CROWN DISCLOSURE

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1. A careful assessment of the facts in this case pertaining to the issue of Crown Disclosure reveals a consistent and disturbing pattern of withholding relevant information from the time during the preparation for Marshall's trial, the appeal and through to his compensation settlement, a pattern only briefly relieved by Frank Edwards' disclosure of R.C.M.P. reports to Steven Aronson during his preparation for the Reference in 1982.

I. A Review of the Facts - The Missing Pieces

A. Persons Known Only to the Crown

2. This Commission should find from the evidence before it that Crown Counsel prosecuting Donald Marshall, Jr. in 1971 did not disclose to the Defence counsel, Khattar and Rosenblum, (i) the prior inconsistent statements of Pratico, Chant and Harriss nor (ii) did Crown Counsel disclose to Khattar or Rosenblum the fact that Jimmy MacNeil came forward in November 1971, ten days after Marshall's conviction and while the matter of Marshall's Appeal was being prepared by Rosenblum exculpating Donald Marshall in the murder of Sandy Seale. Khattar and Rosenblum did not know of the existence of Jimmy MacNeil or Roy Ebsary in 1971. (Vol. 26/4774)

B. The Disability of a Witness

3. Khattar and Rosenblum also did not know that Pratico had a history of psychiatric illness and was hospitalized in the Nova Scotia Hospital following the preliminary hearing and prior to Donald Marshall's trial.

4. Matheson was unable to confirm that information concerning Pratico was provided by Donald MacNeil to Marshall's Defence Counsel. He took the shockingly complacent view that anyone who had an interest in Pratico knew of his whereabouts. (Vol. 26/4973) No efforts were made by Crown Counsel to ensure that this knowledge extended to those for whom this information would have been particularly pertinent, i.e. to Donald Marshall Jr.'s Defence lawyers.

C. Post-Trial Failures to Disclose

5. Matheson never advised Rosenblum or Khattar about Jimmy MacNeil's statement or the interviews with the Ebsary family and to his knowledge neither did MacNeil. (Vol. 27/5043)

6. Matheson did not follow-up his call to Robert Anderson requesting assistance in the case because he left the handling of the matter to MacNeil. He never said to MacNeil that they should give information concerning Jimmy MacNeil to Khattar. He testified to presuming that the Attorney General's Department in Halifax would communicate the information from Sug-Inspector Al Marshall's final report to Donald Marshall, Jr.'s Counsel (Vol. 27/5065).

7. It is also Frank Edward's opinion that the Crown never disclosed Chant, Pratico and Harris' prior inconsistent statements.

8. Khattar testified that the Crown never approached him with respect to the prospect of Donald Marshall, Jr. consenting to a polygraph examination in November 1971. Had he been approached by the Crown one would suppose the fact of Jimmy MacNeil's statement to the police to have come out. (Vol. 26/4774)

9. It is reasonable to presume that had Crown Counsel in 1971 disclosed to Khattar and Rosenblum the inconsistent statements of Chant, Pratico and Harriss, the Jury would not have convicted Donald Marshall, Jr. of Sandy Seale's murder. (The evidence of Frank Edwards, Vol. 68/12Ø54; the evidence of Simon Khattar, Vol. 26/4782).

D. The Effects of and Responsibility for Non-Disclosure

1Ø. The failure of Crown Counsel to disclose the statement of Jimmy MacNeil exculpating Donald Marshall, Jr. also substantially contributed to Marshall's wrongful imprisonment (evidence of Frank Edwards Vol. 68/12173); (Felix Cacchione Vol. 65/11682).

11. In Frank Edward's opinion the primary responsbility for disclosing Jimmy MacNeil's November 1971 statement rested with Donald C. MacNeil (Vol. 65/11745).

12. Even Matheson testified that the results of the Ebsary and MacNeil investigation should have been disclosed to Defence counsel (Vol. 27/5025). It was Matheson's testimony to the Commission that the Attorney General's Department in Halifax, and not he or Donald MacNeil, had the responsibility to advise Defence Counsel of this. His basis for saying this was that the final report of the investigation went to Halifax and neither he nor MacNeil saw it (Vol. 27/5026). This position does not withstand scrutiny because MacNeil did know the results of the investigation after being briefed fully by Al Marshall and Eugene Smith and therefore had a duty to see that this information was disclosed to Khattar and Rosenblum, and to do it himself if the Attorney General's office did not do it.

E. Disclosure Problems During the Reference

13. In 1982 when Stephen Aronson was representing Donald Marshall, Jr. on the Reference to the Court of Appeal once again disclosure seemingly depended solely on the discretion of Crown Counsel, fortunately exercised in 1982 by Frank Edwards to Donald Marshall, Jr.'s benefit.

14. The evidence revealed in Red Exhibit Vol. 31 at p.69 a letter from Aronson to Edwards dated July 2, 1982, confirming that on June 23, 1982 Edwards had provided two RCMP reports relating to the reinvestigation of the Marshall case to Aronson, one dated 82-05-04 (and found in Red Exhibit Volume 34 at p.76) and another report dated 82-05-20 (found in Red Exhibit Volume 34 at p.88).

15. It does not appear that at the time anyone in the Attorney General's Department was aware that Mr. Edwards had made this disclosure. Remarkably, Mr. Edwards would later be thoroughly chastized by the Deputy Attorney General for making these RCMP reports available to Mr. Aronson.

16. Edwards' evidence was that he gave Aronson the reports after the Reference under Section 617(c) of the Criminal Code to the Nova Scotia Court of Appeal was mandated as it was then clear that Aronson had carriage of the case before the Court (Vol. 67/11874).

17. This information was of substantial assistance to Aronson although he testified that it put him under a great deal of pressure in relation to preparing the affidavits for the Court of Appeal not to have had these reports until June 23, 1982 (Vol. 56/10228), with the deadline for filing the affidavits only weeks away.

18. By the time Aronson obtained the RCMP reports he had only one month approximately to go through all the information, find all the witnesses referred to, and prepare all the affidavits for the Court of Appeal in circumstances where not all the witnesses were located in Cape Breton. Aronson testified that if he had the reports before the Reference was handed down he could have done a significant amount of ground work in advance.

19. Although having the reports assisted Aronson considerably in his preparation for the Reference, not having had this information

previously had made it difficult for him to make submissions to the Attorney General of Canada on the Reference as he had to rely largely on what he was told by the RCMP in formulating his position to the Minister of Justice.

20. The Commission heard varying opinions from representatives of the Attorney General's Department on whether it was appropriate for the RCMP reports to have been released to Aronson by Edwards in June 1982 (evidence of Martin Herschorn, Vol. 63/11372; evidence of Gordon Coles, Vol. 79/14053,14056).

21. Giffin who was the Attorney General in 1984 when his Deputy took such issue with Edwards' release of these reports testified to having no objection to Edwards' conduct, at least in so far as releasing statements of various witnesses that were attached to the RCMP report but expressed concern to the disclosure by Edwards of a report that may have contained opinion material (evidence of Ronald Giffin, Vol. 58/10534).

22. It appears clear from the evidence heard by the Commission that had Edwards not operated from the principle that full disclosure to Aronson was appropriate in 1982 and had he sought direction from his superior officers in the Attorney General's Department concerning the release of the RCMP reports he would have been instructed to withhold information of assistance to Donald Marshall's counsel. Especially in circumstances where Mr. Aronson had the responsibility to present the evidence to the Court of Appeal and where the matter of Donald Marshall,

Jr.'s liberty was still very much at stake, such lack of disclosure may have once again resulted in Donald Marshall's continued wrongful imprisonment for a murder he did not commit.

F. Disclosure and Compensation

23. Unfortunately, while Felix Cacchione was attempting to negotiate a compensation settlement on Marshall's behalf in 1984, counsel with the usual departmental attitude was acting for the Crown and full disclosure of information material to Donald Marshall, Jr.'s compensation application was not obtained.

24. Aronson handed his entire file over to Cacchione when the case was transferred in May 1983 and as a result of that Cacchione had in his possession the same two RCMP reports from May 1982 that Edwards had provided to Aronson. No new information was disclosed to Cacchione by the Attorney General's Department during the time when he acted on behalf of Donald Marshall, Jr.

25. Recognizing that he had insufficient information, Cacchione applied under the Freedom of Information Act to the Provincial Government for the release of information in their possession. Despite the language of a letter dispatched by Mr. Giffin, which suggested he had given the matter his individual attention, (Red Exhibit Vol. 32/316) Giffin, the Attorney General at the time, did not personally review Cacchione's request. The Attorney General and his Deputy knew the letter was misleading and it was intended to mislead. Gordon Coles, the

Deputy Attorney General, did not review the file either and simply refused Cacchione the information he requested. The treatment of this matter was most unfair and contrary to the applicable legislation. Giffin justified the Department's actions by saying they were trying to approach the entire matter as cautiously as possible and did not wish to provide information until he knew the direction of the Government with respect to the question of compensation (Vol. 58/10577). He failed in his responsibility as Attorney General.

26. Regrettably Mr. Cacchione was never informed that the Attorney General's Department did not have all the material in its possession that he was requesting.

27. However, even once the Government had determined some direction with respect to the compensation issue by establishing the Campbell Commission, which shortly gave way to negotiations between the Government and Mr. Marshall, no instructions were provided by the Attorney General's Department to their negotiator, Reinhold Endres, to disclose any relevant information to Cacchione that would assist in his negotiations with the Department (Vol. 79/14086). This was in spite of the apparent intention of Giffin that Justice Campbell presiding over the Commission should have access to all the information in the Government's possession.

28. The evidence before the Commission is clear that in denying Cacchione's request for information no regard was had by the Attorney General's Department for the needs of Mr. Marshall, his entitlement and

his good faith attempts to advance a settlement of compensation. Gordon Coles simply looked at the nature of the information requested and concluded on his interpretation of the Act that Cacchione was not entitled to the information being sought.

29. The failure of the government to provide Cacchione with the disclosure he requested put him at a very considerable disadvantage. Cacchione had wanted disclosure of correspondence between the Attorney General's Department and the City of Sydney with the Parole Board in order to show that there had been an attitude that Mr. Marshall was a dangerous person and should be kept behind bars. He was interested in this material as support for any claim that might be made with respect to the pain and suffering Mr. Marshall had wrongly experienced by virtue of his continued incarceration. Cacchione was never even advised as to whether or not the Attorney General had this material (Vol. 64/11545).

30. The Government's attitude toward Mr. Cacchione's request for disclosure was adversarial and unprincipled. It is another example of the denial to Mr. Marshall of information potentially beneficial to him which the Government, even in the face of an actual request by counsel, refused to provide.

31. One material piece of information that Cacchione did not have was Staff/Sgt. Wheaton's May 20, 1983 report concerning the conduct of the Sydney Police Department, particularly MacIntyre and Urquhart. Had Cacchione had this report in his possesion during the compensation negotiations he would have been in a much stronger position to negotiate

a settlement that fairly reflected the wrong occasioned to Mr. Marshall by the Government of Nova Scotia. As it was, compensation was settled with the Government acknowledging no liability for Mr. Marshall's wrongful conviction and imprisonment.

II. Disclosure Policy

A. In 1971 - The Statement

32. With respect to disclosure policies promulgated by the Attorney General's Department, in 1971 the only written policy with respect to disclosure was set out in a letter by Malachi Jones, then Director of Prosecutions, which established general rules to be followed and stated the law that supported them. Essentially the policy provided the Crown was not to withhold information that the Defence should know except that facts should not be disclosed which might put a witness in jeopardy. (Evidence of Lewis Matheson, Vol. 26/4922).

B. In 1971 - The Practice

33. Matheson testified that if Defence counsel did not request information from him he did not volunteer it but that usually Defence counsel in the course of preparing for a trial or before going into Court at least would inquire as to what the Crown had. On occasion Defence counsel would also ask to see statements both of accused persons and witnesses (Vol. 26/4923).

34. Matheson testified that the general practice of Cape Breton Defence Bar was to approach the Crown to see what case they had against an accused (Vol. 26/4925). He testified that Khattar's practice of not approaching the Crown to request disclosure was not consistent in his experience with the general practice of the Cape Breton Bar.

35. Matheson also testified that he if he had a fact that he thought was of significance to the Defence but the Defence could not have known about upon their own initiative, then he would have initiated disclosure. He did not, however, do so with respect to Chant's, Pratico's and Harriss' prior inconsistent statements, Pratico's psychiatric history or the Jimmy MacNeil revelations in November 1971. It matters little that he testified that prior inconsistent statements comprised the sort of material he would consider disclosing to Defence on his own initiative (Vol. 26/4932), as he did not follow even his own version of the correct practice.

36. The letter from Malachi Jones is Exhibit 81. Matheson testified that the letter reflected a practice that was followed by the Crown Prosecutor's office during his time in that office which would include 1971 (Vol. 28/518Ø). This policy directive puts a burden on the Crown to provide to the Defence copies of inconsistent statements (Vol. 28/5181).

37. Other witnesses testified to real problems with respect to obtaining disclosure from the Crown both in the 5Ø's, 6Ø's and 7Ø's (the evidence of Innes MacLeod Vol. 39/7329. Harry How, Vol. 61/1Ø917 and

concerning more recent practices, the evidence of Felix Cacchione, Vol. 64/11425). There was differing evidence before the Commission with respect to the particular disclosure practices of Donald C. MacNeil (evidence of Arthur Mollon in Vol. 29/5421 and evidence of Melinda MacLean, Vol. 39/7244-49). For the purposes of this Commission's findings it makes little difference that some counsel may have found Donald C. MacNeil more apt to disclose than others; the cogent evidence before this Commission is that Donald C. MacNeil did not disclose to Donald Marshall, Jr.'s Defence Counsel information that he had in his possession which he must have known was crucial to Marshall's defence.

38. The evidence does appear to support the fact that until 1984 other than the letter from Malachi Jones there was nothing in the way of written disclosure policies emanating from the Attorney General's Department. Disclosure practices appear to vary and to have varied widely throughout the province and from prosecutor to prosecutor and according to some evidence was and may still be dependent on social relationships between Crown and Defence Counsel.

C. Perceptions of Obligations

39. Harry How indicated support for the view that the Crown has a duty as an officer of the Court to bring evidence that would assist the Defence to the attention of the Defence regardless of whether the Defence counsel makes a request for disclosure (Vol. 61/10922).

40. In How's view, the Crown has a moral obligation to disclose additional evidence that has come to its attention after already disclosing what was assumed to be its full case. How testified that this was the Crown's duty regardless of whether Defence counsel requested disclosure from the Crown (Vol. 61/10922).

41. Giffin testified that disclosure constituted a positive obligation of the Crown but according to Cacchione this does not seem to have been the consistent practice (Vol. 64/11422, 11424-25). Cacchione cited a recent example of where information intended to establish the innocence of his client was not revealed to him, the information being police photographs which indicated that someone else had committed the offence (Vol. 65/11596).

