couple of hours with him. After being pressed Chief turned over previous written statement by Patricia Harriss in which she described someone matching Ebsary (Wheaton said Chief went scarlet when pressed about this

statement) - also turned over November, 1971 statements of Mary and Greg Ebsary...." (Emphasis added). Wheaton confirms a meeting with Scott and Edwards on April 16, 1982 (T. v. 42, p. 7697) wherein he states "we felt we were misled" by MacIntyre (T. v. 42, p. 7698).

447. Staff Sergeant Harry Wheaton acknowledges receiving "statements" of George Wallace MacNeil and Roderick Alexander MacNeil - referring to the statement taken May 30, 1971 (Exhibit 16 - R. v. 16, pp. 26-27). Wheaton already had been in possession of at least a copy of this statement when he submitted his first report on the investigation on March 12, 1982 (Exhibit 99 - R. v. 34, p. 20). If Wheaton had received the original before March 12 there would have been no reason to distinguish the George Wallace MacNeil and Roderick Alexander MacNeil statement from the list of "typewritten copies of statements" on the first page of Exhibit 88. Staff Sergeant Wheaton must have received both an original and a copy of the George Wallace MacNeil and Roderick Alexander MacNeil statement on April 26 because he makes no notation about the kind of statement received and Exhibit 88 shows that no distinction was made in the description of that statement in the way a distinction was made with respect to the statements taken on November 15, 1971. The notations on page 4 of Exhibit 88 show that one of the "statements" received was an original.

448. Wheaton does make the distinction as to what he received in relation to Mary Patricia O'Reilly, Catherine Ann

O'Reilly and Raymond Rudolph Poirier. This would indicate that on April 26, 1982, Wheaton received only the originals of these statements, because he had already received the typewritten copies. At the same time, Wheaton never mentions the O'Reilly statements until his report of May 4, 1982 (Exhibit 99 - R. v. 34, pp. 76-77).

449. Turning to page 4 of Exhibit 88, there is an unnumbered listing of "Original Statements". It is also important to recall that all typing was completed and signed before Staff Sergeant Harry Wheaton and Corporal Davies left MacIntyre's office for what they say was the first time, and that there was no further typing or initialling once the document allegedly on the floor was recovered. On page 4 the list of original statements corresponds with the list of "typewritten copies of statements" which appears on page 1. It is respectfully submitted that there can be no doubt that the references on page 4 are to original statements exclusively.

450. With respect to Maynard Chant, the typed portion of page 4 simply indicates that a May 29 statement of Chant was missing. Wheaton indicates in a handwritten note that he did receive an original of Chant's June 4, 1971 statement on April 26, 1971. No mention is made of the Chant statement of May 30, 1971, but Wheaton must have secured that at some point during the investigation because it is believed that the original now in the possession of the Commission (Exhibit 16 - R. v. 16, pp. 20-21) was secured from the R.C.M.P.

451. Beside the names of Pratico, Davis, Gushue and L. Paul on page 4 of Exhibit 88 are the words "O.K." and then Wheaton's initials. We know that there are two original statements from John Pratico (Exhibit 16 - R. v. 16, pp. 23, 43-45). There is no evidence that Wheaton received one of the original Pratico statements at some earlier point in the investigation, and the R.C.M.P. were in possession of both original statements at some point but did not receive any materials from the Sydney City Police or other source after April 26, 1982, the reference to Pratico must be a reference to Wheaton receiving both original statements.

452. We know about two existing original statements of Patricia Harriss (Exhibit 16 - R. v. 16, pp. 64, 67-68). The typewritten notation with which Wheaton signified his agreement appears on Exhibit 88 as follows:

P.A. Harriss One Statement given to S/S
Wheaton already.

It is respectfully submitted that within the context of the other materials being handed over, that this single line demonstrates the fallacy of Wheaton and Davies' assertion that the original of the Patricia Harriss 8:15 p.m. June 17, 1971 statement was placed on the floor. If, as Wheaton and Davies must be taken to be alleging, MacIntyre was taking the position that there was only one Patricia Harriss statement and that that was the June 18, 1971 statement, there would have been no reason to make a special notation beside Patricia Harriss' name. An "O.K." would have been sufficient as it was in the case of Gushue. If, as some may

suggest, it indicates that the original of the June 18, 1971 statement ~~was given to Staff Sergeant Wheaton already,~~ and MacIntyre was asserting that this was the only Patricia Harriss statement, there would have been no purpose served by prefacing the notation with the words:

One Statement given to S/S Wheaton already.

Reference to one statement in particular begs the question of where a second original statement is. The "One Statement given to S/S Wheaton already" can not refer back to page 1 of Exhibit 88 or else the same comment would have been applicable to all of the names and statements indicated on Exhibit 88.

453. While there is no explicit reference to a June 17, 1971 statement of Patricia Harriss in Exhibit 88, there is no evidence that the June 17, 1971 statement of Patricia Harriss was ever typed while it was in the possession of the Sydney City Police (compare Exhibit 16 - R. v. 16, pp. 63 and 65-66). It is respectfully submitted that the only rational conclusion to draw from the reference to Patricia Harriss on page 4 of Exhibit 88 is that with MacIntyre and Wheaton both being aware that there were two original statements of Patricia Harriss in existence, one was turned over which referred back to page 1 of Exhibit 88 (the June 18, 1971 statement) and another had been "given to S/S Wheaton already" (the June 17, 1971 statement). This reading of Exhibit 88 is consistent not only with the terms in which Exhibit 88 is written, but also is consistent with the contemporaneous notes of Crown Prosecutor Frank Edwards indicating that he was in

possession of the original of the June 17, 1971 statement of Patricia ~~Harriss~~ on April 19, 1971, and in fact discussed it with Inspector Donald Scott on that date (Exhibit 17 - R. v. 17, pp. 9-10, 38-39, 41; T. v. 66, pp. 11793-11796, 11806-11809).

454. Also, it is inconceivable that John MacIntyre would have put Staff Sergeant Wheaton in possession of the original of Patricia Harriss' June 17, 1971 statement without also providing him with the related O'Reilly statements - of which only the originals were left with the Sydney City Police by April 26, 1982 (Exhibit 88, p. 2). A final point in support of this understanding of Exhibit 88 is the fact that Staff Sergeant Harry Wheaton added to the list of original statements on page 4 the original of the statement taken from George MacNeil and Sandy MacNeil. It will be recalled that the previous reference to that statement did not distinguish between originals and copies (Exhibit 88, p. 2). It is respectfully submitted that the O'Reilly and Poirier statements were not included on page 4 of Exhibit 88 because even though original statements were received with respect to them no further clarification was needed given Wheaton's note on page 2.

455. The only further comments which it is necessary to make with respect to the fourth page of Exhibit 88 is that the typewritten portion indicates that certain original documents could not be found which had been listed, and received, in typewritten copy (Exhibit 88, p. 1). Wheaton himself confirmed that the original statements of Donald Marshall, Jr. and Marvel

Mattson were not present. The last that anyone seems to have heard of the original of the Donald Marshall, Jr. statement of May 30, 1971 was when it was in the possession of the Crown Prosecutor at the Preliminary Hearing (Exhibit 1 - R. v. 1, pp. 69, 76). With respect to the Marvel Mattson statement, Mattson's evidence was that there never as an "original" - he typed up his own statement (T. v. 4, pp. 738-739; Exhibit 16 - R. v. 16, p. 59).

Wheaton's Subsequent Reports Do Not Support Wheaton's Position

456. Staff Sergeant Harry Wheaton's reports during the course of his involvement between February and July, 1982, do not contain any concluded opinions about John MacIntyre's investigation in 1971 or in relation to the 1982 reinvestigation (T. v. 44, p. 8136-8145). When asked in 1983 to comment on the handling of the original investigation and particularly "any instances of improper police practices or procedures" (Exhibit 20 - R. v. 20, p. 1), Wheaton's compendious conclusion was that:

Chief MacIntyre chose to believe the statements he wanted to believe and told the witnesses they were telling the truth and they agreed with him. This, I feel, is improper police practice.

...I found Chief MacIntyre to be adamant that MARSHALL is and was guilty and still refuses to look on the matter in balance. I would submit for your consideration that if a police officer in his drive to solve a crime refuses to look at all sides of an investigation and consider all ramifications, then he ultimately fails in his duty. (Exhibit 20 - R. v. 20, pp. 12, 13).

