

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?

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--- 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 mislead 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~~ 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.

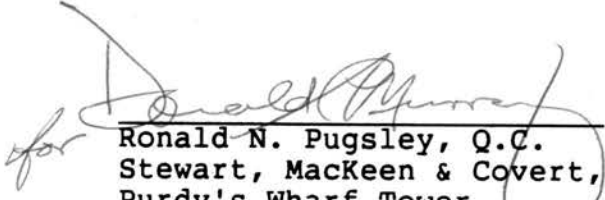
Q. Is that, the fact that he believes it. Let's accept that.

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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