42. Frank Edwards by his own evidence seems to be an example of a Crown Prosecutor who provides very full disclosure. In Edwards' opinion the ultimate obligation to disclose rests with the Crown (Vol. 65, 11743).

D. A Lack of Leadership

43. It is apparent from the evidence of the more senior members of the Attorney General's Department that over the years there has not been sufficient leadership or direction with respect to the issue of disclosure. Gordon Gale testified that nothing particularly active was done to ensure that Crown Counsel were conducting themselves in accordance with what was considered correct disclosure practices in the

department. There were not formal written policies and a new Prosecutor would adopt the practice and procedures being followed by the Prosecutor to whom he or she was assigned (Vol. 74/13297)

44. In 1971, the then Deputy Attorney General, Gordon Coles, did not even know what the law was with respect to disclosure, despite the fact that he was advising the chief law officer for the Crown in the Province of Nova Scotia (evidence of Gordon Coles, Vol. 79/13980).

45. Coles testified that prior to 1980 he did nothing to ensure that Crown Counsel understood their obligations with respect to disclosure. As Deputy Head of the Department he bore the ultimate responsibility for such direction (Vol. 79/13982). Other than Coles' angry reaction to Edwards' disclosure to Aronson, an ironic response in light of the effect that failure to disclose had previously had in this case, the Department did nothing to examine its disclosure policies and practices in the wake of the Marshall case.

46. With respect to Coles' reaction to Edwards' disclosure of the RCMP reports, it does not appear in the evidence that Edwards was acting beyond his authority in releasing the reports. Coles testified that in his view parts of police reports might be extracted and disclosed if a Prosecutor exercising his or her discretion deemed that it was necessary to make such a disclosure (Vol. 79/14025). Coles also said that if Crown Counsel determined that there was nothing contained in the police report that ought not to be disclosed, it could disclose the report (Vol. 79/14053). Although Coles testified that Edwards required the

authority of one of his superiors in the department in order to release a police report, (Vol. 79/14Ø56) it is submitted that there were no disclosure policy directives in 1982 making this clear and that those referred to by Coles in 1984 were promulgated after Edwards' disclosure to Aronson.

E. Present Policies - The Evidence

47. It would appear in the evidence before this Commission that current disclosure directives of the Attorney General's department do not require Crown Counsel to disclose to the Defence facts within the knowledge of the Crown which might bring into question the credibility of Crown witnesses. An example of such information would be previous psychiatric condition of a witness (evidence of Martin Herschorn, Vol. 62/11262). (Since this evidence on March 24, 1988, the Attorney General's Department has issued new disclosure guidelines dated July 18, 1988.)

48. In Martin Herschorn's view this type of information or a Crown witnesses' criminal record was information of a confidential nature that should not be disclosed to the Defence (see Red Exhibit Vol. 28/15 Herschorn's memo of December 3, 1984, referring to confidential information).

49. It is our submission that there is an obligation on Crown Counsel to at least raise for the Defence a witnesses' psychiatric history or any other information which might be relevant to determinations of

credibility, and that once the Defence has this information it rests with the Defence to bring this information forward in whatever manner it sees fit. This obligation on Crown Counsel exists regardless of whether the Defence requests disclosure from the Crown or not; Crown Counsel's duty as an officer to the Court requires that information known by the Crown be brought to the Defence's attention, including new evidence arising after a verdict has been rendered. Disclosure is really a question of fairness to the accused and integrity before the tribunal. It is submitted that such information should be divulged as soon as Crown Counsel is in possession of it so that the information can be appropriately investigated and evidence relating to it gathered or further developed.

III. Crown Disclosure: Sources of Obligation and the Failure to Observe Them in the Marshall Case

A. A Basic Principle in 1971: Fairness in Criminal Trials

50. In discussing Crown disclosure, it is material to refer to the general duties required of Crown Prosecutors as laid out by such cases as Boucher v. The Queen (1954), 110 C.C.C. 263 (S.C.C.), R. v. Chamandy, 61 C.C.C. 224 (Ont.C.A.) and Wu v. The King (1934), 62 C.C.C. 90 (S.C.C.).

51. It is submitted that in 1971, Crown Counsel had an obligation to disclose the prior inconsistent statements of Chant, Pratico and Harriss to the Defence, the psychiatric state of Pratico and was furthermore obliged to disclose the fact of Jimmy MacNeil coming forward with a

statement that exculpated Donald Marshall Jr. following his conviction but prior to the appeal of that conviction.

52. It was by 1971 long settled that the Crown must not hold back evidence because it would assist the accused. (LeMay v. The King (1951), 102 C.C.C. 1 (S.C.C.).

53. Long before the prosecution of Donald Marshall Jr. in 1971, full disclosure by Crown Counsel to Defence was approved as the proper practice. G. Arthur Martin, Q.C. in "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada, 1955 at page 3, referred to an often-quoted comment made by Mr. W. V. Common, Director of Public Prosecutions for the Province of Ontario, who was obviously not referring to the practice of Crowns like Donald C. MacNeil when he stated:

> ...usually in all criminal cases there is complete disclosure by the prosecution of its case to the defence. To use a colloquialism, there are no "fast ones" pulled by the Crown...If there are statements by witnesses, statements of accused, the accused is supplied with copies, they know exactly what our case is, and there is nothing hidden or kept back or suppressed, so that the accused person is taken by surprise at a trial by springing a surprise witness on him. In other words, I again emphasize the fact that every safeguard is provided by the Crown to ensure that an accused person, not only in the capital cases but in every case receives and is assured of a fair and legal trial.

If this was ever true in Ontario it is now an historical fiction. Full disclosure in Ontario is increasingly rare.

54. The difficulty facing defence counsel for Donald Marshall Jr. in 1971 was not surprise witnesses being sprung upon them, as they knew from the preliminary that Chant, Pratico and Harriss would be testifying. They were, however, conducting the trial blindfolded by virtue of Crown Counsel not having disclosed these witnesses' prior inconsistent statements. The obligation to provide full disclosure and not to hold back evidence favourable to the Defence was well established by 1971 and governed such a situation. The necessity of the Crown trying to ensure that the accused was given "a fair and legal trial" was not an elusive or ephemeral concept in 1971. This was a fundamental principle.

55. Mr. G. Arthur Martin, referred to above, made the following comments regarding Crown disclosure at page two of the Special Lectures:

> It would appear, therefore, that the duty of the Crown to disclose to the Defence counsel evidence in its possession favourable to the accused might be a somewhat wider duty than the duty of Crown counsel actually to call witnesses to give that evidence and hence make them available to the Defence for cross examination.

56. The significant question of the extent to which Crown counsel may be obliged to call witnesses favourable to the accused's case will not be explored in these submissions. Rather it is the question of whether the Crown counsel in 1971 were obligated to provide Donald Marshall Jr.'s defence counsel with the prior inconsistent statements of certain witnesses being called to testify.

57. It has long been firmly established principle in our common law that proceedings against the accused person must be fair. There are many sources for this obligation, but surely its pedigree is not in issue. Avory J., in R. v. Harris, [1927] 2 K.B. 587 at page 594, held that in a criminal trial, where the liberty of the subject is at stake, the sole object of the proceedings is to make certain that justice should be done between the subject and the State.

58. Similarly, G. Arthur Martin, Q.C. an eminent barrister prior to his elevation to the Bench, is quoted in Problems in Litigation (1953), Canadian Bar Review, page 503 at pages 509 and 510, as saying:

> "In my opinion, it is not debatable that the Crown must bring to the attention of the defence any evidence favourable to the defence of which the Crown has knowledge..."

59. In 1971, these principles were clearly expressed in the Canons of Legal Ethics (referred to, supra) where it was stated that Crown Counsel must "withhold no facts tending to prove either the guilt or innocence of the accused."

60. Anthony Hooper, commenting on this in Discovery in Criminal Cases, [1972] 1 Canadian Bar Review, page 467, at page 467 and 468 stated that this can only mean that the Crown Counsel must either introduce evidence proving innocence as part of the Crown's case, or must disclose the existence of such evidence to the Defence.

61. Mr. Hooper stated "the ethical obligation of a Prosecutor as interpreted by the Supreme Court of Canada, require him, as a minimum, to disclose evidence favourable to the accused at some stage prior to the verdict."

62. With reference to this duty both Crown Counsel prosecuting Donald Marshall Jr. failed miserably.

63. It would appear that in 1971, Defence Counsel would not have been able to apply to the Judge presiding at the preliminary hearing for an Order compelling the Crown to disclose more of its case. (Patterson v. The Queen (1972), C.C.C. (2d) 227 (S.C.C.), Caccomo v. The Queen (1975), 21 C.C.C. (2d) 257 (S.C.C.)).

64. In the Caccomo case, De Grandpre, relying in Patterson v. The Queen, held that the prosecution was not under a duty prior to the start of the trial to inform the defence of the existence of a particular exhibit and of its intention to introduce into evidence that exhibit.

65. The reasoning for this relates to the purpose of the preliminary hearing, which is to satisfy the Magistrate that there is sufficient evidence to put the accused on trial. In light of this, the Crown has the discretion to present only that evidence which makes out a prima facie case.

66. However, de Grandpre noted that the discretion of the Crown to call what evidence it saw fit did not lessen the duty of Crown Counsel

to bring forward evidence of material facts known to the prosecution, whether favourable to the accused or otherwise, a principle set out in the LeMay case. (referred to supra)

67. While it might be argued, therefore, that MacNeil and Matheson were not obliged to disclose the prior inconsistent statements of Chant, Pratico and Harris at the preliminary hearing, they were obliged in law to make the defence aware of the statements at the trial.

68. This failure made the prosecution of Donald Marshall Jr. unfair and resulted in a miscarriage of justice.

69. If a trial is to be truly fair, however, what is required of Crown counsel is to provide early disclosure. The law with respect to Crown disclosure has experienced some considerable evolution. The early common law was governed by the theory that the accused should not be informed of the case against him until the last possible moment, on the basis that if he knew the witnesses to be called against him, he might interfere with them, or if he knew the evidence to be addduced against him, he might contrive to fabricate evidence to meet it. (G. Arthur Martin, Q.C., Preliminary Hearings, Special Lectures of the Law Society of Upper Canada, 1955).

70. Mr. Martin went on to state:

> "That policy has given way over the years to the policy of fairness, which requires that the accused be apprised of the case which he has to meet in order that he may properly defend himself..."

71. In 1955, Mr. Martin observed that the law was still in an evolutionary stage with respect to the duty of the Crown to make early disclosure, the extent of that duty not being completely defined in the case law. There was no suggestion, even in 1955, that the Crown was entitled not to make disclosure and to suppress or hide evidence helpful to the Defence.

72. In Mahadeo v. The King, [1936] 2 All E.R. 813, the accused was tried for murder and was directly implicated by a witness who had made a statement to the police. Defence counsel requested disclosure of the witnesses statement from the Attorney General, but was denied it. The Judicial Committee of the Privy Counsel held that the statement should have been furnished to the accused in order that Defence counsel could make whatever points it could in cross-examination of the witness at the trial, arising from any variance between the witness' evidence and the statement he had made to the police.

73. It is precisely this use to which Khattar and Rosenblum could have put the prior inconsistent statements of Chant, Pratico and Harriss. The inability to cross-examine on these statements makes their non-disclosure so critical to Donald Marshall's wrongful conviction and subsequent incarceration. There was a clear, grave dereliction of their duty as Crown counsel that MacNeil and Matheson, in full knowledge of these prior inconsistent statements, failed to provide them to Donald

Marshall's defence counsel. In doing so, they did not act fairly and impartially toward the accused, Mr. Marshall.

74. In addition to the common law principles set out, there are also statutory provisions in the Canadian Criminal Code and the Canada Evidence Act which provide an accused person with a limited right to disclosure. These are thoroughly set out in Professor Archibald's Research Paper to the Commission, Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia, p.92.

B. More Recent Developments: Continuing a Tradition

75. Crown counsel disclosure obligations have certainly not been narrowed since 1971. The original Supreme Court of Canada cases Boucher and LeMay still stand firmly for the principles they originally espoused, with their emphasis on fairness in the trial process. Further, more recent developments do not indicate any departures in principle or quantum leaps from the position obtained in 1971 concerning disclosure. They merely state the law as it has always been in the common law tradition or at the very least as it was in 1971.

76. The British Columbia Court of Appeal in 1984 in Cunliffe v. Law Society of British Columbia (1984), 40 C.R. (3d) 67 quoted with approval the decision of Boucher in upholding a finding by the Discipline Committee of British Columbia that a prosecutor was guilty of professional misconduct for failing to disclose evidence to Defence counsel prior to trial.

77. Courts across the country in recent years have commented positively on the duty of Crown counsel to make full disclosure to the Defence. For example, in R. v. Trotchie (1984), 31 Sask. R. 215 (Sask. Q. B.) at page 253, it was held:

> It is recognized as a general rule that there is a duty on the Crown, not only to make full disclosure of its own case, but also to make the Defence aware of any other evidence in its possession which may be relevant to the issues and worthy of consideration by the Court. This policy of full disclosure tends to assure the fairest possible trial of an accused person and minimizes the chance of judicial error.

78. In Regina v. Savion and Mizrahi (198Ø), 52 C.C.C. (2d) 276, the Ontario Court of Appeal held that the Court had broad powers to compel the Crown to produce the statement of a witness, Zuber, J.A., delivering the judgment of the Court, stated at p.284 that this power flowed "from the ability of the Court to control its processes so as to manifestly ensure fundamental fairness and see that the adversarial process is consistent with the interest of justice".

79. In the Savion and Mizrahi case the Crown was ordered to produce physical evidence, a tape recording of a conversation between the accused and a police officer that was not tendered in evidence, as well as statements.

8Ø. The Saskatchewan Court of Appeal in the R. v. Bourget (1987), 56 C.R. (3d) 97 held that the failure of the Crown to produce certain

evidence to the accused constituted a violation of s.7 of the Canadian Charter of Rights and Freedoms. Tallis, J. A. held at p.102:

> Although we have elected to employ an adversary system of criminal justice, the Crown plays an essential role in the truth-finding function of our system. The need to develop all the relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments or verdicts were to be fashioned on a partial or speculative presentation of facts. The very integrity of the judicial system and public confidence in it must depend upon full disclosure of all the facts, within the framework of the rules of evidence.

81. Emphasizing the role of s.7 of the Charter in deciding the issue, Tallis, J. A. stated that s.7 is not limited to the notion of procedural fairness in Court and encompasses the whole process, including discovery and disclosure. He held:

> If our system of criminal justice is to be marked by a search for truth, then disclosure and discovery of relevant materials, rather than supression, should be the starting point...
>
> Where life, liberty and the security of the person are at stake, gamesmenship is out of place.