No comment is made about John MacIntyre having attempted to

conceal any documents at any time, let alone the June 17, 1971 statement of ~~of~~ Patricia Harriss, just as Wheaton had not mentioned it in his reports of April 19, 1982 (Exhibit 99 - R. v. 34, pp. 73-74), May 4, 1982 (Exhibit 99 - R. v. 34, pp. 76-77), May 20, 1982 (Exhibit 99 - R. v. 34, pp. 88-89. See also T. v. 44, p. 8146 "as per instructions") and on no further occasion which is documented before this Commission. (1986 report - T. v. 44, p. 8151).

457. Within the week of the libel suit between John MacIntyre and the Canadian Broadcasting Corporation concluding, Staff Sergeant Harry Wheaton suddenly raised the stakes in expressing an opinion about John MacIntyre's 1971 investigation. Staff Sergeant Harry Wheaton advised his superior that he had been asked to comment on, inter alia:

The actions of the Sydney City Police, particularly Chief John MacIntyre and any charges I may have recommended; (Exhibit 20 - R. v. 20, p. 57).

Wheaton had not recommended any charges at that point, but continued to advise his superior officer that if he were to answer the questions honestly:

It would also bring forth the fact that I feel Chief John MacIntyre should be charged criminally with counselling perjury. Thirdly, I do not feel DONALD MARSHALL is the author of his own misfortune. He is the victim of an unscrupulous police officer, John MacIntyre. (Exhibit 20 - R. v. 20, p. 57).

This rather startling assertion by Wheaton to his superior officer quickly put Wheaton in the position where he was ordered

to justify the remarks in his memorandum of June 5, 1986 (Exhibit 20 - R. v. ~~20~~, pp. 58, 63).

458. Wheaton's reply went over the same ground as his previous report about police practices but framed them in terms of evidence "to support a charge and/or further investigation" of John MacIntyre (Exhibit 20 - R. v. 20, pp. 8-13, 63-65). This second review of Wheaton's position about the 1971 investigation dated July 14, 1986 is riddled with misstatements about what witnesses had told him in 1982 and which are unnecessary to detail here. The crucial point is that Staff Sergeant Harry Wheaton once again fails to include any reference to the dropping of the Patricia Harriss statement on the floor. Indeed, there is no documentation before this Commission that Staff Sergeant Harry Wheaton ever reported the matter of the paper on the floor to any of his superiors.

459. It might be argued by some counsel that Wheaton did not mention the paper on the floor because that was a separate wrong from the wrongs that he was discussing in his Reports in relation to John MacIntyre's dealings with witnesses (T. v. 42, pp. (7782-7783). However, it is respectfully submitted that such an argument is precluded by further evidence given by Staff Sergeant Harry Wheaton before this Commission. Wheaton stated that he was concerned during the 1982 reinvestigation that he was being "knowingly misled" by John MacIntyre (T. v. 42, p. 7698), and the incident of putting the paper on the floor was:

It was...if you will, the first physical
overt act that I saw the Chief do. I

felt that he had been misleading me all along, but here he was actually hiding a - piece of paper. (T. v. 44, p. 8145).

That "overt act" done by John MacIntyre would demonstrate knowledge and awareness - indeed mens rea - with respect to the concealment of the Patricia Harriss statement. However, Staff Sergeant Harry Wheaton addressed the very mens rea point when challenged in 1986 to produce evidence about counselling perjury and never mentioned the paper on the floor incident (Exhibit 20 - R. v. 20, p. 65).

460. It is noteworthy that since 1982 Wheaton has continued to expand his criticism of John MacIntyre without any further investigation having been conducted. Indeed, Wheaton's documented activity since 1982 indicates that the idea of criminal charges only became a subject of discussion for him after he had asked about any recommendation about criminal charges by the Canadian Broadcasting Corporation. Wheaton concurred and asked for permission to speak with the C.B.C. but understandably his superior officers were concerned about that and directed Wheaton to justify his position. This Wheaton attempted to do, but without any comment about the paper on the floor incident.

461. ~~—~~ Within three months of this brief justification by Wheaton, this Commission was appointed and obviously Wheaton was going to be a witness. Wheaton was going to be required to testify under oath and to justify to his superior officers an opinion expressed to them. It is at that point that the paper on

the floor suddenly became a centrepiece of Wheaton's testimony - "the first physical overt act that I saw the Chief do" (T. v. 44, p. 8145). It is respectfully submitted that there is just too much adding to this story for this Commission to be satisfied with Wheaton's version of events.

462. There are other reasons to doubt Wheaton's credibility with respect to this matter. Staff Sergeant Harry Wheaton has demonstrated elsewhere and to this Commission that his views and opinions about John MacIntyre's involvement in 1971 and since are fixed, concluded, and admit of no reassessment in light of contrary evidence which has since come forward. For example, Wheaton asked this Commission to accept his opinion about what occurred in 1971 on things such as the Maynard Chant June 4, 1971 statement - even though Wheaton's views about how that occurred and specifically who was present, disagree with the recollection of every other witness who claimed to have a recollection of the taking of that statement. In particular, Wheaton disagreed with John MacIntyre, William Urquhart, Wayne Magee, Beudah Chant, and Maynard Chant himself (T. v. 44, pp. 8050-8070).

463. Wheaton's recollection of the statement on the floor issue ~~is~~ also inconsistent with his notes. Wheaton's recollection is inconsistent with Frank Edwards' notes. Wheaton's recollection is inconsistent with Frank Edwards' recollection. Wheaton's recollection is inconsistent with Frank Edwards' recollection and notes about Donald Scott's knowledge of

the Patricia Harriss' statement. Wheaton's recollection is inconsistent with a reasonable reading of Exhibit 88, as detailed above. Wheaton's recollection has been demonstrated by him to be unreliable with respect to the evidence actually gathered in the course of the 1982 reinvestigation (Exhibit 20 - R. v. 20, pp. 63-65), and particularly with respect to dates (e.g., T. v. 43, p. 7909).

Conclusion

464. What is the reason for the extraordinary change in emphasis in Wheaton's testimony concerning the April 16th incident?

465. He testified at one point:

Well again, all I could say to you, sir, is I, insofar as Patricia Harriss' statement, there is confusion whether it was the 16th or 26th, I believe. And I wished I could clarify it. I've tried with Mr. Orsborn, I can try with you, but I can tell you I do not, to the best of my own personal recollection I think it was the 26th and I base it on a paper flow. And I base it on the fact that I submitted a report stating that. However, I can't be clear in my own mind, sir (T. v. 44, p. 8100).

466. The foregoing is contrasted with his affirmation:

I'm suggesting, I'm not suggesting, I'm stating the man perjured himself (T. v. 42, p. 7751-7752).

467. It would be easy to dismiss Wheaton's outburst on the ground that he craved public recognition. He was familiar with the R.C.M.P. written guidelines concerning dealings with the media (T. v. 44, p. 7991) yet he granted interviews with the

press while Ebsary was still before the Courts. He confirms that he had no ~~per~~mission from any superior to speak with Heather Matheson (T. v. 44, p. 7990) yet advises that "I do recall I spoke fairly openly" (T. v. 45, p. 8215). "I quite properly answered her to the best of my knowledge" (T. v. 44, p. 7989).

468. He testified that he spoke with Michael Harris on eight occasions, had lunch a few times with him; indeed drove down to Windsor to spend three or four hours over lunch with Harris ("Basically, I endeavoured to assist him in the writing of his book, anyway he wanted.") (T. v. 45, p. 8206).

469. One contrasts these disclosures with his statement "the general rule of thumb, yes, My Lord, is you do not speak of a case while it is before the Courts, and I've always tried to adhere to that" (T. v. 45, p. 8225).

470. His calculated comment "we were able to place Mr. MacLean at the front door of the restaurant in a blinding snowstorm at approximately 4:00 to 5:00 o'clock in the morning (T. v. 44, p. 8170) when he knew that charges had not been laid against MacLean, and further that the Insurers had paid up on the insurance, was, in our respectful submission, calculated to enhance his own image.

471. — There is, however, a more fundamental and important explanation for Wheaton's challenge to MacIntyre. Wheaton required a villain, and MacIntyre was the easiest target. This Commission, it is respectfully submitted, must be careful not to be seduced by the same siren call. It is human nature to wish to

resolve problems, to try to find solutions, to package things neatly. Our position is that there are no villains in this tragedy but rather a number of completely unrelated events which happened to coalesce at a point in time, and combined to send Donald Marshall, Jr. to prison and to keep him there.