82. The failure of Crown counsel to provide Donald Marshall Jr.'s defence lawyers with witnesses' prior inconsistent statements can be seen as similar to the circumstances in the case of R. v. Turnbull, R. v. Camillo (1976) 63 C.R. App. R. 132. The Court, at page 137, stated:

> Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If...the prosecution had

> reason to believe that there is such a material discrepancy they should provide the accused or his legal advisors with particulars of the description the police were first given. In all cases, if the accused asked to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification of evidence.

83. In Donald Marshall's case, first statements by Chant and Pratico did not identify Donald Marshall as Sandy Seale's assailant. The later statements did so, therefore there was a material discrepancy with respect to identifying Donald Marshall Jr. as the killer.

84. The Lord Chief Justice's statement in the Turnbull and Camillo case confirms that Crown counsel is positively obliged to advise an accused's defence lawyers about a material discrepancy, whether the accused asks for such particulars or not. The case seems to go further still and suggests a standard that would require Crown counsel to have advised the jury about the prior inconsistent statements.

85. The Nova Scotia Court of Appeal in R. v. Doiron (1985), 67 N.S.R. (2d) 130, held, at page 141 that there is an overriding obligation on the part of Crown counsel to inform defence of evidence which may be helpful to an accused. The Cunliffe case is also referred to with approval.

86. At the very least, the trial judge has the power, at trial, to require production of statements made by Crown counsel for use by the

Defence. This is to ensure a fair trial and to guarantee that an accused can make full answer and defence. Mr. Justice Jones, in the Doiron holds that "the discretion should be exercised in favour of production in the absence of any cogent reason to the contrary...". Mr. Justice Jones noted correctly that if the statement of a Crown witness reveals nothing contradictory no harm is done to the Crown's case. On the other hand, when the statement is contradictory or contains evidence previously not disclosed, it is material to the Defence. In either instance, there is no reason, especially in light of a requirement that the accused have a fair trial, for the Crown not to disclose such statements.

87. The clear obligation on the Crown is to disclose to Defence counsel evidence favourable to the accused, and it must be a positive obligation. There is no suggestion in any of the cases that the Crown's obligation is, or ever has been, reduced when Defence counsel fails to request disclosure. Logically, this is precisely when the obligation becomes most important. Crown counsel has an abiding and independent responsibility as an officer of the Court and a public officer engaged in the administration of justice to ensure that the accused person has a fair trial and an opportunity to make full answer and defence to the charges.

IV. Conclusion

88. The Marshall case, from start to finish, through the original prosecution to the time compensation was settled is characterized by a

chronic strategy of non-disclosure by representatives of the Attorney General's Department. At all times this practice of non-disclosure was an inexcusable departure from the standards set out in the law, in policy and by ethical consideration.

RECCOMENDATIONS: CROWN DISCLOSURE

It is submitted that the Attorney General's disclosure guideline dated July 18, 1988, are utterly inadequate.

The following is an adaptation of the Law Reform Commission of Canada Report No. 22, "Disclosure by the Prosecution" dated June 1984.

It is submitted that the following be adopted as the Crown Disclosure policy for Nova Scotia.

1. A judicial officer shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself,

(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution;

2.1 Without request to the prosecutor, the accused is entitled, a reasonable time in advance of a summary conviction offence, before being called upon to elect mode of trial or to plead to the charge of an Indictable offence, whichever comes first, and thereafter,

(a) to receive a copy of his criminal record;

(b) to receive a copy of any relevant statement made by him orally or recorded in writing (or to inspect such a statement if it has been recorded by electronic means);

(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof;

(d) to receive a copy of any relevant statement made by a person whom the prosecutor could call as a witness and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness in as much detail as the prosecution possesses.

(e) To inspect the electronic recording of any relevant statement made by a person whom the prosecutor could call as a witness;

(f) to receive a copy of the criminal record of any victim or proposed witness that could affect credibility;

(g) to receive, where known to the police officer or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who could be called as a witness, or other details enabling that person to be identified;

(h) full information concerning any emotional or physical disability known to the prosecution that might affect the reliability of a witness; and

(i) any other information that might reasonably affect the innocence, guilt, or degree of culpability of the accused,

unless, upon an ex parte application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a judical officer having jurisdiction in the matter orders, in writing and with reasons, that disclosure be delayed until a time fixed in the order.

2.2 A request under section 2.1 imposes a continuing obligation on the prosecutor to disclose the items within the class requested, without need for a further request.

2.3 A statement referred to in paragraph (b), (d) or (e) of section 2.1 does not inlcude a communication the disclosure of which is prohibited by the privacy provisions of the Criminal Code.

3. Where a judicial officer having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of section 2.1 he shall at the accused's request, adjourn the proceedings until in his opinion there has been compliance, and he may stay the

proceedings permanently, exclude evidence or make such other order as he considers appropriate in the circumstances.

ROLE OF DEFENCE COUNSEL

ROLE OF DEFENCE COUNSEL

1. Although it is submitted that Donald Marshall, Jr.'s wrongful conviction was primarily due to the nature of in the police investigation and conduct of the case by Crown Counsel, the defence of Mr. Marshall by his own lawyers was seriously deficient in many respects. Marshall's defence by Khattar and Rosenblum was shot through with indifference, was undermined by influences of suspicions of guilt, and failed to meet minimum standards of practice and sensitivity. However, whereas it was within the control of Marshall's Defence counsel to have conducted themselves differently, they were nonetheless cruelly hampered by the Crown's inexcusable failure to disclose information to them which would have helped show Marshall's innocence. Whatever the failings of Marshall's Defence counsel, Crown counsel cannot be absolved from, and must bear the primary responsibility for, the failure to disclose information they had in their possession to Marshall's Defence counsel, and other egregious errors. If criticism can be made of the Commission counsel's submissions in this regard, it is this imbalance between their justifiable criticism of Defence counsel and their relative silence regarding Crown counsel.

I. Preparation for and Conduct of the Trial

A. Experience of Counsel and Lack of Monetary Restrictions: A Hopeful Combination

2. Khattar and Rosenblum had no excuse for not having more thoroughly prepared their case before going into court on Marshall's behalf. Although Khattar had only served as Defence counsel in one other murder case before representing Marshall, in 1971 he was a lawyer with 35 years experience at the Bar, including an extensive criminal practice and experience as a Crown prosecutor for the County of Cape Breton and the County of Richmond in the 1950's and 1960's. Rosenblum was a very experienced criminal lawyer in 1971, having served 45 years at the Bar.

3. Probably because of their reputations, Khattar and Rosenblum were retained by the Membertou Indian Band and the Department of Indian Affairs respectively to represent Donald Marshall. There were no restrictions with respect to the amount of money available to be spent on the defence. (Vol. 25/4693)

4. Despite the ready availability of money, Khattar and Rosenblum gave no consideration to hiring an investigator to help them with a case they knew was going to be very difficult. Instead they relied upon the names of possible witnesses that Donald Marshall could provide to them and also made some loose inquiries in the Indian community for assistance with respect to evidence about the incident. Not surprisingly, these inquiries produced little results. From June 4 to the time of his trial in November, Donald Marshall was in custody and

therefore in no position to actively assist in preparing his Defence by locating possible witnesses.

B. Early Client Contacts and the Lack of Diligent Investigation

5. When Marshall first met Khattar, and then later Rosenblum, he related the story which he would give in evidence at his trial concerning the encounter with the two men in the park on the night of the stabbing. Despite being provided with this information, Khattar and Rosenblum did not make any inquiries as to whether anyone had seen these two men in the park that night and did not themselves look for any witnesses that might have been there as well. They made no independent inquiries of their own to follow up Marshall's information. (Vol. 26/4803) They merely contacted people in the Native community and asked them to direct possible witnesses to come and speak with them. In terms of defending Marshall, Khattar testified at the Inquiry "we had to rely entirely on what Marshall told us." (Vol. 25/4703)

6. Actually, it would not have been that difficult for Khattar and Rosenblum to locate some of the young people who attended the dance on May 27 and were later in the park. By doing so, for example, they probably would have learned that Pratico was with Barbara Floyd and Sandra Cotie when they received word that there had been a stabbing at the park. This would have then thrown Pratico's later evidence that he witnessed the stabbing into very considerable doubt. It must always be remembered that Sydney was a relatively small and close-knit community in 1971 and that this type of evidence was not so elusive.

7. Khattar and Rosenblum did not even inquire of Marshall whether he had given a statement to the police (Vol. 25/4692). The first time they learned that Marshall had given a statement was at the preliminary hearing when MacIntyre produced it to be marked for identification. This was the first time Marshall's Defence counsel had ever seen their client's statement to the police (Vol. 25/4713).

C. The Infectious Nature of Uncontrolled Suspicion

8. Khattar and Rosenblum permitted themselves to be impeded in their efforts on Marshall's behalf by their considerable suspicions that he was guilty. There is ample evidence that they did not believe their own client which may explain why they conducted their trial preparations with such indifference.

9. Khattar testified to having doubts about Marshall's story concerning a meeting with two men in the park that he thought were priests who then stabbed Seale and himself. Khattar testified, "I didn't say I don't believe you. I had my doubts." (Vol. 25/4691)

1Ø. There is ample corroboration from other witnesses that Marshall's own lawyers did not believe him.

11. Milton Veniot, who argued the Attorney General's response to Marshall's appeal in 1972 before the Court of Appeal, testified to remembering discussions with Rosenblum outside the courtroom. Rosenblum

conveyed to Veniot the very clear impression that he thought Marshall had done what he had been convicted of (Vol. 38/7043). Veniot testified that in his discussion with Rosenblum there was no mention of Pratico going back on his testimony during the trial and no suggestion from Rosenblum at all that he felt Marshall had been wrongfully convicted (Vol. 38/7046). Veniot testified that Rosenblum's words conveyed to him the impression that Rosenblum did not believe in Marshall's innocence (Vol. 38/7046).

12. Staff Sergeant Harry Wheaton also testified about a conversation he had with Mr. Rosenblum in 1982. Wheaton testified that he told Rosenblum that he believed Marshall was innocent and related that Rosenblum's reaction was one of amazement. Rosenblum told Wheaton that he did his best for Marshall but that he always felt deep down that he was guilty. (Vol. 41/7654)

13. It is well settled that it is not for Defence counsel to determine whether or not their client is guilty. The client seeks the skills of Defence counsel as advocate; it is for the jury to determine guilt or innocence. It is the advocate's responsibility to present his or her client's case in the best possible manner, unhampered by personal beliefs.

14. There are numerous examples that demonstrate the substandard nature of Khattar and Rosenblum's trial preparation on behalf of Marshall. Already referred to was the degree to which Khattar and Rosenblum relied on their client and the Native community to come up

with the names of possible witnesses, failing to make their own independent inquiries.

15. Khattar and Rosenblum also failed to speak with the Crown prosecutor concerning the kind of case being prepared against their client. Neither of them had any discussion with Donald MacNeil or Lewis Matheson about the case in advance of the preliminary or trial. (Vol. 25/4697) They did not request nor receive a list of witnesses to be called at the preliminary. They did not contact the Crown to obtain copies of the forensic test results on the exhibits which had been analyzed at the Sackville, New Brunswick, Crime Laboratory (Vol. 25/4708).

16. Khattar seems to have known and testified that it was obvious from reading the evidence that Chant and Pratico were interviewed frequently by the police. No attempt was made to get an order for production of statements.

E. The Preliminary and Grand Jury: More Missed Opportunities

17. At the preliminary hearing, Rosenblum elicited from Patricia Harriss (Red Exhibit, Vol. 1, p.23) that she had given a written statement to the police (Vol. 25/4712). Khattar was aware that Harriss had given signed statements to the police (Vol. 26/4780). Harriss' statements were never requested by Khattar and Rosenblum from either the police or the prosecution.

18. In Nova Scotia in 1971 the Grand Jury was still in existence and the Judge in charging the Grand Jury used a statement of facts prepared by the prosecutor. This statement of facts was read by the Judge to the Grand Jury in the presence of Defence counsel (Evidence of Simon Khattar, Vol. 25/4722).

19. The statement of facts used in this case is found in Red Exhibit, Volume 16, p.167. At the bottom of the second full paragraph it is stated, "Mr. Chant had first related to the police the story the accused gave him, but later advised that he related the false story because of fear of the accused." The reading of this statement of facts provided another opportunity where Defence counsel must have learned that Chant at least had given a prior inconsistent statement to the police. These opportunities would not be sufficient however to relieve Crown counsel of their obligation to positively disclose such prior inconsistent statements to Defence counsel.

20. It is Frank Edwards' opinion that Rosenblum did not have the prior inconsistent statements. Mr. Edwards did not accept the suggestion by counsel for the Estate of Donald C. MacNeil that Rosenblum and Khattar had the prior inconsistent statements but avoided using them for tactical reasons (Vol. 69/12265). There is no evidence that Rosenblum and Khattar did have the statements. Khattar testified that he was not aware of Chant giving the police any written statements (Vol. 25/4725).

21. Khattar and Rosenblum both swore Affidavits in preparation for Marshall's Reference to the Court of Appeal in 1982. Khattar's

Affidavit, Exhibit 79, states that he did not have the prior inconsistent statements and that had they the opportunity at the trial to cross-examine the juvenile witnesses on those statements a jury might reasonably have come to a different conclusion. The Commission heard evidence that Rosenblum's affidavit was exactly the same as Khattar's (Evidence of Simon Khattar, Vol. 26/4784).

22. The failure of Khattar and Rosenblum to make general inquiries of Crown counsel and requests for disclosure which may well have uncovered the existence of witnesses' prior inconsistent statements, does not in any way relieve Crown counsel in 1971 from the obligation to have positively disclosed this information. A more thorough Defence counsel might have made these inquiries despite a knowledge of Mr. MacNeil's practice not to respond, but their failure to do so would not and should not absolve the Crown from their own independent obligations in fairly administering justice.

F. Uncontacted Crown Witnesses

23. Khattar and Rosenblum did not contact any of the principal witnesses testifying against Marshall. They did not do so, testified Khattar, because it was not their practice to interview Crown witnesses. This is in spite of the fact that it was well-settled even in 1971 that the Crown has no property in a witness. Khattar testified to relying on the information he got from the preliminary hearing and not to questioning Crown witnesses prior to trial. Felix Cacchione testified to his opinion that it is an obligation on Defence counsel to speak to a

witness before the witness testifies and because Defence counsel may want facts other than those obtained by the police officer from his or her perspective (Vol. 65/11681).

24. Had Khattar and Rosenblum interviewed any of the three juvenile witnesses, they probably would have discovered what weak witnesses they were and would have learned that they were lying out of fear of the police and prosecutor.