472. Support for Wheaton's prejudice against MacIntyre is found when one considers the following points:

(1) When asked why Maynard Chant gave his first incorrect statement of May 30, 1971 to John MacIntyre, Wheaton said "he was pressured by the Sydney City Police" (T. v. 44, p. 8034). There is no reference, however, in the statements that Chant gave to the R.C.M.P., nor indeed in his viva voce evidence before this Commission, that he was ever under any pressure by the Sydney City Police with respect to the first statement (T. v. 44, p. 8026-8033). Indeed there is no reference to John MacIntyre in either the first or second statements given in 1982 by Chant to the R.C.M.P.

(2) Wheaton concludes that the Sydney City Police should have known John Pratico was a patient at the Nova Scotia Hospital and should have communicated that information to the Crown (T. v. 44, p. 8043). Wheaton, however, acknowledged on cross-examination that if Pratico's physicians knew he was going to be a key witness at a murder trial, that would have been a relevant factor. He did not carry out any investigation in this regard (T. v. 44, p. 8045).

(3) Patricia Harriss states in her statement to Wheaton that Terry Gushue was browbeaten. In reviewing the statement taken from Gushue by the police there is no support for this allegation (T. v. 44, p. 8046).

(4) Wayne Magee advised Wheaton that MacIntyre did not exercise any undue

pressure on Chant in taking the statement of May 30th. This very key statement supporting MacIntyre, was not noted by Wheaton in the statement taken from Magee (T. v. 44, p. 8049).

(5) Harry Wheaton maintains that Wayne Magee was not present at the taking of the second Chant statement in Louisbourg on June 4th. He acknowledges that "it was very important who was there" (T. v. 44, p. 8050, 8052). The evidence however reveals that Wayne Magee was in fact present. Wayne Magee says he was there (T. v. 44, p. 8050). John MacIntyre said Wayne Magee was there (T. v. 44, p. 8054). Urquhart presumably said Wayne Magee was there (T. v. 44, p. 8054). Mrs. Chant says Wayne Magee was there (T. v. 44, p. 8060, 8063, 8098) and Maynard Chant himself states that Wayne Magee was present (T. v. 44, p. 8167, T. v. 45, p. 8191).

(6) Wheaton in his reports failed to give any weight to the fact that MacIntyre gave statements at the commencement of the reinvestigation consistent with Donald Marshall's allegations of innocence (T. v. 44, p. 8078). Wheaton failed to acknowledge that MacIntyre, when delivering statements to the R.C.M.P. reinvestigation, left out statements which were consistent with Marshall's guilt (T. v. 44, p. 8094, 8118).

(7) Wheaton himself left out certain critical statements in his report to his superiors taken during the 1971 investigation which were consistent with Marshall's guilt (T. v. 44, p. 8087).

(8) Wheaton came to the conclusion that Donald Marshall was innocent even before he interviewed him in Dorchester on February 18, 1982 (T. v. 44, p. 8089). He had only taken three statements at this time - James MacNeil (whom Alan Marshall described as "subnormal intelligence, slightly mental, I have no doubt in my mind he is not telling the

truth" - and did not even take a statement from him (T. v. 44, p. 8090)). Byron Sarson (with whom Wheaton was not impressed) (T. v. 44, p. 8091) and Maynard Chant (who lied in the first two statements he had given in the 1971 investigation, and also had lied at the preliminary hearing and trial).

(9) Wheaton was quick to assume MacIntyre had pressured Pratico during the course of the jury trial to change his evidence (T. v. 44, p. 8134) when a brief investigation would have revealed that Simon Khattar was present throughout any meeting at which MacIntyre was present.

(10) Wheaton criticized MacIntyre for not handing to defence counsel copies of all statements taken during the 1971 investigation (T. v. 44, p. 8150) when clearly, in our submission, the criticism if justified should be directed towards the Crown Prosecutor.

(11) Wheaton's first reports of May 5 and May 20, 1982 to his superiors after the reinvestigation contain significant inaccuracies detrimental to MacIntyre (T. v. 44, p. 8137 and seq.).

(12) In the 1986 report directed to Superintendent Vaughan there are a number of inaccuracies, all reflecting detrimentally on MacIntyre (T. v. 44, p. 8154) -

(a) Chant will state he was interviewed by MacIntyre (T. v. 44, p. 8155);

→ (b) In the statement he will give evidence that he said what MacIntyre told him to say, basically that he saw Donald Marshall, Sandy Seale and two other men on Crescent Street (T. v. 44, p. 8155);

(c) He advises he was afraid of MacIntyre who threatened him by banging the table and talking loudly

(T. v. 44, p. 8157);

- — (d) The Court transcripts were checked. In all instances Chant's recall has been extremely accurate (T. v. 44, 8158);

(e) "Pratico will give evidence" (T. v. 44, p. 8161) whereas Wheaton's thinking was Pratico should not be called to give evidence because of mental problems (T. v. 45, p. 8188).

S. General Racial Prejudice

The Task of This Commission

472. Upon appointment, this Commission considered that allegations of racism in the administration of justice in Nova Scotia were sufficiently serious in the circumstances of this case to justify a grant of standing, and then funding, to the Black United Front and Union of Nova Scotia Indians. However, explorations of the racism issue were not confined at the hearings before this Commission to those groups, nor were the inquiries restricted to the administration of justice generally. Instead, there was a great deal of evidence which appeared to be directed toward the conclusion that one particular individual or another had specific racial prejudices. John MacIntyre was the subject of some of this testimony.

473. It is respectfully submitted that the reception of that evidence puts this Commission in a difficult position. The Commission was appointed to look into the circumstances surrounding the prosecution of Donald Marshall, Jr., for the stabbing of Sandy Seale. Certainly proof of racial motivations distorting the criminal justice process in that case would be extremely germane to this Commission's deliberations. However, where the evidence is not so related to this particular case, and does not itself make any connection with the specific circumstances of the Seale murder investigation, this Commission is left with a body of evidence which has gone well outside the

bounds of this Commission's inquiries and made severely damaging imputations with respect to the reputation of individuals. It is therefore respectfully submitted that this Commission has a duty to redress any apparent unfairness which has occurred as a result of a broad approach to the reception of evidence in the first instance. This Commission was not established, just as a criminal trial is not established, to put anyone on trial for his whole life.

474. As Mr. Justice Macdonald stated in R. v. Gottschall (1983), 10 C.C.C. (3rd) 447 (N.S.S.C., A.D.), at p. 463:

The judicial experience has been that it is fairer to try a man on the facts of the particular case than to allow the prosecution to try him on his whole life. A rule of policy based on fairness has therefore emerged that the prosecution may not, in general, introduce any evidence of the bad character of an accused, simply to show that he is the sort of person likely to have committed the offence.

And, in Koufis v. The King (1941), 76 C.C.C. 161, at p. 170 (S.C.C.), Mr. Justice Taschereau stated that:

When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, "and the evidence must be limited to matters relating to the transaction — which forms the subject of the indictment" (Maxwell v. Director of Public Prosecutions, [1935] A.C. 309). Otherwise, "the real issue may be distracted from the minds of the jury," and an atmosphere of guilt may be created which would indeed prejudice the accused.

The only exception to the rule of fairness is evidence which

bears upon the question of whether the acts alleged were designed or accidental— such as ongoing feelings of hatred, hostility, emnity, or ill will towards a particular victim. However, it is respectfully submitted that unless such a connection exists, the rule of fairness adopted by the Criminal Courts ought to be sedulously guarded by this Commission as well. To do this now that the evidence has been heard requires specific dissociation from such evidence which is not referable to the particular investigation studied by this Commission.