G. The Rationale Behind Passivity at the Preliminary Inquiry

25. In view of Khattar's evidence that it was not his or Rosenblum's practice to interview Crown witnesses but rather to rely on the information that came out of the preliminary, one might expect that witnesses would have been tested vigorously by Defence counsel at the preliminary. Khattar and Rosenblum, however, asked questions only of Harriss at the preliminary and none of Pratico and Chant! Khattar testified this was the practice of Cape Breton lawyers to ask very few questions on the preliminary so as not to give away a potential defense (Vol. 25/4700, 4701). But the only possible defense to which Marshall was irrevocably committed by his statement to the police was well known to the prosecutor, however, there can have been no mystery that the Defence stategy in defending Donald Marshall would inevitably be to vigorously cross-examine the Crown witnesses as to their credibility and that exploring possible weaknesses and inconsistencies in their testimony at the preliminary hearing was essential.

H. The Preparation of the Client for Testimony

26. Marshall does not appear to have been prepared other than in the most incidental fashion by his counsel before giving evidence. There is no evidence to suggest that Rosenblum did other than advise Marshall about his mannerisms, such as taking his hand away from his mouth and to be clear in his testimony, to be truthful and not to hesitate in answering. (Vol. 26/4798) This was inadequate. Khattar and Rosenblum, either together or independently, may have met with Marshall as few as three times during the course of their representation of him.

I. Failure to Inquire about the Jacket

27. Khattar and Rosenblum failed to follow up on some of the physical evidence that was used at his trial to his disadvantage. For example, they never investigated the tears in the jacket Marshall was wearing on the night of the stabbing. Had they done so, even to the point of asking Marshall about them, they would have discovered that Marshall's cousin, Stewart Marshall, cut and then tore the cuff of Marshall's jacket after the stabbing to relieve the swelling from the knife wound and also that Marshall's jacket sleeve had been bunched up which explained the irregular cuts in it from Ebsary's knife. Negative inferences were drawn at the trial by MacNeil from the fact that the cuff of Marshall's jacket was cut, suggesting, according to MacNeil, that Marshall had deliberately inflicted the wound upon himself (Red Exhibit, Vol. 21, p.181 and 182). This suggestion could and should have been negated by the Defence.

J. Trial Errors

28. By not inquiring about the Crown's case, Khattar and Rosenblum did not know that Robert McKay and Brian Doucette who testified at the preliminary inquiry were not being called to testify at Marshall's trial. Khattar and Rosenblum could and should have called these individuals to testify for the Defence that after the stabbing Marshall went to get help for the injured Seale (Red Exhibit, Vol. 1, pp.47,48-5Ø).

K. Defence Counsel's Excuse for Inadequacy - "Blaming the Victim"

29. Using the same rationalization as the police and prosecution, in testimony before the Commission, Khattar shrouded the indifferent and inadequate performance of the Defence by the suggestion that their conduct of the case would have entirely changed had Marshall told them the story about attempting to roll Ebsary and MacNeil. Khattar testified that they would have then endeavored to check out that story and that it would have affected their cross-examination of Pratico, Chant and Harriss (Vol. 26/4788). It is hard to see how that could have been so.

3Ø. Khattar suggested that had they known about the version of events involving the "rolling" that they then would have investigated to see if there was any person who fitted the description given to them by Marshall. However, there is no explanation for why Khattar and

Rosenblum did not conduct such an investigation anyway, given that Marshall did describe an encounter with two men and provided a detailed description of each of them. Khattar and Rosenblum may have found the version involving the rolling more believable than the version Marshall related to them simply because they could not accept that a young Indian kid would have an innocent purpose for being in the park and would only have found his story plausible if it involved some wrongdoing on his part. This is in itself shocking, and it supports the view that Khattar and Rosenblum simply did not believe their client.

L. Indifference to New Developments

31. As the Commission counsel have pointed out, there is evidence that suggests that Rosenblum in particular was indifferent towards his client and did not carry through after verdict as he should have done. One of the girls who saw John Pratico outside the dance at St. Joseph's on the night of May 27 when she already knew that something had happened in the park called Rosenblum's office during the trial to advise him John Pratico could not possibly have been an eye witness to the stabbing because he was at the dance. Ms. Floyd specifically asked for Marshall's lawyer and spoke to a man whom she does not remember as identifying himself. The man told her in a blunt fashion that she was too late and terminated the conversation (Barbara Floyd, Vol. 18/3139 to 3141).

32. Barbara Floyd believed that she was speaking with Mr. Rosenblum (Vol. 18/316Ø) and her evidence about calling his office was supported

by Sandra Cotie, present at the time of the call who testified to Barbara Floyd having looked up Rosenblum's office number and then calling his office (Vol. 18/3215).

33. Simon Khattar testified that no other male person worked at Rosenblum's office other than Rosenblum (Vol. 25/4752). It seems almost incontrovertible then that Barbara Floyd spoke to Rosenblum during Marshall's trial and attempted to provide him with critical information that would have substantially assisted Marshall's defence only to be rebuffed.

34. This same attitude was exhibited again by Mr. Rosenblum to Kevin Lynk, a parole services officer, who in 1977 prepared a community assessment report with respect to Donald Marshall. (See Exhibit 69) In the course of that preparation, Mr. Lynk went to see Mr. Rosenblum concerning the case. Mr. Lynk's report states, "Mr. Rosenblum indicated that there was absolutely nothing that can be done and he is quite frankly sick of hearing Donald Marshall's name mentioned." Kevin Lynk in testimony before the Commission confirmed that Mr. Rosenblum had indeed said to him the remarks contained in his report (Vol. 40/7411).

II. CONCLUSION: Advocacy Impaired by Attitude

35. The evidence concerning the manner in which Khattar and Rosenblum conducted Donald Marshall, Jr.'s defence suggests strongly that they were wrongly influenced by, at least strong suspicions of, if not belief in their client's guilt. This would seem to account for their general

indifference and lassitude with respect to Mr. Marshall's case. These improper attitudes no doubt severely impaired their duty to provide Donald Marshall with a vigorous and thorough defence.

III. Contacts with Lawyers by the Inmate, Donald Marshall, Jr.

36. Donald Marshall, Jr. sought the assistance of other Defence counsel during his long incarceration and upon his release for the Appeal Reference and compensation negotiations. In examining the role of Defence counsel generally, particularly with respect to Mr. Marshall's case, it is important to understand that for a person wrongfully imprisoned for eleven years, a service which would have been very helpful to him were services like Penitentiary Legal Services, described by Deborah Gass in transcript Volume 40 at p.7378 and an enhanced Legal Aid Service. Penitentiary Legal Services provided assistance to penitentiary inmates, but the services they were able to provide were limited by funding, funding which eventually ran out during the time when Mr. Marshall was seeking their assistance. Deborah Gass testified that had Penitentiary Legal Services had more money they could have done such things as hiring a private investigator to work on a particular inmate's case.

37. The Legal Aid Service was and is restricted by some of the same problems as Penitentiary Legal Services with respect to funding and the inability to hire investigators. Legal Aid lawyers as well are notoriously overworked. These services, however, are vital as it is virtually impossible for a prisoner to work on his own case given such

restrictions as lack of education, inability to access information and lack of available legal resources (Evidence of Deborah Gass, Vol. 40/ 7383).

IV. Conclusion and Recommendations

A. An Historic Consensus on the Duties of the Advocate and the Conduct of this Case by the Defence

38. The sacred duty of the advocate to his client has been the subject of consensus for generations. A passage from Brougham's speech in defense of Queen Caroline in her trial in the House of Lords is referred to in an article by Mr. Showell Rogers, "Ethics of Advocacy" [1899] Law Quarterly Review, at page 269 as follows:

> . . .to save that client by all expedient means - to protect that client at all hazards and costs to all others, and amongst others to himself - is the highest and most unquestioned of his [the advocate's] duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. . .

39. The legal profession dealt with a lawyer's duty to his client in the 1920 Canadian "Canons of Legal Ethics and Rules". In Rule 3 (1),(5),(6) the duty is stated as follows:

> (1) He should obtain full knowledge of his client's cause before advising thereon and give a candid opinion of the merits and probable results of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where the employment may depend on such assurances. He should bear in mind that seldom are all the law and facts on

> the side of his client and that audi alteram partem is a safe rule to follow.
>
> (5) He should endeavour by all fair and honourable means to obtain for his client the benefit of any and every remedy and defense which is authorized by law. He must, however, steadfastly bear in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicanery.
>
> (6) It is his right to undertake the defense of a person accused of crime, regardless of is own personal opinion as to the guilt of the accused. Having undertaken such defense, he is bound by all fair and honourable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of the law.

40. The Honourable Mr. Justice Schroeder in Some Ethical Problems in Criminal Law (1963), Special Lectures, Law Society of Upper Canada, 87 states at p.90:

> While Counsel who undertakes any case owes it to his client to put himself in full possession of all the material facts, he is under no ethical constraint to satisfy himself by investigation that his client is in the right, before he undertakes the duty of acting for him. It is not for counsel to decide whether the client's story is improbable and to be rejected by him. To do that would be to usurp the function of judge and jury and, apart from being utterly inpracticable, such a course could only lead in most instances to great injustice. Experience in the courts has demonstrated again and again that improbable stories can be and are true despite their apparent improbability. Whatever counsel may privately think about the truthfulness of the client or of any of his witnesses, or whatever doubts he may entertain about a proposed alibi would unquestionably influence the advice that he would feel disposed to give the client as to the conduct of the

> case, but on the broader question as to whether he should or should not undertake the case, or having undertaken it whether he should continue to represent the client, his personal beliefs or opinions wholly irrelevant... Moreover he has no right to assert his belief in his client's innocence or in the justice of his cause. That is one thing that he must absolutely refrain from doing... It is not for counsel to assume to prejudge the issue, his principle concern being that the Court does not pronounce judgment before having heard all that could possibly be urged on his side.

41. Mr. Justice Schroeder also commented on those qualities which were apparently lacking in Khattar and Rosenblum's defence of Donald Marshall, being ". . the zeal, the courage, and the loyalty which counsel bring to the discharge of their forensic duties." (p.102)

42. John A. Hoolihan, Q.C. in his article entitled "Ethical Standards for Defence Counsel" found in Studies in Criminal Law and Procedure, Canadian Bar Association (1972) at p.123 stated:

> Counsel must use his skill, ability and experience to the end that his client will have a fair trial and that he will be protected by all proper legal safeguards. It is for the Judge or Jury to decide whether the accused is guilty or innocent. As Baron Branwell said in Johnson v. Emerson and Sparrow: 'a man's rights are to be determined by the court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that will advocate a case against their own opinions. A client is entitled to say to his counsel, 'I want your advocacy, not your judgment; I prefer that of the Court.'

43. It is well established law that a lawyer must bring a degree of expertise and care to the duties he performs on behalf of his client equivalent to the standard exercised by reasonably competent solicitors

in the province. (e.g. see Maple Leaf Enterprises Ltd. v. MacKay 42 N.S.R. (2d) 60 (N.S.S.C.T.D.))

44. Lawyers have previously been found negligent for failing to contact and interview a witness who could be of assistance to their client's case. (Fawell et al. v. Atkins, Evans and Munroe (1981), 28 B.C.L.R. 32 (B.C.S.C.) - A Civil Case)

45. Law Society Rules should be broad enough to make gross incompetence a disciplinary offence. As stated by the Royal Commission Inquiry into Civil Rights (McRuer Report) Report No. 1, Volume 3 at p.1181:

> The obligation to maintain high standards of competence and ethical conduct is not discharged once an applicant has been admitted to practice. There is the continuing obligation to see that practicing members of the body provide proper service to the public. The service provided will only be valuable so long as it is a combination of a high degree of technical compentence and a vigilant observance of the ethical requirements of practice.

46. As to the failure by Khattar and Rosenblum to expose the weaknesses in Chant, Pratico and Harriss' evidence, the comments of Hall, J. in Patterson v. The Queen (1970), 2 C.C.C. (2d) 227 (S.C.C.) are pertinent as providing ,

> ...a lesson to Defence counsel as to the importance of tenacity. If Defence counsel had made an attempt to elicit from the witness what the statements given by them contained or whether evidence then being given was adverse, he might well have made out a case for the immediate production of the previous statement.

47. Patterson was a case where the magistrate presiding over a preliminary hearing refused to order production of a statement made by one of the witnesses. Not only did Khattar and Rosenblum not elicit sufficient information from Chant, Practico and Harriss to satisfy the observations of Hall, J. in the Patterson case, it would appear that they were not even aware of the Patterson case which provided that a trial judge had a discretion to order production of witness statement to Defence counsel (Vol. 26/4855, 4868).

V. CONCLUSION

48. Having regard to the approved standards of practice and the law in 1971, it seems clear that there were well established standards that should have governed Khattar and Rosenblum's conduct in Donald Marshall, Jr.'s Defence which they simply failed to meet. This resulted in a host of missed opportunities and a defence which was tragically diluted and ineffective.

RECOMMENDATIONS: ROLE OF DEFENCE COUNSEL

Recommendations should be made to the Provincial Government for the following changes and reforms by the appropriate bodies responsible for the Education and Certification of private and legal aid lawyers:

1. Specialized Continuing Legal Education Programs emphasizing criminal practice should be offered. These sessions should include materials sensitizing Defence Counsel to issues of race, ethnicity and gender as well as to standards of competent defence work. Attendance at these programmes should be made a condition precedent to any speciality designation.

2. Checklists to be produced with respect to trial preparation. Such checklists to be prepared by Criminal Lawyers for use as guides in preparing for trial and appeal and as indicators of standards of practice.

3. The entitlement to advertise a speciality to require certain special qualifications such as:

   a) five years experience at the bar with significant criminal practice at trial and appellate levels.

   b) lecturing at Continuing Legal Education Seminars or Law School Courses in area of practice.

c) enrollment in yearly refresher courses.

4. Development of a Bar Society/Legal Aid Research Facility with reciprocal connections to the Ontario Legal Aid Research Facility concept and materials.

ANY MISCARRIAGE OF JUSTICE IS MORE APPARENT THAN REAL

"The desire for vengeance imports an opinion that its object is actually and personally to blame. It takes an internal standard, not an objective or external one, and condemns its victim by that. The question is whether such a standard is still accepted either in this primitive form, or in some more refined development, as is commonly supposed, and as seems not impossible, considering the relative slowness with which the criminal law has improved."

The Common Law, Lecture II, The Criminal Law, by Oliver Wendell Holmes, 1963 ed. at p.35

ANY MISCARRIAGE OF JUSTICE IS MORE APPARENT THAN REAL

1. Blaming the victim is not new. It is no doubt a great consolation for those who seek to justify or minimize their responsibility for a system that was incapable of producing justice in Donald Marshall Jr.'s case. Blaming the victim is the last refuge of those who refuse to admit full responsibility for the mistakes that can and do occur in the administration of justice.