General Evidence of Racial Bias

475. Barbara Floyd testified to this Commission that while she had heard stories, in the time between 1970 and 1973 when she was friendly with Indian boys in Sydney, neither she nor they had any particular problems with the City of Sydney Police, and that of course included John MacIntyre (T. v. 18, pp. 3146, 3170, 3171-3172). Indeed, in her one personal contact with John MacIntyre during the course of the Seale murder investigation, which was an interview at her home in the presence of her parents, questioning by counsel for the Union of Nova Scotia Indians brought out the fact that John MacIntyre did not make any comment about Indians in general at that time (T. v. 18, p. 3187). —→

476. Sandra Cotie had a personal assumption that the Sydney Police did not like the group of Indian boys she associated with but this "wasn't based on anything in particular" (T. v. 18, pp. 3194-3195). In fact, Cotie could not even

remember anyone in the group actually saying that they thought that they ~~were~~ being "picked on" by the Sydney Police (T. v. 18, p. 3203). Any contact Cotie did have with the police did not include contact with John MacIntyre (T. v. 18, p. 3236). Indeed, Sandra Cotie did not herself observe any differential approach as between Indians and Whites hanging around in the park by the Sydney Police with whom they did come into contact (T. v. 18, pp. 3236-3240).

477. Mary O'Reilly (Csernyik) only had one contact with the police prior to the Seale murder investigation, and despite her regular association with the Indian boys, did not think that they got into trouble any more than Whites that she knew (T. v. 18, pp. 3278 ff, 3282, 3286). Mary O'Reilly's one contact did not even involve John MacIntyre (T. v. 18, p. 3279).

478. Catherine O'Reilly (Soltesz) only had contact with the police once and that was during the Seale murder investigation. Although she associated with the Indian boys, she herself was never questioned by police on patrol and indeed, never even overheard conversations by the police involving or making reference to Indians in a disrespectful way (T. v. 19, pp. 3358, 3362-3363, 3436). However, she felt able to express the opinion that ~~the~~ Sydney Police did not like Indians because some were put in jail for break and enter offences which her companions claimed that they never did (T. v. 19, pp. 3404-3405). However, Catherine O'Reilly did not feel "clear enough" to speak about any incidents in particular (T. v. 19, p. 3404).

Catherine O'Reilly had no evidence specifically relating to John MacIntyre except with respect to the taking of her statement during the Seale murder investigation.

479. So far as Native witnesses themselves, Artie Paul's evidence is that he had direct contact with John MacIntyre on about three occasions, all in relation to "petty crime" to which Paul ultimately pleaded guilty (T. v. 24, pp. 4344-4348). Paul testified:

I had no problems with John MacIntyre.
(T. v. 24, p. 4348).

It appears that Paul had respect for MacIntyre, but did not think much of MacIntyre's investigative abilities (T. v. 24, p. 4368). MacIntyre's interviewing style was described as slow, laid back and gentle, dominating the interview (T. v. 24, p. 4369). Paul stated that John MacIntyre did not lose his temper, but rather used it (T. v. 24, p. 4369). Counsel for the Union of Nova Scotia Indians, who is on a first name basis with this witness (T. v. 24, p. 4360), lead the witness to say that MacIntyre would display a strong temper at times and would raise his voice (T. v. 24, p. 4369). It is respectfully submitted that there is nothing in Arthur Paul's evidence which suggests anything in the nature of racism on the part of John MacIntyre. → Certainly, there is nothing worse in these remarks by Arthur Paul than what Chant, Pratico and Harriss claimed to have endured during the 1971 investigation.

480. Bernard Francis was a court worker for a number of years and had occasions to come into contact with John MacIntyre

(T. v. 22, p. 4013). Francis may or may not have spoken with John MacIntyre in 1971 or 1972 about the possible finding of the alleged murder weapon, but could not specifically state on oath that he had, despite the fact that he was familiar and would have been familiar with John MacIntyre's voice (T. v. 22, pp. 3974, 4013). Again, after a leading question from counsel for the Union of Nova Scotia Indians, Francis recalled someone - perhaps Tom Christmas - making a statement to the effect that MacIntyre was not interested in the truth, but rather was interested in Indians (T. v. 22, pp. 4090-4091). That leading question had followed a previous leading question to which Francis had agreed that Indian youth on the Reserve did not want to talk to John MacIntyre (T. v. 22, p. 4090).

481. The only specific incident described by Bernard Francis involving contact between himself and John MacIntyre was in relation to a charge of arson which had been laid against a particular person. Francis went to MacIntyre and expressed concern about the serious nature of that charge in the circumstances. At that time, MacIntyre "was a bit rude", "not interested in listening", and MacIntyre thought there was enough evidence to warrant a charge. Francis says that he expressed the same concerns ~~later~~ to the Crown Prosecutor Donald C. MacNeil without success in having the arson charge withdrawn (T. v. 22, p. 4086). The point Francis was making in relating this incident was that this particular woman who was charged received poor treatment when the matter came to Court and the charges were not

really understood by her (T. v. 22, pp. 4086-4088). There is no evidence that John MacIntyre's belief that the facts supported the charge was misplaced, or even if misplaced that the belief was dishonest or unreasonable and developed for racial reasons.

482. Roy Gould had no comment or complaint about John MacIntyre as a Detective. On the one occasion during the Seale murder investigation when they came into contact things were cordial, the statement given reflected what Gould had to say, and in particular no threats or pressure was put on him (T. v. 21, pp. 3855-3856). Gould was asked about MacIntyre raising his voice, to which Gould indicated that MacIntyre was a big man and had a deep voice apparently for that reason (T. v. 21, p. 3856). Gould and MacIntyre would have had other brief encounters - including MacIntyre selling Gould a car "and I thought he gave me a good buy" (T. v. 21, p. 3882).

483. The evidence of Gould only indicates one disappointment or difference of opinion between himself and John MacIntyre during all of the years that both have been in Sydney. This difference of opinion was in relation a proposal for a Community Relations in the Law project (Exhibit 66) which John MacIntyre did not support or endorse (T. v. 21, pp. 3842-3846). Gould indicated that MacIntyre did not agree that some of the assertions in the proposal (as to the necessity of the project) were valid, and Gould acknowledges that the proposal could have been read as levying criticism at the Sydney City Police (T. v. 21, p. 3862). Gould's own perception was that John

MacIntyre did not feel very comfortable with the project (T. v. 21, p. 3884).— It is respectfully submitted that there is nothing in this evidence to suggest any discriminatory or racist motivation to John MacIntyre's failure to endorse the Community Relations Program.

484. Eva Gould was a Court worker in the Sydney area between 1972 and 1976 (T. v. 73, p. 13014). Eva Gould testified that Native people did not trust the City Police, and did not think that the City Police tended to believe Native suspects (T. v. 73, p. 13046). Eva Gould did not attempt to speak generally for Natives or for difference as between Native boys, white boys or Black boys (T. v. 73, pp. 13047, 13050-13051). Eva Gould did not think that Natives were afraid of the police because of bad experiences suffered themselves (T. v. 73, p. 13047). One "bad experience" which Eva Gould did describe specifically was not related to John MacIntyre in any way (T. v. 73, pp. 13047-13048).

485. When counsel for Donald Marshall, Jr. raised the name of John MacIntyre, Eva Gould was unsure about who counsel meant, and then asked:

A big person[?]

which counsel confirmed for her (T. v. 73, p. 13048). As a result of this prompting, Eva Gould then testified that:

He didn't like us so we didn't have too much dealing with him because the impression was always, "I don't need you to do my work." (T. v. 73, pp. 13048-13049)

referring to the Court worker Program (T. v. 73, pp. 13048-

13049). Eva Gould went on to offer that:

— "...even the name always scared me because of the, like he put on a big, I don't know if it was a big air or what, but he would come across as like you were going to be in trouble any minute for talking to him. You were going to be locked up or you were going to be, it was always intimidating to me. I was always very scared. And it wasn't just myself it was some people. And it was basically how he presented himself, how he talked to us, his tone of voice. How he treated you, type of thing (T. v. 73, pp. 13049-13050).

Simon Khattar, Q.C., said essentially the same thing - when you were in the presence of John MacIntyre you knew you were in the presence of authority (T. v. 26, pp. 4830-4831).

486. Finally, Eva Gould agreed with counsel for Donald Marshall, Jr.'s assertion that Native people would have been treated differently by John MacIntyre than John MacIntyre would have treated "White police officer colleague[s]" (T. v. 73, p. 13050). It is respectfully submitted that there is nothing in this evidence to justify a conclusion that John MacIntyre was somehow racist because he was big and intimidating. Also, it would be amazing if a police officer had the same relationship with members of the general public as he had with his police officer colleagues.