2. It is not a theory that originated with the judiciary. It was nudged into existence by Mr. Gordon Gale, who asserted, with a comforting arm thrown over the shoulders of John MacIntyre, that as far as he was concerned Marshall was the "author of his own misfortune". It is but a short step from this notion to the idea that "any miscarriage of justice is more apparent than real" -- a shocking phrase that discloses the callous character of Nova Scotia justice at the highest level. The Court that uttered the phrase is a disgrace to justice.

3. This aspect of the decision of the Nova Scotia Court of Appeal was fairly characterized by counsel for the Commission as:

> "Not supported by the evidence before the Court and...such comments are gratuitous and unnecessary to support the decision to acquit Donald Marshall, Jr."
>
> Submissions of Commission Counsel, p.110

4. Both phrases assume that Donald Marshall and Sandy Seale were involved in a robbery attempt. Counsel for the Commission, in their submissions, approached the matter on the assumption that there was some sort of robbery attempt, without attempting to resolve the underlying factual issue. We submit that they are correct in that approach, and in their conclusion respecting it:

> "Accordingly, with respect to the 1971 behaviour of Donald Marshall, Jr., we are of the view that his failure to advise anyone of an attempt to obtain money from Ebsary and MacNeil was not a factor which contributed to his wrongful conviction."
>
> Submissions of Commission Counsel, p.153

5. Though it is unnecessary, therefore, to expose the weakness of the factual basis for a finding that there was an attempted robbery of some sort going on, and for an analysis of the weakness of the view that Marshall's concealment of this fact contributed to his wrongful conviction, we will briefly attempt to do both of these tasks. We think it can be shown that the suggestion of an attempted robbery does not explain anything, that is, that the theory cannot bear the weight that is sought to be placed upon it. And second, the suggestion itself, when examined, is without any convincing factual foundation.

A. <u>The Use of This Theory</u>

6. It is conceded that there are indeed two possible ways of viewing the speculative question of what John MacIntyre would have done had he thought that there was an attempted robbery going on in the park that night. It is indeed speculative: John MacIntyre himself does not suggest that

information about an attempted robbery would have made any difference whatsoever to his investigation.

7. On the one hand Superintendent Scott is an example of an officer who does feel that knowledge of an attempted robbery would have meant that the investigators would "put more confidence in [Marshall's] statement, because he was actually admitting to a very serious offence, which he could go to jail for". Quite fairly, Superintendent Scott admits that all this is "speculative" and he also agrees that whether the information was available or not, nevertheless when speaking to Marshall he would "certainly take what he had said and investigate it fully". And that is the obligation of any honest police officer.

8. The assertion that lands this theory whatever strength it might claim is correctly put by Superintendent Scott:

> "...it would have been more credible to them of what he was up and doing that night in the park, rather than just up talking to two people that looked like priests."

But examine this statement. This theory requires as a premise that talking to these two people that look like priests is a less likely event to have taken place in a public park in peaceful downtown Sydney than attempting to rob these two people that look like priests. But the evidence suggests that the park was not a lonely and secluded place that night; at that time there were a number of people present because of the dance that had recently ended. Other youths were in fact talking in that park at that very time. The only difference is that Seale and Marshall were not white. Given the background of Mr. Seale and Mr. Marshall Jr., a robbery is extremely unlikely. Neither

had been in any serious trouble with the law, and Seale's background had been in many ways exemplary. (Vol. 51/9344-49).

9. On the other hand there are those who don't accept this theory. Staff Sgt. Wheaton says:

> "I don't follow it myself. If there was a robbery or if there wasn't a robbery, it still should have been followed up. His evidence that there was a short grey-haired man and a taller younger man and somewhat dressed like a priest and so on." (Vol. 43/7969, lines 1-8)

This is the crucial fact. An honest police officer, following sound police practices would have acted in exactly the same way whether or not there was an attempted robbery. (See Police Investigation Standards - 1971)

10. And so the question is irrelevant to the task of the tribunal. It would have made no difference. Whether or not there was an attempted robbery, witnesses ought not to have been pressured into perjury, a serious search for Ebsary and MacNeil ought to have been undertaken at the earliest opportunity, and MacNeil's evidence ought to have been evaluated by a proper investigation when he came forward in 1971. It is therefore not surprising that Mr. MacIntyre did not suggest that this would have made a difference. Quite clearly, it would not have affected any of the criticism that had been made of his conduct, one way or the other.

B. The Factual Underpinning of the Attempted Robbery Theory

11. The theory gains what credence it might have from the evidence of Donald Marshall itself. Marshall heard Ebsary speak in a fashion that is

consistent with the notion that Ebsary believed that he was being robbed. Those words are "if you want it, everything in my pocket I will give you." Or, phrased differently, "If you want everything from my pockets, I'll give it to you now." This occurred immediately before Ebsary pulled the knife out and killed Seale. (Vol. 82/14,370;14,438 line 12;14,375-6)

12. What is important is that Marshall did not hear Seale say anything that would indicate that Seale was trying to rob Ebsary. Yet he was clearly in a position to have heard such comments if they had occurred. Accordingly, Marshall testified:

> "Q. ...What did Seale say immediately before that? Did he ask Ebsary for everything in Ebsary's pocket?
> A. He never said anything.
> Q. What would prompt Ebsary to refer to his pockets?
> A. Perhaps a little crazy, sir.
> Q. Seale did not say 'Dig man dig'?
> A. No.
> Q. Or ask him for money?
> A. No.
>
> (Vol. 82/14,438-9)

13. Ebsary had been drinking. It is clear from all the evidence we have heard about him that from time to time he did not manage to sustain a firm control on reality. He believed that he had been attacked in the park before, and was said to have sworn "by my Christ" that the very next man who tried to rob him, would die. It seems likely that he thought, quite wrongly, that Seale was going to rob him. But it seems equally unlikely that Seale intended any such thing.

B.(i) Donald Marshall, Jr.

14. Marshall, imprisoned for eleven years for a crime he did not commit, could have thought of little else but the events that transpired that tragic evening. He would naturally wonder whether whoever did the killing might have thought that they were being robbed. That would be a logical inference to draw, because the comment that he did hear is consistent with Ebsary's subjective belief that he was being robbed.

15. Accordingly it makes sense that when Mr. Marshall speaks with Lawrence O'Neil, his lawyer's assistant, on January 11, 1980, at Springhill, Nova Scotia, he speculates that Mickey Flinn [whom he thought was Ebsary] may have felt that Marshall was going to rob him. (Vol. 82/14,460-1)

16. It is, of course, true that Marshall testified under oath at the Reference in the Court of Appeal and spoke in conversation with Staff Sgt. Wheaton, earlier, in accordance with the attempted robbery theory. Marshall testified that at the time Staff Sgt. Wheaton came to see him at the prison:

> "What was in my mind, I have already heard what the old man had said and the other gentleman. Then I had to follow what they had said."

Thus, he gave information that confirmed what Ebsary and MacNeil had said even though it was not true -- in order to secure his release. It would be unjust to fault him for lying to the police in the circumstances in which he found himself. He thought that he would not be believed unless his story

confirmed what Ebsary and MacNeil were saying. (Vol. 82/14,393-4;14,395 line 12)

17. When Staff Sgt. Wheaton comes to Dorchester Penitentiary, Donald Marshall Junior has served eleven years in prison for a murder that he knows he did not commit. It is hard to imagine the despair, and the desperation from which he suffered. That desperation was magnified by Staff Sgt. Wheaton's approach to this crucial interview:

> "I told him that if he had any hope of getting out of Dorchester that it was extremely important to be absolutely truthful with me...And I emphasized that very strongly to him right at the beginning of the conversation."
>
> (Vol. 43/7966-7)

18. He was a man who had been told he had no prospect of release on parole because he would not utter the ultimate lie and admit his guilt. Staff Sgt. Wheaton very fairly admits that his comments would have the effect of "intensifying that pressure on him."

19. Thus, Marshall's testimony to the Court of Appeal at the Reference, and his testimony about planning to make money with Seale at the first Ebsary trial can be understood:

> "Because they had doubted in what I said in 1971....I had already gone to the ones that were in control and they doubted me at that time. And I told them what had occurred in '71 and '82 and '83. They would not have believed me....I told myself that....Because I know the behaviour of these ones that are in charge....and also the police. They did not listen to me then and they did wish to listen to me in 1981."
> (Vol. 82/14,434, lines 3,11-23)

It is important, then, to turn to the evidence of other witnesses to see

what convincing evidence there might be of the attempted robbery theory.

B(ii) Roy Ebsary

20. Ebsary admitted that it was misty that night; he did not have his glasses on; and he could not see properly. He admits he was expecting a mugging. It was clear from his evidence that he had been drinking that night so heavily that one of his rare hangovers was so bad the next morning that he could not get out of bed. In explaining his state of mind that day, he had said "I swore by my Christ that the next man that struck me would die in his tracks". But Ebsary struck Seale first. He struck preemptively. Seale had done nothing. Marshall had done nothing. (Vol. 2/217-18)

21. Mr. Ebsary was first of all an unreliable witness. He was frank about this under oath:

> "Q. Why would you want to tell Mr. Ratchford, 'any bloody thing' to use your language?
> A. Because he'd believe it.
> Q. And is that what you do, if someone will believe it, you'll tell them any bloody thing?
> A. Right, why not?
> Q. Even now?
> A. Even now.
> Q. Even today?
> A. Even today."

The witness is clearly willing to lie under oath at any time. (Vol.2/204, lines 10-25; p.205, lines 1-3)

22. What is more important, he seems incapable, at times, of knowing when he has told a lie. For example:

"Q. ...Now, as I understand your evidence yesterday, you said that there was no conversation with Mr. Marshall and Mr. Seale prior to the attack. Is that correct?
A. Not to my knowledge, no.
Q. All right.
A. Any more than Marshall was boasting what he would do to us if we didn't dig out.
Q. And you have been asked twice now what that would be, what he said he would do and you have been unable to answer. Can you try it again?
A. I told you Marshall was -- the only thing that Marshall said to us was: "Dig out, and if you don't dig out, look at this." Right? In other words, he's going to put a beating on us.
Q. All right. The words were: "Dig out, and if you don't dig out, look at this." waving his muscles in the air.
A. That's right. Look what I got here.
Q. Now I suggest to you that that is the very first time in your life you ever told that to anyone. Is that true?
A. Now I am going to tell you you're a goddamn liar because I've told that to everyone that I've spoke to.
Q. You told Carroll?
A. Yes, I told it to Carroll, too.
Q. Told it to Ratchford?
A. Yes.
Q. And told it to Sergeant MacIntyre in 1971.
A. I did -- Well, I saw Sergeant MacIntyre at that time or the time you state --
Q. Once again, Sir, did you or did you not?
A. What?
Q. Tell Sergeant MacIntyre in 1971?
A. How the hell do I know?
(Vol. 2/181, line 20 to p.182, line 25)

23. The attempted robbery theory has served Ebsary well. He persuaded officials of the Attorney General's Department not to prefer an indictment for murder after he had been wrongly discharged on a charge of murder by a Provincial Court judge. Thus, he was tried only for manslaughter on the incorrect legal theory that the judge was entitled in law to take into account evidence of self-defence at the preliminary hearing, or alternatively, that any jury would have accepted the self-defence argument. Both positions are legally wrong. If self-defence had been accepted by the jury, an acquittal would have resulted, not a manslaughter.

24. More importantly, it is a theory which allows Ebsary to portray himself as a heroic figure, as the rescuer of MacNeil, and he takes advantage of this opportunity from the very beginning. It is submitted that no reliance ought to be placed on Ebsary's evidence in any area, but especially in an area where he can be perceived to have an emotionally laden self-interest in the content of that evidence.

B.(iii) MacNeil

25. During this period of time, Mr. MacNeil was not eating properly because of his consumption of alcohol, and he was in very poor health. At the time of Seale's murder he was quite "thin" -- approximately 100 pounds. And he was on medication at the time: Dilantin, Phenobarb and Valium. His own characterization of his condition that evening is significant: "pretty drunk but not paralyzed". (Vol. 3/521, 525, line 3;583, lines 10-25)

26. This witness too is of questionable reliability. On a number of occasions he has testified with complete certainty, and yet when questioned further, he was also quite prepared to say that the exact opposite to his testimony was also possible. And, he was unable to give the Commissioners any insight into how that could possibly be the case.

Nevertheless he does say:

"I know it was an attempted robbery. I know that".

But it is hard to find facts upon which such certainty could rest.

(Vol. 4/548, line 15;549, lines 20-24;550-1;555-6;562-4;569)

27. It is therefore important to understand his mental processes in evaluating his evidence. On some occasions, he acknowledges that "in your imagination, you just assume what had happened". For example, he figured that Ebsary must have had a knife, and though he never saw one:

"Q. "...therefore [you] just put a knife in his hand. That's what happened in your own mind, right?"
A. Yeh".

And:

"Q. You've testified so many times that that image [Marshall being slashed by Ebsary] may well have come from all those years in trying to figure out what happened, and that's where its come from. Possible?
A. Possible".

(Vol. 4/552, lines 18-22;554, lines 14-20)

28. Was MacNeil staggering as he stepped off the curb? And was Mr. Marshall holding him, as Mr. Marshall suggests, only because he wished to help a drunken man who was in danger of falling down?

29. MacNeil was thoroughly intoxicated that night. When he left the State Tavern, he had at least seven or eight beers [eleven ounces each] and there could have been a "few more besides that". It would not, on the other hand, have taken very much beer to make him drunk to the point where he was staggering because his health wasn't that good "so it wouldn't take too much." MacNeil admits that he "had a little stagger". It is significant that when Marshall touches him, he is located right by the curb and he is only held for the briefest of periods:

"Q. When you first have your recollection of where you are when Mr.

Marshall touches your arm, you're right by the curb, aren't you, right by the curb?
A. Yeh.
Q. Walking in one direction or the other, right?
A. Yeh.
Q. And you say Marshall grabbed your arm, right?
A. Right.
Q. And he grabbed it just for a second, didn't he? I mean the whole thing happened within a few seconds?
A. Right.
Q. It was just for a second?
A. Right."

Nor is he able to tell us when Mr. Marshall let his arm go in relation to Mr. Ebsary's actions:

"Q. .He let your -- It's an important question. I want you to hear me. He let your arm go before Mr. Ebsary took anything out of his pocket?
A. No, no, after.
Q. Why did you testify to Mr. Orsborn that, in fact, it was before?
A. Well, I was confused on that day.
Q. You were confused. I am going to put it to you, sir, that, in fact, it was before or it happened so quickly, you can't be certain today?
Q. You can't be certain, right?
A. Right."

The nature of the pressure on MacNeil's arm is inconsistent with any robbery attempt:

"Q. Now when you describe the feeling of that -- in that split second of Marshall holding your arm, you have described in the past as a feeling of pressure, small pressure, right?
A. Yeh.
Q. Nobody was jacking your arm up your back, right?
A. No.
Q. And,in fact, there was no pain, right?
A. No.
Q. And there was no twisting of the arm, right?
A. No.
Q. It was just a feeling of pressure on the arm that lasted a couple of seconds, right?
A. Right
Q. And, in fact, you could have moved. Isn't that what you've testified to before? If you weren't tensified you could have physically moved?
A. Yeh.
Q. Right?
A. Right.

Q. Now I'm going to suggest to you, sir, that's just the kind of feeling you would have, not when someone is jacking up your arm, but when someone just grabs your arm for a split second maybe when you trip, that's just the feeling you'd have, right?
A. Yes.
Q. Correct?
A. Yes.
Q. And that today you can't be certain that that isn't what caused the feeling, just somebody grabbing it for a second when you staggered, right, Mr. MacNeil?
A. No.
Q. You can't be certain?
A. No."

(Vol. 2/381, lines 8-25;387, line 6; Vol. 3/394, lines 1-16; 520-1; Vol. 4/572-3)

30. From the moment Mr. Marshall touched his arm, MacNeil was "tensified", "froze." Being "tensified" is a state that is close to being in a trance, but not one that is so intense that "you can't know what's going on". More significantly, it is also a state where he does get confused about what he saw and what he did not see.

31. And MacNeil is confused now as to whether Mr. Marshall and Mr. Seale approached him from behind or from the front.

(Vol. 4/435, lines 1-6;547, line 24 to 548, line 3)

32. Mr. Marshall did not move Mr. MacNeil any distance at all, nor did he fight with him. Once his arm was taken, he then went into a state of shock. Marshall said nothing at any time. And at no time did Marshall have his hand around MacNeil's throat, as Ebsary swore under oath. The only thing that suggests a robbery is the over-heard phrase "Dig, dig, man, dig" but Mr. MacNeil is not able to say whether that phrase was uttered by Seale or by Ebsary. (Vol. 4/574, lines 10-24)

33. It is important to remember that the effect of alcohol on Mr. MacNeil is not typical. He possesses the rare ability to "drink himself sober." And he may have been "drinking himself sober" that night.

(Vol. 3/392, line 24;395, line 10;397, line 1-20;522, line 19)

34. In addition, Mr. MacNeil during this period and surrounding this incident had dreams and some of the things that he remembers come from his dreams and not from his memory. For example, the red eyes that he saw may have come from his dreams. So too, the picture in his mind of blood surrounding this incident may not be real. To some extent, Mr. MacNeil has testified under oath in clear and coherent detail to events which he now admits were pure imaginings. He has from time to time been unable to tell the difference between what he actually saw and what he imagined. For example:

"Q. And when you tell us you didn't see any blood, is that true to the best of your memory?
A. That's true to the best of my memory.
Q. But when you testified in the past that you saw a big squirt of blood when you saw his intestines coming out of his stomach, where did you get those pictures from?
A. It -- probably in my thoughts.
Q. Where would you get those thoughts?
A. From dreaming.
Q. From dreaming?
A. Yeh.

(Vol. 3/433-34;495, lines 1-10)

35. It seems clear that James MacNeil honestly believed himself to be the victim of an attempted robbery. Mrs. Mary Ebsary recalls him coming in and:

"Jimmy started going on about Roy saving his life and he was a good fellow tonight, and you did a good thing tonight and you saved my life."

But the real question, in the circumstances, is whether or not this drunken belief was accurate. (Vol. 24/4550, lines 16-22)

36. At the end of the day, the only thing that really stands out in Mr. MacNeil's memory about that night is the fact that Roy Ebsary stabbed Sandy Seale. Apart from that, though he was not totally confused, he was pretty confused about what he knew and remembered as supposed to what he imagined and dreamed about.

(Vol. 3/523, lines 14-25;528, lines 18-21;533, lines 4-10)

37. During this period MacNeil was not eating properly because of his consumption of alcohol; he was taking drugs in significant quantities, and he was in very poor health. It didn't take much to make him stagger, and it is perfectly reasonable that Marshall would lean over, take his arm and attempt to prevent him from falling off the curb. (Vol. 3/521)

B(iv) <u>Seale</u>

38. According to the evidence of Deborah Timmins, Seale lay injured, dying, perhaps not in his right mind with pain and the seriousness of his injury, and when faced with her statement "he's gone for help", Seale replied, "No cops." (Vol. 4/709, line 25)

39. This evidence is suspicious because it had never surfaced before her evidence given before the Royal Commission. But even assuming it to be

true, it hardly provides serious support for a robbery theory. Seale had no need for money from the robbery. It would have been totally out of his character to engage in an attempted robbery. He was clearly unarmed.

40. Much of the evidence of how young blacks and Indians were treated by the police department in Sydney is negative. One piece of concrete evidence, focused on in this case, about how police treated young blacks and Indians is the manner in which Donald Marshall Junior was treated by police that night. Scott MacKay, an impartial witness, says the word for describing how he was put in the car that night at the scene of the crime is "man handled". It would be surprising if black youths had faith and confidence in that police department. It would be surprising if they wanted the police called. There is no suggestion that Seale appreciated the gravity of his injury. (Vol. 4/663, line 23 to 664, line 1)

B(v) Chant

41. At some point there is apparently a brief conversation between Mr. Marshall and Mr. Chant in the police station and Mr. Marshall "very raged, very aggressive" says to Chant: "There was two of them, wasn't there." Chant replied, "yeh, there was two of them." It is important to note that Marshall was speaking "not to the point of shouting, but with a very strong voice." It seems likely that Marshall had been told, by Chant or by the police or by other children, that Chant had told the police that he had "seen it all." If he did, then it followed that he would know and be able to corroborate that there were two men -- when the police proved unwilling

to accept that fact. Nothing could be more reasonable than to seek independent support for that fact from a supposed eye-witness.

(Vol. 5/787, lines 4-17;790, lines 4-22)

42. Chant is not certain when this conversation, which Marshall does not remember, took place. It may have been on the Saturday, but it may have been on the Sunday afternoon as well. (Vol. 5/815, lines 4-20;818, lines 5-20)

43. It may seem a reasonable response to what one would suppose would be frustration and perhaps anger by the police refusal to accept Marshall's account of what occurred.

B.(vi) Scott MacKay

44. Scott MacKay did indicate that there was some initial reluctance on the part of Mr. Marshall to call the police. But that was brief. The first thing MacKay said to Marshall was "we better call the police." Marshall initially said "no." Then MacKay said "we better get help" (meaning the ambulance). It was at that point that Marshall said "yes" and the two boys started walking towards the house to get help.

(Vol. 4/648, lines 20-25;662, line 14;646-7)

45. This initial resistance to calling the police is consistent with normal behaviour for a seventeen year old Indian male in terms of the relationship between the police and native people that we have seen disclosed in the

evidence. And this skepticism about the police , as it turned out, was completely accurate. When the police did come, according to MacKay, they grabbed Junior Marshall and "man-handled him" into a police car.

C. Conclusion

46. All in all, there is no factual foundation that satisfyingly conveys an air of reality to the suggestion of an attempted robbery. It is far more likely that MacNeil was staggering and that Marshall's contact with him was a brief one designed to prevent him from falling into the gutter in his drunken and extremely emaciated state. It is far more likely that Ebsary convinced himself that he was about to be robbed -- and did so without any factual foundation whatsoever.

COMPENSATION

Jack Stewart explained what Marshall had lost over the years of his imprisonment.

> "The normal sort of evolutionary socialization that takes place. The ability to interact with people. The ability to think in...a critical fashion as oppose to necessary a paranoid fashion. To be a little less focused. Most fellows that come out, they are focused very much on rules, regulations". (Vol. 71/12669).

COMPENSATION

1. The handling by the Government of Nova Scotia of the matter of compensation to Donald Marshall, Jr. was, in all respects, disgraceful. The Government's attitude, delays and tactics served to ensure that Donald Marshall, Jr. was treated neither fairly nor compassionately during the compensation process and eventual settlement.

2. The compensation process was characterized by both the Federal and Provincial Governments refusing to acknowledge their legal obligations to compensate wrongfully convicted persons and by the employment of unprincipled tactics on the part of the Nova Scotia Provincial Government in negotiating the ex gratia payment to Donald Marshall, Jr. In these negotiations inappropriate factors such as Donald Marshall, Jr.'s alleged conduct were considered and appropriate issues such as police conduct in the original murder investigation were ignored. The result was neither a fair process nor an adequate settlement.

3. Donald Marshall, Jr.'s lawyer throughout the compensation process was Felix Cacchione, an outstanding criminal defence lawyer who, after working for approximately eight years with Nova Scotia Legal Aid had gone into private practice. Cacchione had specialized as a criminal defence lawyer exclusively since his early days with Legal Aid. He had no experience negotiating civil claims. Cacchione testified to never having negotiated any sort of settlement and never having been involved

in defending or bringing forth a claim in a civil matter (Vol. 64/11503).

I. The Federal Role

4. In August and September of 1983, Cacchione corresponded with Mark MacGuigan, then Federal Minister of Justice. Cacchione requested compensation from the Federal Government for Donald Marshall, Jr. pursuant to the International Covenant on Civil and Political Rights (Red Exhibit Vol. 30/26). This was the first compensation request Cacchione made to anyone. MacGuigan's response was that because of Marshall's conduct (as falsely characterized by the Nova Scotia Court of Appeal), he did not comply with the conditions of the Covenant and could not receive compensation under it. The portion of Article 14(6) of the International Covenant relied on by MacGuigan provides for compensation for a person whose conviction was reversed "...on the ground that a newly discovered fact shows conclusively that there has been a miscarriage of justice...unless...the non-disclosure of the unknown fact in time is wholly or partly attributable to him". MacGuigan claimed that Marshall fell within the exception to Article 14(6) on the basis of the comments made by the Nova Scotia Court of Appeal. MacGuigan told Cacchione that the matter was more properly an issue for the Provincial Government (Red Exhibit Vol. 30/29)

5. Although the Federal Government was mentioned little in evidence concerning this exchange, its conduct should not escape censure. It would appear that the Minister accepted without question the perspective

of the Court of Appeal of the Province of Nova Scotia. It should have been obvious from even a cursory reading of the decision that there was no evidentiary foundation for the Courts' remarks. It is also suggested that the Minister was interpreting the Covenant in a simplistic manner, which paid no heed to its purpose: to compensate victims of miscarriage of justice. The Minister should have conducted an independent investigation of Marshall's entitlement. As it stands, the Federal Government must share in the ignominy of the Donald Marshall, Jr. case, and must share responsibility with the Government of Nova Scotia for having accorded Donald Marshall less than fundamental fairness in its determination of his claims.

II. Provincial Responsibility

A. A Pattern of Delay

6. Cacchione then made a request to Attorney General Harry How for a meeting to discuss compensation. This request was passed on to the Deputy Attorney General, Gordon Coles, by Mr. How but no meeting was ever arranged.

7. In April 1982 Attorney General How had publicly acknowledged a willingness to pay compensation to Donald Marshall (Red Exhibit Vol. 38/10). At that time How said if Marshall was cleared of the murder, the Government would pay compensation for his ten and a half years behind bars. There is no reason why research on the issue of compensation could not have been commenced by the Government when the Minister announced this posture.

8. Although unsuccessful in his attempt to meet with Attorney General How, Cacchione managed to secure a meeting with the new Attorney General Ron Giffin in November 1983. This meeting apparently took place in an atmosphere of mistrust and suspicion on the part of Giffin who took petty exception to an innocuous news report announcing the fact that a meeting had been scheduled.

9. In light of the intense public interest surrounding the case, the public acknowledgement of a meeting between Donald Marshall, Jr.'s lawyer and the Attorney General for the province seems quite appropriate and not at all unreasonable. Attorney General Giffin chose to use this disclosure as an excuse for having no further meetings with Cacchione following the one on November 21st. Giffin decided after the first meeting that he would not meet with Cacchione personally to deal with the Marshall matter (Vol. 57/10426). The assurance of compensation of a wrongfully convicted person is essential to maintain public confidence in the criminal justice system. This requires that as little as possible should be effected in secret. The mere announcement of a meeting being held is a minimal gesture in the correction direction. No doubt Government believed it could strike a cheaper settlement in secret; this, however, should not have been its goal.

10. At the November 21st meeting Cacchione raised the question of a public inquiry, the payment of Marshall's legal fees and the matter of compensation. Giffin described the meeting as not being "very productive". The Government was taking no initiative with respect to

the matter of compensation and Giffin's comment sounds like an excuse for not making greater efforts to advance the issue of fair compensation compensation quickly.

B. The Campbell Commission: Short-Lived Hopes

11. Effectively, the Government did absolutely nothing about the matter of compensation from the time Donald Marshall, Jr. was acquitted by the Nova Scotia Court of Appeal on May 10, 1983, until the establishment of the Campbell Commission on March 5, 1984. Cacchione, who throughout this time was desperately trying to get information and some form of dialogue with the Government, testified to his belief that the Campbell Commission was established as a means of taking public pressure off the Government (Vol. 64/11554, 11498).

12. No suggestion was ever made by the Government to Cacchione as to how he might proceed with the issue of compensation. Giffin testified that the responsibility for dealing with the situation was exclusively in the hands of the Nova Scotia Government (Vol. 57/10427). That being the case, the Government was remarkably ineffective and uncommitted in trying to get a discussion about compensation underway with Donald Marshall, Jr.'s counsel. Giffin in his testimony, made a number of references to the Government trying to decide how to best approach this "unprecedented situation" (Vol. 57/10425-28). There was no satisfactory evidence before this Commission that any thoughtful or concrete steps were being taken by the Government to determine the way in which it was going to handle compensation despite Giffin's testimony that there were

weekly cabinet meetings as well as discussions in which he participated in the Attorney General's Department with senior officials. (Vol. 57/10435).

13. These discussions in the Attorney General's Department included consideration of the civil proceedings Marshall had commenced against the City of Sydney, the criminal proceedings against Ebsary, and scenarios which included considering whether the Government should do absolutely nothing or whether the Government could set up a mechanism for dealing with the question of compensation under the Inquiries Act (Vol. 57/10436).

14. During this time the Government effectively did nothing to advance the compensation issue. Their rationalizations for accomplishing so little seem to have centered principally around the concern by the Government that because Donald Marshall, Jr. had commenced a civil suit against the City of Sydney the matter was before the Courts. The Government of Nova Scotia wanted to exercise great care not to do anything that might adversely affect the interests of any party in the civil suit (Vol. 57/10415).

15. There was a view in the Attorney General's Department, subscribed to by Giffin, that Marshall could pursue his remedy through his action against the City of Sydney and Urquhart and MacIntyre. Such a view did not address the fact that Marshall had no money with which to pursue a civil action, that the civil action had been started in the first place in order to preserve his rights pursuant to limitation periods, and that

a civil action was not a viable option for obtaining compensation for his wrongful conviction and imprisonment.