The Joan Clemens Matter

487. There was direct evidence about one incident involving John MacIntyre which some other witnesses had heard about which satisfied these other witnesses that John MacIntyre treated Indians differently than he would have treated White

persons. This was the interview sometime before the Seale stabbing of Joan Clemens about the giving of liquor by Donald Marshall, Jr. to Joan Clemens. Barbara Floyd testified that this had been an isolated incident (T. v. 18, pp. 3182-3183). Barbara Floyd spoke with Joan Clemens the day after this incident allegedly occurred and identified her understanding or perception that MacIntyre took the position he did with respect to the Clemens incident because of Donald Marshall, Jr. as a person and not Donald Marshall, Jr. as an Indian (T. v. 18, pp. 3183-3184). This was the same position Barbara Floyd took with respect to the incident on examination by Commission counsel (T. v. 18, pp. 3142, 3144). Barbara Floyd also testified that the offence which John MacIntyre had been investigating at the time was one that she had seen Donald Marshall, Jr. commit herself (T. v. 18, p. 3169).

488. Sandra Cotie said that one of the reasons she had the impression that the police did not like the Indians was also the Joan Clemens incident (T. v. 18, p. 3196). Initially Cotie was with Clemens when Clemens was asked to get into the police car, but Cotie was then ordered out of the vehicle. Cotie "probably" spoke to Clemens the next day (T. v. 18, p. 3199). The police had given Joan Clemens and her mother a very hard time, and in particular, Cotie assumed that MacIntyre was the one who said that Joan's mother was an "unfit mother" and a "bag" (T. v. 18, pp. 3200-3201). Cotie never spoke to Mrs. Clemens personally about it (T. v. 18, pp. 3201-3202). Cotie

acknowledged that she had never heard from Joan Clemens that John MacIntyre ~~ever~~ said anything derogatory about Joan going out with Indians (T. v. 18, p. 3246). Cotie was aware that Donald Marshall was actually found guilty in the case of serving liquor to Joan Clemens, and Cotie herself had personal experience from that time of Donald Marshall, Jr.'s giving liquor to minors (T. v. 18, pp. 3246-3247). It is respectfully submitted that this recollection does not support any animus on the part of John MacIntyre with respect to race.

489. Emily Clemens, the mother of Joan Clemens, testified about the contact that she and her daughter had had with John MacIntyre. Leaving aside at this point any questions about how MacIntyre interviewed Joan Clemens, it appears that little if any of the discussion was based upon race or racial issues of any kind. There was a dispute between Emily Clemens and John MacIntyre when she said that he was "like bloody Gestapo or Russian" and "a lobster", while John MacIntyre is alleged to have told her that she was not:

...what you would call a proper person to bringing up any child because I didn't - that I was letting my children run around with unsavory characters. To that effect. (T. v. 19, p. 3460).

Donald Marshall, Jr. was mentioned in relation to the difficulties which he had encountered with the law, and MacIntyre did tell her that Marshall was an Indian (T. v. 19, pp. 3461-3463, 3470-3475). Counsel for the Union of Nova Scotia Indians pursued this point with Emily Clemens that MacIntyre seemed

concerned about Joan Clemens hanging around with Donald Marshall, Jr. and other Indians. Counsel asked:

Q. Okay. And was this a point, then, that was of some significance to him then?

A. I don't know right off hand. I don't know because I said -

Q. What do you suppose you were supposed to get out of the fact that he was telling you that your daughter was hanging around with Indians or hanging around with Jr. who was a Indian?

A. Well, I guess that she just wasn't going around with the right crowd. That's - because otherwise why would I be an unfit person to look after my daughter.

Q. Okay. Would you agree that it's fair to think that he was intimating to you that Marshall should be avoided? That he was undesirable for your daughter to hang around with because he was an Indian?

A. Well, the way I thought it was, it - I don't know what it - at that time I could take it both ways. It could have been for what things he was involved in at the time or as if he was what he was. But I didn't quite think of it.

Q. Okay. Now -

A. Just that he wasn't just the person that my daughter should be hanging around with. That's the only thing that had come to my mind at the time. (Emphasis added) (T. v. 19, pp. 3517-3518).

490. It is respectfully submitted that the evidence from Emily Clemens and the other witnesses who have some knowledge

through hearsay of this incident that John MacIntyre's main consideration at the time was not any racial issue. Instead, to the extent that any views may have been expressed by John MacIntyre to Emily Clemens, they were directed toward the kind of person, with the kind of local history, that Donald Marshall was understood to be and to have. At this point, it is sufficient to conclude that the evidence falls short of establishing racism or racial prejudice in this situation.

Thomas Christmas

491. Thomas J. Christmas testified about the various encounters he had with John MacIntyre. In the course of that discussion, Christmas had cause to mention the general relationship of the Indian youth to Sydney Police at about the time of the Seale murder investigation. Christmas actually gives very little testimony from which one might be able to infer a racist or discriminatory state of mind on the part of John MacIntyre.

492. Christmas did testify to the impression which he and others had - that John MacIntyre was not after the truth but was after Indians (T. v. 23, p. 4227). Christmas indeed recalled making such a remark, but could not be specific as to a time and date or place:

That happened in 16, 17 years ago. (T. v. 23, pp. 4227-4228).

Christmas testified that he recalls being told:

...if it wasn't for you Indian people none of this would be happening. (T. v.

23, p. 4227);

— —
and he said that when the Detectives were taking statements, "they" would holler, call the witness a liar, and would say:

You're nothing but a bum on the street
(T. v. 23, p. 4278),

and a bum who would go around bothering people.

493. These are the kind of non-specific allegations which it is virtually impossible for someone in the position of John MacIntyre to respond to in his own defence. This Commission really can have no idea as to the circumstances in which any of these alleged remarks were supposed to be made. Specific remarks when recalled are not brought home to specific individuals.

494. It appears from the documentary evidence that Mr. Christmas' recollection with respect to the involvement of particular officers on particular offenses in his record is not always correct (e.g., T. v. 23, pp. 4142-4151, 4230-4232; Exhibit 48 - R. v. 22, p. 8). The basis for much of Tom Christmas' criticism of the police appears to be that he was victimized by the Detective Division and was not responsible for the offenses charged against him and which appear on his criminal record (Exhibit introduced T. v. 23, p. 4205). It is respectfully submitted ~~that~~ it is not within the mandate of this Commission to effectively retry those cases now to determine any issue before this Commission. From very early on in his criminal record, Tom Christmas knew the difference between standing accused and standing convicted (T. v. 23, pp. 4229-4230). Tom Christmas

acknowledged to this Commission that he would make up stories to tell the police, effectively lie to them, when they were conducting investigations (T. v. 23, pp. 4233, 4236-4239). It is respectfully submitted that upon consideration of all of these factors, the evidence of Thomas Christmas does not carry sufficient weight or cogency to justify a finding of a racist or discriminatory animus on the part of John MacIntyre.

Other Comments

495. Staff Sergeant Harry Wheaton testified that during his first meeting with John MacIntyre in February, 1982, about the original Seale investigation he asked MacIntyre why he had not asked Dr. Virick to get a blood sample from Donald Marshall, Jr. (T. v. 41, p. 7518). John MacIntyre's alleged reply was that:

Those brown-skinned fellows all stick together. (T. v. 41, p. 7518)

Wheaton asked MacIntyre what he meant by that and MacIntyre advised that Dr. Virick "was the Indian doctor...which treated Indians on the Reserve" (T. v. 41, pp. 7519). Wheaton himself took from the name that Dr. Virick "was probably an East Indian or Pakistani" (T. v. 41, p. 7519). Wheaton of course had no notes of this interview. Even if believed, this comment stands as an isolated remark following of over eighty days of testimony during which no stone was left unturned by Commission Counsel and the Union of Nova Scotia Indians' counsel to bring forward this kind of evidence.

496. In assessing the reliability of the Virick comment

having being made, and if made whether it demonstrates any attitude on ~~the~~ part of John MacIntyre, this Commission may wish to consider that those who may wish to attempt to discredit evidence given by Oscar Seale will do so on the basis that in some way Oscar Seale and John MacIntyre are as thick as thieves with respect to a continuing belief in Donald Marshall, Jr.'s guilt. Such a position is hardly consistent with the remark attributed to John MacIntyre by Staff Sergeant Harry Wheaton.

497. A further ground upon which to doubt the reliability of Staff Sergeant Harry Wheaton is the fact that other evidence before this Commission indicates that John MacIntyre's relationship with representatives of the Native and Black races in Sydney was good. For example, Parole Service Officer Archie Walsh who was otherwise quite negative about John MacIntyre's approach to parole in this case and otherwise, did state that John MacIntyre held Donald Marshall, Sr. in high regard and with great respect (T. v. 40, p. 7464). While Donald B. Scott had no opportunity to observe John MacIntyre's attitude towards natives in Sydney, he did indicate that:

I know with Blacks in the Pier during Armistice Day ceremonies and afterwards, we used to go to the Legion as invited guests and quite often we ran into Blacks ~~at~~ at the Legion that all knew Chief MacIntyre and they used to come up and talk to him about the old days. (T. v. 50, p. 9194).

498. Without multiplying these few references by others which appear in the evidence, it is respectfully submitted that the attribution of the apparently racist remark by Wheaton to

MacIntyre is not supported by any other evidence. Thus, we would respectfully submit that this Commission should conclude with respect to this point as with all others referred to in this section of the brief, that there is inadequate support for any attribution of a racist attitude or prejudice of any sort on the part of John MacIntyre as against Natives or Blacks.

PART V

CONCLUSION

The Role of John MacIntyre

499. John MacIntyre has been a focus of the hearings conducted by this Honourable Commission, and his conduct over the years of his career has been subjected to minute and, at times, highly confrontational scrutiny. This Honourable Commission quite appropriately insisted from the start of its hearings that this inquiry into the administration of justice in Nova Scotia should be subjected to not only the consideration of the Commissioners but the public as well. As the Chairman stated on September 18, 1987 (T. v. 8, pp. 1323-1324):

The chief concern of this Commission is to obtain the facts. Freedom of the press is a report - is a right to report fully. In that regard, this Commission has had, in my view, the maximum public exposure, the maximum coverage by the media with unrestricted right of access that has been enjoyed before any Canadian Commission.

— The right of the press to report fully is secondary only to the Commission's duty to ensure that all relevant evidence is given freely and uninhibited.

Commission counsel's motion would in no way prevent the media from reporting fully upon the proceedings. It would merely ensure that a witness be allowed to testify without such testimony being

impeded by floodlights.

- —In our view, the public can best be served and protected and the adjudicative role of this Commission discharged fairly and properly by granting the application of John Pratico....

The openness with which this Commission has conducted its proceedings had not been without its stresses for those who have become a focus of evidence, as John MacIntyre has, as much as it has from time to time for the Commissioners themselves (e.g., T. v. 10, pp. 1788-1790).

500. Now that the Hearings have concluded it will be for the Commissioners to consider the evidence as a whole and come to conclusions which will assist in providing Nova Scotians in the future with a system of justice in which they and all other Canadians can be confident. Unlike the counsel appearing before this Commission, this Commission at last has the opportunity and, we suggest, the obligation, to look at all sides of the Marshall affair, to consider all ramifications - in short to look on the whole matter in balance. This will not be a process that can be rushed. Very few witnesses appearing before this Commission with respect to connections with the Marshall matter at some point in time or at several points in time have managed to remain uncommitted to one or another view of the case. In the case of some witnesses this is understandable. In the case of other witnesses even though a preference for a particular theory may be admitted to or hinted at, their ability to continue to look on the matter in balance has remained. It is the evidence of these

witnesses which can best guide the Commissioners when considering John MacIntyre's role in the Marshall matter.

Norman MacAskill

501. Norman MacAskill was John MacIntyre's predecessor as Sergeant of Detectives after which MacAskill served as Deputy Chief with the Sydney City Police (T. v. 17, pp. 3011-3012):

Q. During that course of time up until 1966, did you form any opinion as to Mr. MacIntyre's competence as to Mr. MacIntyre's competence as a detective, as an investigator?

A. Well, he was certainly a hard-working, dependable man.

Q. Yes. Did you form any opinion as to his competence as an investigator?

A. I would think that he was quite competent.

Q. Did you think that?

A. Pardon?

Q. Did you think that?

A. Yes.

Q. Did you ever have occasion, either during the time that you were the Senior Detective or during the time that you were Deputy Chief, to formally commend Detective MacIntyre?

A. I can't recall offhand.

...

Q. Did you ever have occasion to formally criticize or reprimand Detective MacIntyre?

A. No.

Also (T. v. 17, pp. 3060-3061):

- A. ...He was very attentive to his work. Hard working man. You know, he always followed up everything he was involved in.
- Q. Would he, in your experience, set up facts and ignore other facts?
- A. Pardon?
- Q. Would he, in your experience, set up certain facts and ignore other facts?
- A. Oh, no.

Staff Sergeant David Murray Wood

502. Murray Wood was stationed in Sydney, Cape Breton from 1964 to 1972. He had occasion to work with John MacIntyre from time to time (T. v. 10, p. 1813):

- Q. What was your opinion or what is your opinion of him and the work that he was carrying out?
- A. I'd say that Detective Sergeant MacIntyre was conscientious. He was a "take charge" type of individual who, I thought, tried to do his job to the best of his ability.

Joseph Terrance Ryan

503. Inspector Joseph Terrance Ryan was stationed with the R.C.M.P. General Investigation Section at Sydney between 1970 and 1972 and, like his partner Murray Wood, had occasion to work with Detective MacIntyre (T. v. 11, p. 1857):

I had known both [MacIntyre and Urquhart] of those individuals on and off from 1964. I would say that Detective MacIntyre was a very determined investigator. I would say that he was conscientious and on the surface, as I

had known him, I would also say that he was competent, based on the police - community at that time.

Ryan explained in more detail as follows (T. v. 11, pp. 1877-1878):

- Q. Had you ever had occasion to work with him on any kind of homicide investigation?
- A. No, I did not work with Sergeant MacIntyre in any detailed fashion on any investigation or taking of statements or assisting in an investigation to that extent.
- Q. So is it fair to say that your view of him does not arise from having worked with him in any detailed way?
- A. My view of him would be from having known him since 1964 and having had a number of encounters with him through exchanges of police information and what have you from seeing him in the courtroom on numerous occasions with cases before the Court. So I would have formed an opinion over him - an opinion of him based on a number of contacts with him over a number of years.
- Q. Would it be fair to say that from your perspective you regarded him as someone with a lot of common sense and wouldn't miss the obvious?
- A. Yes, that would be a fair statement.

Douglas James Wright

504. Douglas Wright had a thirty-four year career with the R.C.M.P., rising to the position of Assistant Commissioner from 1977 until retirement in 1982. Between 1959 and 1962 Wright was the Corporal in charge of the Sydney General Investigation Section of the R.C.M.P. Wright worked on various investigations

quite closely with John MacIntyre. When questioned by Commission counsel, Wright had the following comments (T. v. 28, pp. 5253-5257):

Q. ...How would you describe his style? Did he have a style?

A. Well, he persevered. There was no question about that. You know, John MacIntyre is an investigator in my view and I'm not speaking on part of the force. I'm giving my own personal views, hey.

Q. Yeh.

A. John MacIntyre in my view as far as an investigator was concerned was a hard working digger. You know, I've often used the phrase that the good investigator succeeds when others fail because he's still working when the others have gone home and gone to bed.

Q. Yes.

A. And I think he fit that bill very, very well to be quite frank with you, but certainly a very, very diligent investigator. Quite frankly speaking I never saw him do anything in an interrogation that would concern me in the area exceeding his authorities or doing anything that was unethical or trying to fabricate anything or anything of that nature. There was nothing to concern me.

Q. Have you -

A. I guess to best describe him, and you know, it's certainly my opinion and again, you know, when I left Sydney and went to Halifax I was in charge of the plain clothed units there and I know I had to come down occasionally to Cape Breton on investigations and I would almost think it was a general feeling that

- — if you wanted to know anything about what was on the move in the criminal circles in the City of Halifax or the City of Sydney, Mr. MacIntyre was a pretty good fellow to get ahold of.

...

Q. Is there anything else you want to tell us about Sergeant MacIntyre or tell the Commissioners about your opinion of him or his confidence as a police officer?