16. Reliance on Marshall's civil claim to relieve the Government of having to deal with compensation dated back to Attorney General How. He testified that as Attorney General he said to department officials, "Let us see what happens in that case in terms of what he might recover financially" (Vol. 61/10989).

17. Giffin was concerned that a compensation inquiry would function as a discovery process in relation to Marshall's civil suit (Vol. 57/10440). It is submitted that the Commission must seriously question what possible concern the Government could have had about this question as they were not even a party to the proceedings. This concern can be characterized as a further excuse by the Government not to do anything about compensation and is a further example of the Government prefering the interests of others to those of Donald Marshall, Jr.

18. Another rationalization for inaction on the part of a Government related to worries that the issue of compensation not adversely effect Ebsary's position before the Courts (Evidence of Giffin, Vol. 57/10425). This was a sham. In fact, the Government could, and ultimately did, settle the matter of compensation without suggesting Ebsary was guilty. The Government could easily have taken action, even to the point of conducting an inquiry into compensation, without impairing Ebsary's right to be presumed innocent. In fact, the Government established the Campbell Commission long before the Ebsary case was finally concluded in

the Courts, with no explanation as to why the Ebsary matter had been such an impediment to dealing with compensation but was no longer considered to be so (Evidence of Coles, Vol. 78/13911-13916. This therefore only lends support to the view articulated further in our submission, that the Campbell Commission was set up by the Government in response to public pressure and not as a result of a genuine desire to resolve Donald Marshall, Jr.'s compensation claim.

19. The provincial Government too readily accepted the position of the Government of Canada that it had no legal obligation to Donald Marshall, Jr. and would not participate in any payment of either legal costs or compensation to him (Evidence of Giffin, Vol. 57/10408). It is submitted that Canada's international obligations pursuant to the International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant, ratified by Canada on August 19, 1976, constitute a binding obligation at international law upon the Federal government and provincial governments as well. Giffin also received legal advice that the Government of Nova Scotia had no legal responsibility to pay compensation to Mr. Marshall; therefore, when compensation was finally considered it was in the form of an ex gratia payment (Vol. 57/10419, 104120. The correctness of both disclaimers ought not to be uncritically accepted. Both are self-serving. A good argument could be made that the Federal and Provincial Governments were liable under the common law or the International Covenant of Civil and Political Rights.

20. In addition to not promptly dealing with even the process by which compensation could be determined, the Government had also chosen to withold information that Cacchione needed. Once the Campbell Commission was established Cacchione was advised that the Government was going to make available to Justice Campbell the files, documents and other materials in the Government's possession including those files to which Cacchione had requested access and to which access had been denied (Red Exhibit Vol. 33/344). Giffin testified in Vol. 57 at p.10,451 that if Campbell had decided to turn this material over to Cacchione that would have been acceptable to the Government. This professed willingness by the Government to support Cacchione's eventually having access to relevant materials was never tested, however, as the Campbell Commission never did begin adjudication on the issue of compensation and therefore received no files from the Government.

21. Prior to the establishment of the Campbell Commission, it became obvious to Cacchione that the civil proceedings brought by Donald Marshall, Jr. were material in the eyes of the Government to the matter of compensation. In order to remove any impediment to the process, a decision was made in January 1984 to let the civil action lapse.

22. The mandate of the Campbell Commission was intentionally limited by the Provincial Government so as to prevent it from exploring issues of systemic wrongdoing and error. The evidence before the Commission indicates that initially Justice Campbell was of the opinion that the only way to deal realistically with the question of compensation was for him to examine all the factors involved in the case, including the

police investigation that preceded Donald Marshall, Jr.'s prosecution. (Evidence of Felix Cacchione Vol. 64/11,506.) Cacchione testified to the Commission that he understood that Justice Campbell was prepared to listen to submissions on the relevance of such inquiries.

23. Cacchione was of the view that the Commission should look at the entire picture including the reasons for Marshall's wrongful conviction in order to arrive at a proper resolution of the matter of compensation (Vol. 64/11499).

24. Cacchione made it quite clear to Justice Campbell that on behalf of Donald Marshall, Jr. he would assert that the police investigation that led to Marshall's prosecution was relevant to the terms of the Inquiry (Red Exhibit Vol. 33/379).

25. Such a wide ranging Inquiry fully exploring the factors bearing on the issue of compensation was not to take place. Gordon Coles testified that the Commission was set up to determine how much ought to be paid to Donald Marshall, Jr. on an ex gratia basis having regard to the period of his incarceration following conviction (Vol. 78/13912, 13913). Coles said there was no question of liability before Justice Campbell and that basically compensation was to be looked at similarly to an assessment of damages. This view of Justice Campbell's mandate was consistent with what had been the Government's position all along: that compensation of Donald Marshall, Jr. was not to take into account the processes by which he was found guilty (Vol. 57/10408).

26. Although the Government touted the Commission as an independent Commission with a mandate to make recommendations concerning compensation, the evidence discloses that the Attorney General exchanged correspondence with Justice Campbell unbeknownst to Donald Marshall, Jr.'s counsel concerning the manner in which the Commission was to proceed. This correspondence was never made known to Cacchione (Vol. 64/11507). This was wrong and a denial of fundamental fairness.

27. The Attorney General's attempts to influence the manner by which Justice Campbell was to conduct his Inquiry were in response to Justice Campbell's apparent willingness to consider pre-incarceration issues, including police conduct and the position of the Government with respect to these issues. Coles suggested that Campbell discuss the scope of the Inquiry with the Attorney General (Vol. 78/13918, 13919) (Red Exhibit Vol. 33/407).

28. The Attorney General's department was determined that Campbell would not look at the conduct of the police or matters arising prior to Donald Marshall, Jr.'s conviction in November 1971 and would simply consider compensation for the period of his incarceration following the denial of his appeal by the Nova Scotia Court of Appeal in 1972. The explanation for this position was given by Gordon Coles. The Attorney General's department was concerned that a precedent not be set that would make the Government responsible to pay compensation for someone whose acquittal was reversed in the ordinary appeal process (Vol. 78/13914). Gordon Coles' reasons for not wanting the issue of police conduct or other matters to be considered in the course of resolving

compensation simply do not withstand scrutiny. Even the most cursory inquiry into the circumstances leading to Donald Marshall, Jr.'s wrongful conviction would have disclosed profound systemic failures. to say nothing of the fact that the Crown never advised Donald Marshall, Jr. of Jimmie MacNeil's statement in 1971. Gordon Coles reasons for not wanting the issue of police conduct or other matters to be considered in the course of resolving compensation simply do not withstand scrutiny. They are simply further excuses for not dealing with Donald Marshall, Jr. in a fair, honourable and honest fashion. Further, as the ex gratia nature of payment was repeatedly referred to, it is difficult to accept these fears as being realistic.

29. The correspondence by the Deputy Attorney General to counsel for the Commission concerning the scope of the Inquiry was known to Attorney General Giffin and accorded with his views (Vol. 57/10464). Giffin also seems to have no difficulty with the idea of Justice Campbell speaking to him about the Inquiry's mandate before getting the Inquiry underway (Vol. 67/10466).

30. However, on cross-examination Giffin acknowledged that no guidelines were established for dealing with Marshall's compensation and said that he did not think it would have been appropriate for the Government to give Justice Campbell guidelines. The Inquiry was supposed to be independent so these matters would be dealt with by Campbell himself. Giffin expressed concerns that guidelines would have compromised the independence of the Inquiry (Vol. 59/10654). These concerns, however, did not extend to Giffin opposing the communications

by his Deputy which might limit the scope of the Inquiry. Giffin failed in his duty as Attorney General in this regard as did his Deputy.

31. The pattern of delay and inaction by the Government continued even after the Campbell Commission was announced on March 5, 1984. By May, the Campbell Commission had subpoenaed no witnesses, convened no hearings and heard no evidence. Donald Marshall, Jr. had received $25,000 as an ex gratia of payment only because Justice Campbell went to see Cacchione and upon learning about Donald Marshall, Jr.'s desperate financial circumstances recommended that the Government make an interim payment to Marshall (Vol. 64/11505).

32. Cacchione was becoming increasingly discouraged by the lack of any developments with respect to the issue of compensation even once the Campbell Commission had been mandated. As a result of a meeting on May 16, 1984, with Coles, Endres and MacIntosh concerning how the Commission would proceed, Cacchione became fearful that disputes over the scope of the Inquiry would result in procedural and jurisdictional challenges and further delays occasioned by litigation. Cacchione at this time was also gravely concerned about Donald Marshall, Jr.'s fragile emotional condition and how much more strain he could endure (Vol. 64/11510). Marshall, in fact, was on the verge of disintegrating (Vol. 64/11512).

C. The Negotiations: The Government Falls Further From Grace

33. Having regard to these concerns, on May 16, 1984, Cacchione suggested handling the matter of compensation by way of negotiations rather than through the Campbell Commission (Vol. 64/11510).

34. The Attorney General's Department negotiated compensation with reference to none of the factors that had lead to Donald Marshall, Jr.'s wrongful conviction. The negotiations were regarded by counsel for the Attorney General, Reinhold Endres, as no different from those in other civil cases (Vol. 73/13083, 13084).

35. The attitude of various principals in the Attorney General's Department was material to the way that compensation negotiations were handled. The Attorney General's Department had already determined that any request for compensation would be considered in the context of Mr. Marshall being to some extent, the author of his own misfortune (Red Exhibit Vol. 38/30,34) (Evidence of Giffin, Vol. 57/10403, 10407). Furthermore, the Government was not prepared to acknowledge that there had been any miscarriage of justice in connection with Marshall. This position had long been maintained by the Government in one form or another and was advanced at the Reference before the Court of Appeal. Giffin, testifying before the Commission, confirmed that this position was consistent with that of the Government of Nova Scotia (57/10423).

36. Giffin maintained before the Commission that the relationship between Donald Marshall, Jr. and the Attorney General's Department was

essentially a non-adversarial one (Vol. 57/10429, 10430). This would indeed have been the proper prosture to take in negotiating compensation. However, the evidence simply does not support this portrayal of the parties' dealings, and it is doubtful that Giffin could have honestly believed this to be so.

37. The Government objected to the scope of the Campbell Commission including an inquiry into the factors that lead to Donald Marshall, Jr.'s wrongful conviction even to the point of determining that if the mandate of the Inquiry was a matter of dispute, the Government should be represented by Counsel (Evidence of Ron Giffin, Vol. 57/10463, 10464). This surely suggests an adversarial stance.

38. There is ample evidence that the compensation negotiations themselves were conducted in a fashion that took little account of any wrongdoing on the part of the Government and had no committment to compassion or fairness with respect to Mr. Marshall, as a victim of a miscarriage of justice.

39. Giffin testified to the Commission that the instructions given to the Attorney General's negotiator, Reinhold Endres, on May 17, 1984 were that the settlement was to be all inclusive, including no damages claimed and to cover the period starting with the date of incarceration following conviction (Vol. 57/10484).

40. No research was ever done to determine a reasonable level of compensation and no serious analysis was ever pursued with respect to

compensation settlements from other jurisdictions (Evidence of Giffin, Vol. 57/10487). (Evidence of Endres, Vol. 73/13079). In the view of the then Attorney General, Ron Giffin, it was a question of just seeing what the negotiating process would "yield up". Giffin acknowledged in evidence that in negotiating a settlement the Government "tried to get the best deal we could" (Vol. 58/10629). He acknowledged on cross-examination that it was fair to say that the Government was trying to get out as cheaply as it could. (Vol. 58/10630).

41. Reinhold Endres conducted his negotiations in a particularly cold and unfeeling fashion and was permitted by the Government to negotiate the matter of compensation as he saw fit. Endres testified to receiving very few instructions about the negotiations and was given no specific instructions about factors he was to apply in the course of negotiations (Vol. 73/13114). Endres was never provided with any instructions from his superiors that led him to believe that he ought to take a non-adversarial and more compassionate posture in the negotiating process (Vol. 79/14097).

42. Gordon Coles, the Deputy Attorney General testified to being reasonably well informed with respect to the compensation negotiations (Vol. 79/14089). Coles made it clear in his evidence that he did not oversee Endres' negotiation strategy and made no assumption about what he was doing other than that Endres would "negotiate well" on behalf of the Government. Coles acknowledged that this assumption included a belief that Endres would use whatever levers were to his advantage in the process of negotiating (Vol. 79/14091).

43. "Negotiating well" on behalf of the Government meant negotiating so as to arrive at the lowest possible figure acceptable to Donald Marshall, Jr. There was no mandate to be either humane, just or fair (Vol. 79/14092) or to act in a manner commensurate with the special moral and legal nature of the obligation of a Government to a wrongfully convicted person.

44. This is confirmed by Endres who testified that in his negotiations he had no consideration for policy. The only motivating factor in Endres mind during negotiations was to try and settle for as little as possible (Vol. 73/13160). His purpose was "make a deal", to arrange a settlement at a bottom figure, "that is the lowest figure that we could agree upon" (Vol. 73/13112). There were no discussions in the Attorney General's Department about the final compensation figure being a fair one (Evidence of Reinhold Endres, Vol. 73/13115). Endres was explicit: "So the only one that spoke about fairness in the terms of the dollars that I recall was Mr. Cacchione". (Vol. 73/13,115-16). Endres, by his own admission, had no concern that justice be done to Mr. Marshall (Vol. 73/13161-62). Considering that his attitude and tactics were effectively those of the Government of Nova Scotia, the approach of the Government in the compensation negotiations and settlement can only be described as being devoid of any moral reference points.

45. Endres testified that during the negotiations for compensation he tried to see how far down the Attorney General's Department might be able to force the settlement. It was at the figure of $275,000 that he

felt there was real resistance by Donald Marshall, Jr.'s Counsel (Vol. 74/13129).

46. In negotiating with Cacchione, Endres referred to a number of either spurious or inappropriate factors. He took the position that Marshall had to be apportioned some blame for his wrongful conviction. Furthermore, Endres maintained, there was no obligation on the Government to pay compensation to Marshall as the Government was not to blame for the wrongful conviction and accepted no responsibility.

47. Endres also used the comments of the Court of Appeal to his advantage during the compensation negotiations. Cacchione recalls being told by Endres, "You know, he [Marshall] was there to rob somebody and the Appeal Court has said that he was hiding things from his lawyers, he wasn't truthful." (Vol. 64/11469).

48. Cacchione testified to having absolutely no doubt that his negotiating position would have been much stronger if the Court of Appeal had simply acquitted Marshall and had not made the comments they did. Cacchione testified that oblique references were made to Marshall's conduct in the case by Endres during the compensation negotiations (Vol. 64/11527-28).