A. No, I always looked upon him as I say, as being extremely competent as far as an investigator was concerned.

E. Alan Marshall

505. Inspector E. Alan Marshall by his own admission fumbled the re-investigation of the Seale stabbing in November, 1971 (T. v. 31, pp. 5729-5730). Marshall had been posted in Sydney, Nova Scotia, in 1958 and 1962, and during the 1962 posting worked on a number of cases with John MacIntyre. Marshall's impression from working side by side with John MacIntyre (T. v. 30, pp. 5602-5603) was stated as follows:

Q. And what was your impression of him?

A. My impression?

Q. Yes.

—→ A. Well, my total impression was that here was a man who was a very dedicated policeman. Very energetic. Always ready to help, you know, if I wanted help. He impressed me as being reliable and besides that, a good fellow to work for or work with.

Q. Good fellow to work with in what sense?

A. Well, he was easy to get along with.

- —Q. What sort of guy -

A. His enthusiasm was sort of infectious. His enthusiasm was infectious and he was always anxious to get on with the job.

Q. Did you find him easy to relate to?

A. Yes, sir.

Simon Khattar, Q.C.

506. Simon Khattar has practiced law in Cape Breton since 1936, and has acted both as Crown Prosecutor and Defence Counsel. Simon Khattar testified as follows (T. v. 25, p. 4699):

Q. - did you have any experience with the Sydney Police when you were Prosecutor?

A. Considerable.

Q. And what about specifically with Sergeant MacIntyre or Chief or Detective Urquhart?

A. Both of them were - I found MacIntyre a tougher officer than Urquhart. You could talk to - you could talk to both of them. I found MacIntyre as I say as a very tough officer but from my own personal experience, an honest officer.

Q. Was it your experience with MacIntyre that he would bring to you as Prosecutor, his entire file?

—→
A. That was my experience.

Khattar knew MacIntyre as "a very belligerent officer who took statements" (T. v. 25, p. 4715), by which he meant (T. v. 26, pp. 4830-4831):

Q. ...You also described John MacIntyre

on Friday as a belligerent man. A belligerent man that took statements.

A. Yes.

Q. And did you mean by that that he was a big man with a loud voice?

A. He was a big man with a loud voice. When he asked you questions he'd scare you.

Q. You knew you were in -

A. I was going to say, "scare the hell out of you", but that's what I mean anyhow.

Q. You knew you were in the presence of an authority?

A. Yes, sir.

Counsel for Donald Marshall, Jr. also established through Simon Khattar that:

Both Mr. Rosenblum and I thought that Detective Sergeant John MacIntyre was a good officer and a tough prosecuting officer. That was my feeling and I took that to be that of Mr. Rosenblum. We both thought he was an honest officer. (T. v. 26, p. 4828).

Judge Lew Matheson

507. Judge Lewis Matheson worked as a Crown Prosecutor between 1964 and 1980 when he was appointed to the Provincial Court Bench. Counsel for Donald Marshall, Jr. elicited the following comment about John MacIntyre by Judge Matheson (T. v. 27, pp. 5080-5081) in response to the suggestion that the O'Reilly and Harriss statements contained "utter fabrications" by John MacIntyre:

A. If you'll - if you'll let me go

further and permit an opinion to my -
to this day -

Q. Sure.

A. - I'm satisfied that the statement
John MacIntyre gave was one that he
received from those people.

Q. Of course, you say that, but what do
you base that on?

A. On - on the - on my dealings with
John MacIntyre at the time and
throughout his entire career, sir.
Inasmuch as I was aware. I've known
him since 1957 to today.

Q. And it is indeed unfortunate then
that a number of different people are
now saying that Sergeant MacIntyre
inserted these bits of evidence into
their statement?

A. Yes, it's - from my association with
the man, it's - it's unthinkable.

Later, Judge Matheson expanded upon this (T. v. 27, p. 5102):

A. I considered John MacIntyre to be
honourable in every way. I
considered him a formidable officer
to cross-examine, not in the sense
that he wouldn't disclose but in the
sense that John MacIntyre - Cross-
examination usually disclosed that
John MacIntyre had done his homework
and my experience as a defence was
that you got yourself into trouble
when you looked - looked behind it.
I considered at all times that John
MacIntyre was an honourable police
officer and I say so today.

Michael Whalley

508. Michael Whalley was the City Solicitor for the City
of Sydney from 1958 until the date of his testimony, although
officially he is retired. Prior to his taking the position of

City Solicitor, Whalley had been a part-time Stipendiary Magistrate for four years. Asked about his experience of John MacIntyre over the years, Whalley stated that (T. v. 62, pp. 11121-11122):

- Q. ...Let me start, first of all, with John MacIntyre. What's been your experience with him over the years?
- A. Well, I've known John MacIntyre ever since I started practicing law in Sydney. Certainly when I was Stipendiary, I would see him on practically a daily basis. And after I was appointed City Solicitor, I would see him very often, and particularly after he became Chief of Police.....

Whalley continued (T. v. 62, pp. 11123-11124):

Q. Over the course of the years then dealing with John MacIntyre, what was your impression of him as a policeman, as an individual, and so on?

A. I always thought John MacIntyre was a capable officer, very thorough policeman. He was strict, but he was a good police officer and had a good reputation as a police officer.

Q. To your knowledge, was there ever any complaint filed with the Police Commission alleging improper conduct by Chief MacIntyre?

A. Never.

Q. Ever any suggestion made to you through the Police Commission or otherwise that he was a racist?

A. No, never.

Q. That he was unfair to particular people.

A. Not to my knowledge, no.

- -Q. That he abused prisoners.

A. Never a suggestion of that. And down through the years, there had been lots of allegations against other members of the Police Department, but never John MacIntyre, nor William Urquhart.

Whalley acknowledged a close professional relationship with John MacIntyre (T. v. 62, pp. 11176-11177, 11181-11184) but did advise the Commission as follows (T. v. 62, pp. 11195-11196):

Q. Ms. Derrick raised with you your relationship with John MacIntyre and William Urquhart. And I ask you in view of your professional relationship has that affected the evidence you've given today in any way?

A. I hope not.

Superintendent A.E. Vaughan

509. Superintendent Vaughan has been in charge of Criminal Operations since 1985 in Halifax, and has 32 years service with the R.C.M.P. It was his responsibility to prompt Staff Sergeant Harry Wheaton for support for allegations which Staff Sergeant Harry Wheaton raised subsequent to 1985 for the first time. On August 1, 1986 Vaughan wrote to Gordon Gale at the Department of the Attorney General (Exhibit 20 - R. v. 20, pp. 72-75) to advise that having reviewed the file in light of the serious allegations made by the three 1971 witnesses - Chant, Pratico and Harriss - Vaughan could not support any further investigation because, inter alia:

In his memorandum of 83-06-17 the O.C.

Sydney Sub.-Division suggested that while there were numerous flaws and variances from standard police practices and procedures, he concluded that this was an example of policemen identifying a person they think is responsible for an offence and then setting out to prove the theory by gathering the necessary evidence; moreover, he was of the view that the actions of the Sydney Police investigators was one of overzealousness.

In his memorandum of 83-06-24, the then CIBO took the position that the investigators (MacIntyre and Urquhart) believed MARSHALL to be responsible and in their zealously, together with the evidence available, placed too much reliance on the evidence of certain witnesses, hence, incorrect conclusions were drawn.

...

There appears to be no independent relevant or material evidence available which would tend to corroborate the statements of CHANT et al. In essence, therefore, any prosecution of MacIntyre, or others, for counselling perjury would have to be based on the recollections of three self-confessed perjurers.....

I share the view that this is a classic case of policemen focussing their efforts on one suspect to the exclusion of all other possibilities. This, I submit, reflects poor judgment rather than conduct involving criminal acts. In this regard, the following factors must also be taken into consideration.

MacIntyre and his investigator(s) certainly had grounds to suspect Marshall....

A variation of this letter dated July 30, 1986 (Exhibit 20 - R. v. 20, pp. 89-91) essentially conveys the same information. The penultimate paragraph however is worthy of particular note

(Exhibit 20 - R. v. 20, p. 91):

- --MacIntyre and others would logically in any proceeding suggest that their tactics were forceful and that in fact, while they may be suggestive, desk pounding tactics were intended to elicit a truthful statement from CHANT, PRATICO and HARRISS that they had in fact observed MARSHALL commit the murder and they would undoubtedly allege that this was interpreted by the young witnesses as a suggestion that they lie.