49. Even Endres testified that with respect to the Court of Appeal, comments, "It is conceivable that we would have arrived at a higher figure without that particular element being present." (Vol. 74/13269), also, see Vol. 73/13097). It is clear that Endres used these comments

strategically during the negotiations as part of his efforts to negotiate as low a figure for Marshall's compensation as possible. (Vol. 73/13Ø98)

5Ø. Endres also used Cacchione's concerns regarding the Campbell Commission in the negotiations. He recalls having said during the negotiations that if he and Cacchione couldn't work something out they would just have to go back to the Commission of Inquiry (Vol. 73/13Ø99). Endres reminded Cacchione that even if the Commission recommended a certain figure for compensation there was no guarantee that the Government would accept it and pay up (Vol. 73/131ØØ). Cacchione did not trust the Government to accept whatever recommendation might come out of an inquiry in the event that negotiations failed (Vol. 64/11524). Endres also knew of Felix's concerns that the Commission's involvement would mean serious delays in the issue of compensation being resolved.

D. Marshall: Predictable Further Suffering

51. By the time compensation came to be negotiated, Donald Marshall, Jr. was understandably in a very precarious state, emotionally and financially. There may be some question as to whether the Attorney General's Department used Marshall's psychological condition against him in the negotiations, or more simply, even whether in the face of the knowledge that he was in a fragile state, they did nothing to alleviate the pressures and suffering he was experiencing. It makes little difference either way. The fact is that the Government of Nova Scotia cared so little for Donald Marshall, Jr., a man wronged by the system,

that at best, they allowed his vulnerable emotional state to be exploited to their advantage.

52. Felix Cacchione testified that he made Marshall's psychological and financial condition quite clear to Endres. It is now his opinion that the Government exploited this forthright position (Vol. 64/11513).

53. Cacchione testified that during the compensation negotiations he "knew that Mr. Marshall was pushed to the wall, he was against the wall." (Vol. 64/11562).

54. Marshall's psychological condition is referred to in Endres' notes where it states "Marshall now in need of psychological assistance". (Red Exhibit Vol. 33/431). Endres testified to having little knowledge of Marshall's psychological condition, stating that he was aware that Marshall was having difficulties in adjusting and that he was obtaining or in the process of obtaining counselling (Vol. 73/13095). Endres acknowledged in his evidence, however, that Cacchione may have said that Marshall was "falling apart, cracking up" (Vol. 73/13095, 13096). This information seemed not to have troubled Endres at all. He testified that he had a position to represent but that he did so without becoming emotional about it (Vol. 74/13243). Endres clearly took it as the appropriate position for the Government that no significant degree of compassion or humanity should enter into the compensation negotiations.

55. Endres testified to not having conveyed the information concerning Marshall's psychological condition to the Attorney General because he

did not think it would be of interest. The principle concern in the negotiations was to pay as little as possible (Vol. 73/13096). Endres intuition concerning this issue was probably accurate. The Government was seemingly indifferent to Marshall's condition; they were relying on Endres to "negotiate well" on their behalf. Endres knew that the Government was only interested in driving as hard a bargain as possible. It is submitted that from the Government's prospective, Marshall suffering was only relevant in so far as it may have assisted the Government in achieving its negotiation objectives.

56. Endres relied on other inappropriate considerations when negotiating compensation. He testified that he may have said that Junior might have found himself in jail in any event because of his previous difficulties with the law and because on the night in question he was in the park for a nefarious purpose (Vol. 74/13166). Endres assumed without question that Marshall was involved in a rolling or robbery attempt on the night Sandy Seale was stabbed and readily rationalized Marshall's wrongful imprisonment. Endres acknowledged that after working as a Crown Prosecutor for two and a half years he had developed a very biased view of people who appeared before the Courts. Such a view is an objectionable one and in Donald Marshall, Jr.'s case it further failed to acknowledge that Marshall's criminal record prior to his wrongful conviction for murder was inconsequential.

57. Furthermore, both Endres and Coles took the view that Marshall may have benefitted to some extent from his incarceration where ...

> He had an opportunity to learn, or at least be an apprentice on a trade. It was a note to raise with counsel that there may have been some plus sides not withstanding the incarceration, denial of liberty. There may have been some plus sides as a result of institutional programs and opportunities. (Evidence of Gordon Coles, Vol. 78/13929)
>
> ...In a sense,...the incarceration would have actually been a benefit to him [Marshall]...Evidence of Reinhold Endres, Vol. 73/13172).

58. We submit that this evidence demonstrates the uncaring nature of the Government's attitude to the cruel circumstances of Mr. Marshall's life.

59. The evidence supports Cacchione's view that the Government was "playing hardball" in its negotiations to settle compensation. The Attorney General's Department representatives themselves testified that they were bargaining for the lowest amount to which they could get Cacchione to agree. On behalf of Donald Marshall, Jr., Cacchione did eventually agree to the amount of $270,000 which included Aronson's and his fees and the interim payment of $25,000.

60. This settlement was eventually approved by Justice Campbell although the Press Release issued by the Government (Red Exhibit Vol. 33/543) stated: "The Government's approval of Mr. Justice Campbell's final recommendation completes the work of the Commission." This, we submit was misleading. It misrepresented the true situation. The Campbell Commission had no evidence before it to permit it to recommend

anything and was in fact merely endorsing a figure apparently agreeable to the negotiating parties.

61. This press release was not made until Donald Marshall, Jr. had executed a release (Red Exhibit Vol. 33/532, 533) which stated that he released the Government from "...any action, cause of action, claim for damages or demands ever had arising in anyway from the arrest and incarceration of Donald Marshall, Jr., for a crime for which he was subsequently acquitted."

62. This release in fact covers a period of time greater than the period of time mandated by the Government for consideration during compensation negotiations. It should not be binding on Marshall.

63. Coles testified that anything with respect to the pre-incarceration period was not included in the ex gratia settlement that was reached (Vol. 78/13947). Therefore, compensation was settled with respect to the period following the final disposition of Marshall's case by the Court of Appeal in 1972.

64. There are a great many ways in which the Government could have resolved the matter of Donald Marshall, Jr.'s compensation with greater fairness and honour. The conduct of the Government from the very earliest stages of dealing with the Compensation issue should be condemned most severely.

65. It is submitted that the evidence discloses a deliberate pattern of callousness, delay, and prejudice, by Giffin, Coles and Endres and that in these negotiations they misconceived their duty and failed to serve the public interest.

E. Lost Opportunities

66. In addition to treating Donald Marshall, Jr. fairly and generously in the course of resolving compensation, the Government could have done a number of other things:

A. The Government could have immediately settled Steven Aronson's account by making a discretionary payment under the Finance Act. (Vol. 57/10468).

B. Instead of denying responsibility for compensation as a negotiating tactic the Government could have acknowledged its obligation to act in accordance with international law and a sense of fairness and justice by compensating Donald Marshall, Jr.

C. The Provincial Government could have conducted an extensive and comprehensive review of compensation issues and cases in other jurisdictions, a task not so elusive or time consuming. Relevant material would have been available through the organization, Justice in London, England, the British Home Secretary and several American states and of course, the scholarly literature.

D. The Government should have assessed compensation in light of the systemic wrongs which occasioned Marshall's wrongful conviction and imprisonment. Instead, compensation was resolved by the Government in a manner which protected its financial interest and nothing more.

E. The Government should have taken into account the grave injury done to Donald Marshall, Jr. as a direct result of his incarceration. Considering the effects of long term incarceration on Donald Marshall, Jr. this was material in properly assessing a reasonable amount of compensation.

F. Effects of Incarceration

67. This Commission heard considerable evidence concerning the effect long term imprisonment had on Donald Marshall, Jr. and his response to release.

68. Like any "lifer" Marshall experienced a very high level of "street shock" upon release in 1982 which included such things as not knowing how to go into a restaurant and order a meal, not being up to date of how much things cost and the language spoken by the person on the street (Evidence of Diahann McConkey, Vol. 70/12513).

69. McConkey also testified that Marshall became very involved in the Penitentiary System, "...as it is a survival mechanism. If you know you are going to be there for quite awhile, you adapt, and he adapted." (Vol. 70/13172) The implication in this evidence is that such an

adaptation is essential to survival within the Penitentiary System and would contribute to Marshall's difficulties in returning to the street upon release.

70. Jack Stewart testified to the characteristics present by "lifers" when they are released from incarceration. He described the most overiding characteristic as being fear.

> When they hit the street, they are very nervous. Most of them have been in a very closed situation,...they have been living in a very structured limited community... The whole focus in an institution is attempting to get out the gate, to leave the institution. So a lot of the normal patterns that a lifer would go through are geared to that end. And suddenly when they hit the street they are confronted by a whole lot of things. (Vol. 71/12652)

71. One great problem Stewart identified was the difficulty long term inmates had in adjusting to the different and variable rules that govern life an institution (Vol. 71/12653).

72. The system deals with an ordinary lifer by building in gradual release programs and utilizing halfway houses and continuing supervision over an extended period of time after the inmate leaves the institution. (Vol. 71/12654). In Donald Marshall's case, however, he had fewer releases prior to the point of his release after ten years and ten months inside the Penitentiary than the average lifer (Vol. 70/12512). He had never received any unescorted temporary absences. As a result of this his parole officer, Diahanne McConkey testified to anticipating that Junior would have more adjustment problems than an average lifer. Stewart testified that it is to a prisoner's benefit to have temporary

leaves of absence and other forms of release in the course of a long sentence (Vol. 71/12705, Vol. 70/12512).

73. In addition, Donald Marshall, was an innocent man, wrongfully convicted and imprisoned. Adding to his stress was the extrordinarily amount of press attention that he received once he was released.

74. Marshall was released from the Carleton Center on July 29, 1982 having gone there at the end of March 1982 from Dorchester. He lived in the community and maintained personal contact with Stewart but did not have available to him the conventional institutional resources that assist a long term inmate in adjusting to the street (Vol. 71/12725). It was Stewart's opinion that when Marshall left the Carleton Center he still did not have any of the coping skills that it was felt he needed (Vol. 71/12687).

75. Accordingly, during the protracted Court of Appeal Reference case and compensation process that followed, Marshall became more self destructive and his drinking increased. Stewart testified to being involved with Marshall and Cacchione during the time the compensation matter was being dealt with and observed Marshall to be in a very bad condition. "He was just a little further into feeling that this is never going to end." (Vol. 70/12690).

76. Stewart testified that when Marshall was released from prison he expected to be declared innocent and have people say they were sorry for

what had happened to him. He expected there would be people to help him get back on his feet (Vol. 70/12715). Stewart testified that Marshall had expectations that life would go back to normal and everything would end happily. Instead he had very considerable difficulties adjusting to life on the outside, no longer secure in the environment that he was familiar with for his adult life and isolated from a society that had passed him by.

77. It was Stewart's evidence that Marshall's adjustment to society was made harder by the fact that he had been wrongfully incarcerated for a long period of time. His faith in society and its institutions had been fundamentally undermined, as well it might in the circumstances.

78. Nothing that the Government did following Marshall's release could possibly be described as likely to assist Marshall in regaining any confidence that he would be treated fairly and honourably in the face of having been terribly wronged.

G. Present Prospects for Doing The Right Thing

79. A further question this Commission must look at in our respectful submission is what should be done for Donald Marshall, Jr. now with respect to compensation. At the appeal concerning Cabinet Confidentiality heard on September 14, 1988, Counsel for the Attorney General of Nova Scotia acknowledged to the Court of Appeal that compensation was within the mandate of the Commission. It is submitted that this Commission is uniquely placed to recommend that Donald

Marshall, Jr. should receive fair and generous compensation. The spirit expressed in the Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas should be invoked, where it was stated:

> This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manifactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals.
>
> His [Mr. Thomas'] courage and that of a few very dedicated men and women who believe in the cause of justice has exposed the wrongs that were done. They can never be put right.
>
> Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated.

80. It is respectfully submitted that these principles should govern a reassessment of Donald Marshall, Jr.'s compensation award.

RECOMENDATIONS: COMPENSATION

1. This first set of recommendations relates specifically to Donald Marshall, Jr. In advancing them, we support Commission Counsel's recommendation that the issue of further compensation for Donald Marshall, Jr. be looked into, but submit that their recommendation does not go far enough and that this Commission should recommend that further compensation be paid to Donald Marshall Jr. as follows:

a) The Provincial Government should properly assess Donald Marshall, Jr.'s entitlement to full compensation having regard to the principles that should have been followed in the first place, some of which are set out in paragraphs 66 to 78. A further settlement should be approached in a generous and liberal spirit, taking into account, amongst other factors, the anguish and frustration occassioned to Donald Marshall, Jr. by the previous compensation resolution process itself.

b) Further compensation should be paid to Donald Marshall, Jr. without delay.

c) Donald Marshall, Jr. should be reimbursed with interest for all reasonable legal fees incurred by him in connection with his wrongful conviction and imprisonment at any period including the Aronson and Cacchione accounts.

d) The Provincial Government should fairly assess the expenses incurred by the Marshall family with respect to Donald Marshall, Jr.'s wrongful conviction and imprisonment and should compensate them for these expenses including travel and accomodation expenses, long distance telephone calls, etc.

e) We submit that if these recommendations are not put forward to the Government then the message to accused persons, the public and the institutions responsible for investigating, prosecuting, defending and incarcerating people will be that wrongful conviction is somehow the fault of the accused and ought to be their expense to bear.

2. The second set of recommendations relates more generally to the issue of compensation for wrongfully convicted persons.

a) The Provincial Government, presumably in cooperation with the Federal Government, should commence a study with respect to determining the appropriate compensation forum to be established in Nova Scotia. This study should have as its objective the establishment of a permanent independent forum for determination of compensation awards. Reliance on an ad hoc scheme should be disavowed.

b) Guidelines for the compensation scheme should be published by the Government and made available to the public through the local Government bookstore.

c) The Provincial Government should intensively review and establish principles and policies governing both the process by which compensation is to be assessed and awarded and upon which quantum is to be based with due reference to international legal obligations and principles of fairness and justice.

d) It is submitted that the paper produced by Professor Archibald Kaiser, Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course offers a comprehensive analysis of the major issues surrounding compensation for wrongfully convicted persons and thoroughly explores the general principles that ought to obtain in repsect of such matters. We urge that the comments and criticisms regarding the present remedies with respect to wrongfully convicted persons, (including the current Federal - Provincial Guidelines), ought to be supported by the Commission.

FINAL THOUGHTS

FINAL THOUGHTS

1. Finally, it would be remiss to leave what is in many respects a litany of criticism without singling out for praise two lawyers whose work for Mr. Marshall fills any member of the Bar with a sense of justifiable pride. Steve Aronson and Felix Cacchione laboured under adversity not of their own making, and dedicated themselves to the interest of their client in the best traditions of the Bar at great personal cost. There are heroes in this world. And we have been privileged to glimpse the work of two of them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF OCTOBER, 1988.

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