Despite the factual errors, it is respectfully submitted that it is significant that Superintendent Vaughan comes to the conclusion he does even assuming that John MacIntyre would admit that forceful and suggestive tactics had been used. It is respectfully submitted that John MacIntyre did not go that far at these Commission Hearings and yet Vaughan's considered opinion stands.

510. Vaughan expanded upon his views before this Commission (T. v. 72, pp. 12902-12903):

Q. ...you say there was no corroborative evidence available of the three self-confessed perjurers. Can you give us some suggestion of what kind of evidence you might be looking for?

A. Well, some proof of facts that would objectively lead to the inference that Mr. MacIntyre had wilfully counselled these witnesses to lie. —→ Some overt act which would be of some probative value or tip the scales in favour of an investigation. But I didn't see any of that in the report that I reviewed, in any event.

...

Q. Did you notice in those statements some degree of consistency in the

details which were provided by those two witnesses [Pratico and Chant]?

A. Yes.

Q. Did you address your mind as to how those details may have been, found their way to the statements?

A. I've certainly thought about it, obviously. I think that Mr. MacIntyre, first of all, discovered people who were not adverse to telling untruths. I believe that Mr. Chant was caught up in a series of lies when he saw it all, and then related what Mr. Marshall had told him, I believe it was on the morning of May the 20th to Mr. MacIntyre that he had seen two people. I believe that John Pratico and Mr. Chant were interviewed at the police office one after the other, Chant after Pratico, and Chant had claimed he was in the bushes and had seen the stabbing, Mr. Marshall stabbed Mr. Seale, and since Chant had obviously claimed to have been in or around the tracks, then obviously he's pretty much going to have see the same thing and there may have been the power of suggestion used by the police that, in fact, you're lying, in an attempt to elicit what they believed to be the truth.

Vaughan also commented (T. v. 72, pp. 12907-12909):

Q. In what respect is it poor judgment to focus on one suspect?

A. If, in fact, there's some suggestion, as there was that two others may have been around and you don't expend every effort to pursue that theory, then you're not doing a complete investigation, in my view.

...

Q. Is it not a fact then that the focus was placed on Mr. Marshall before even the first statement was taken

from a witness?

- A. That may very well be, but that may not also at the same time be unusual to focus on a suspect that early.

...

Q. What follows from focussing on one suspect? You then sort of only look for evidence that implicates him? Is that what follows?

A. Well, you may have a strong suspect but you may have other information...In other words, you can't overlook other possibilities. If, in fact, somebody says there's two other people there, then you should expend effort to find out what that dimension is about. But, at the same time, focus on your primary suspect.

Q. Did you form any opinion to the effect that once focussing on the suspect, the evidence was tailored to fit that suspicion?

A. No, I don't believe the evidence was tailored. As I said before, I believe that the police discovered three people who were willing to give false evidence and then the focus became very intense upon that particular individual.

Vaughan added that he did not "necessarily personally adhere to or am a proponent of certain types of tactics that are alleged", and yet came to the conclusion that he did (T. v. 72, p. 12916), and they were indeed what Vaughan would have regarded as improper and unreliable techniques (T. v. 72, pp. 12923-12925). John MacIntyre's tactics were aggressive but not illegal (T. v. 72, p. 12930). Perhaps the key question about John MacIntyre's actions as presented by Staff Sergeant Harry Wheaton in this

investigation, and as considered by Superintendent Vaughan, came in the following exchange between Vaughan and counsel for Donald Marshall, Jr. (T. v. 72, pp. 12945-12946):

Q. As an experienced police officer, is not plausible that overzealousness could lead to wrongful or criminal conduct?

A. I didn't see it in this case, but I suppose anything is possible.

And again (T. v. 73, pp. 12957-12958):

A. What I'm saying there is that Mr. MacIntyre may have used forceful tactics but that he believed that Marshall was guilty of the offence. He was attempting to elicit the truth from them and that in the statements that the witnesses provided they have taken the approach that Mr. MacIntyre used as to suggest that he had counselled them to perjure themselves.

Q. So you're effectively giving Mr. MacIntyre the benefit of the doubt. You're saying that he didn't intend to be threatening, that he merely took it that way.

A. On the basis of my review of the file I did not see what is alleged to be criminal activity on the part of Mr. MacIntyre. I read overzealousness, I read retaining or detaining witnesses for a long period of time, I read allegations of desk pounding and using a loud voice. But I didn't read anything in there of...that would connote criminal activity.

Q. And are you saying, in effect, that you believe the witnesses lied because of an error on their part?

A. I believe they incorrectly interpreted Mr. MacIntyre's actions.

511. Superintendent Vaughan explained why his position was stated ~~much~~ less strongly than Staff Sergeant Harry Wheaton's position (T. v. 73, p. 12967):

...I don't believe, and as I say, it's simply an opinion of mine, I don't believe that at that particular point in time Mr. Wheaton or others (otherwise it would have wound up in the reports) believed Mr. MacIntyre had committed a criminal offence. I believe that people, policemen, and I don't think that they're in isolation, live with certain situations for a long period of time and become emotionally involved in them and they may very well arrive at conclusions after a period of time that certain things were wrong.

Q. Conclusions that might be either right or wrong.

A. That's correct.

There was nothing in what John MacIntyre had done that was unique to John MacIntyre even in 1971 if he had said to witnesses "you're lying, tell me the truth" (T. v. 73, p. 12978).

Frank Edwards

512. Frank Edwards was the Crown Prosecutor in Sydney at the time of the 1982 re-investigation. At the time of the re-investigation in 1982 Mr. Edwards had a suspicion that John MacIntyre was attempting to manipulate the 1982 re-investigation (Exhibit 17--R. v. 17, p. 8) and the evidence indicates other points of conflict as well. However, Frank Edwards made a comment in his evidence which we suggest conclusively resolves any concern that may have been expressed that John MacIntyre conducted himself illegally in any way during the 1971

investigation of Sandy Seale's stabbing or since (T. v. 66, pp. 11781-11783):—

Q. He [Wheaton] was asked, "did you share the opinion that you had been misled and used" and his answer was, "I felt definitely that I had been misled by Chief MacIntyre, yes, sir." And he said, "I was knowingly misled". Do you feel that you were knowingly misled by Chief MacIntyre in this investigation?

A. I agree with the first part that we were misled. The "knowingly" misleading connotes to me that there's a suspicion that MacIntyre knew that Marshall was innocent but still wanted him found guilty. And if that connotation is correct, then I don't accept that, no.

Q. Do you still believe that from the beginning Chief MacIntyre attempted to feed just the information necessary to lead to a pre-determined result?

A. Yes, I felt that and feel that John MacIntyre felt that there was really much to-do here about something that had been decided in Court and that there was only one result a proper investigation could reach. And I think his mind-set, and perhaps I'm speculating now, but I believe his mind-set was such that, you know, he couldn't see it any other way.

...

— Q. Now if he set out, if you believe...

A. Yes.

Q. That he set out and only gave the information that would lead to that result, do you not believe that that is knowingly misleading you?

A. It's knowingly misleading in the

sense that he's putting the thing on course. The difficulty I'm having with knowingly misleading is I would take it that somebody is knowingly...is misleading you if he is trying to get you to reach a conclusion that he knows is wrong. And that's the nub of it. I feel, and felt, well I feel now. How I felt at the time, I don't know, but I feel that John MacIntyre believed that Donald Marshall was guilty and that was his honest belief and perhaps he thought he was being helpful showing them what the answer should be. I don't know.

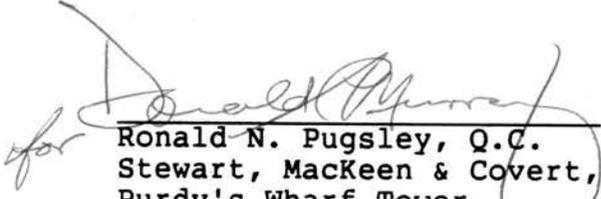
Q. Is that, the fact that he believes it. Let's accept that.

A. Yes.

Q. Does that excuse being manipulative and not disclosing all of the information to you and to the R.C.M.P.?

A. No. No, it doesn't. On the other hand, you know, to keep this in perspective, at no time up to that point, at least, had the R.C.M.P., to my knowledge, gone in and said, "Give us the whole file and everything you've got in relation to this investigation." (Emphasis added)

ALL OF WHICH IS RESPECTFULLY SUBMITTED,


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Dated: October 28, 1988

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