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## SUBMISSION OF COMMISSION COUNSEL

From the time this Commission commenced public hearings in May, 1987, it has been the stated mandate of the Commission to fully investigate the administration of criminal justice in the Province of Nova Scotia, using the tragic example of the Donald Marshall, Jr., case as a focus.

## ROLE OF COMMISSION COUNSEL

As Commission Counsel, it has been our responsibility to seek out all evidence relevant to the mandate of the Commission and to present that material at the public hearings. We have sought to present it in a manner which would bring out all relevant facts and present them in an impartial fashion. We have a unique perspective in that we are carrying a brief for no particular interest. Our role has been to attempt to ensure that all relevant evidence has come before the Commission. Except for evidence from Cabinet Ministers concerning discussions in Cabinet and from Judges concerning the Reference, we are satisfied that we have fulfilled our responsibility.

All other counsel who have participated in the Hearings represent a client and perform the tradit-

ional counsel role of advocating, and protecting their client's position. In the submissions to be made by these various counsel we expect that they will highlight those portions of the evidence which support their client's position, and attempt to discredit evidence which may tend to cast their clients in a less favourable light. No counsel, other than Commission counsel, can reasonably be expected to review the totality of the evidence objectively, and suggest to Your Lordships what findings of fact are supported by the preponderance of evidence, or to comment on the areas or parts of the system of administration of justice which require change. In summary, it is the role of Commission Counsel to present a balanced view of all the evidence for the benefit of the Commission.

It is also our responsibility to present to you what we consider to be the conclusions which flow from the evidence presented. We will indicate in this Submission the facts upon which we ground our conclusions and, in addition, will comment why we think particular conclusions are warranted.

It is important also that Commission Counsel publicly state any views, or conclusions on facts, which we hold, or support, in order that counsel for other parties, who may be affected if Commission Counsel

submissions are accepted, be afforded the opportunity to challenge our conclusions. Traditionally, Commission Counsel are involved with Commissioners to provide assistance and advice as a final report is being prepared. It would not be fair for Commission Counsel to keep secret our views on the evidence, and then take the opportunity at a later date to urge views in private on the Commissioners. Accordingly, on those occasions where we consider the preponderance of evidence supports particular findings of fact, we will make this known and point to the evidence which we consider supports our submission. For ease of reference, where we articulate a view, this is underlined. If we do not hold a particular view with respect to any necessary finding of fact, we will merely present an analysis of the evidence supporting the various possible findings.

At this stage our submissions will be restricted to comments on the factual issues which arise out of the evidence which has been presented. Your Lordships have commissioned research studies into various facets of the administration of justice, and the reports of the researchers likely will recommend changes and improvements. We will comment on parts of the system which appear to require change, but will not be putting forth actual recommendations for change.

## Major Conclusions

We have concluded that if justice is fairness to all, then justice has not prevailed in Nova Scotia. Based on our assessment of the evidence and for the reasons which follow, we have come to three fundamental conclusions:

1. Donald Marshall, Jr., was not responsible for his wrongful conviction and was not the author of his own misfortune;
2. Virtually all the institutions involved in the administration of justice, and their representatives, which touched Donald Marshall, Jr's life, failed him;
3. All individuals have not been treated fairly by the justice system in Nova Scotia.

These are the major conclusions which we urge upon the Commission.

## STRUCTURE OF SUBMISSION

The submission will be structured in the following manner. We will briefly review the facts

of the night of May 28, 1971. Then, rather than following the chronology from that point to the present, we will identify the various institutions and persons who were involved with the Donald Marshall case. We will highlight their involvement in the matter and, where appropriate, indicate what our conclusions are with respect to that involvement. In some cases, we will also point to reasons why we consider certain of the institutions and persons responded in the way that they did.

The institutions and persons who were involved with the Donald Marshall matter concerning which we will comment are:

Sydney Police Department

John MacIntyre

William Urquhart

Crown Prosecutor, Donald C. MacNeil, Q.C.

Defence Counsel C.M. Rosenblum, Q.C., and  
S.J. Khattar, Q.C.

The Trial Judge, Mr. Justice L. Dubinsky

The Jury

The R.C.M.P. in 1971 - Sub-Inspector Al  
Marshall

The Nova Scotia Court of Appeal - 1972 (The  
Appeal from Marshall's conviction)

Correctional Services Canada

R.C.M.P. Investigation - 1974 - Corporal

Green

R.C.M.P. Investigation - 1982-1986

The Nova Scotia Court of Appeal - The Decision  
on the Reference

The Attorney General's Department - 1982-1986

Relationship Between R.C.M.P. and Attorney  
General's Department

Influence of Racism in Treatment of Donald  
Marshall, Jr.

Donald Marshall, Jr.

### Statement of Facts

On May 28, 1971 a dance was held at St. Joseph's Church Hall in Sydney, Nova Scotia. These dances were very popular with local teenagers and were well attended, and members of the Sydney Police Department, who were off duty at the time, acted as paid chaperones to maintain control and restrict entry to those teenagers who paid the admittance fee.

On the night in question Sandy Seale attended the dance with several friends and on at least two occasions was ejected from the hall because he had not paid the admittance fee. At the time Seale resided at Westmount, a suburb of Sydney, and to reach his home he would have to travel by bus, and specifically he would have to catch the 12:00 o'clock midnight bus

in order to be home at the time required by his parents.

Sometime between 11:40 p.m. and midnight Seale left the dance with a group of teenagers including Keith Beaver, Alana Dixon, and Gail Chernin. The group entered Wentworth Park and then split up, Sandy having told the others he was going to get the bus.

Also in Wentworth Park at that time was Donald Marshall, Jr. He had returned to Sydney that evening from a visit to Halifax. He had met with some of his friends in the north end of Sydney and may have been heading towards St. Joseph's Hall.

James MacNeil and Roy Ebsary were in the Park also. They had spent a portion of the evening at the State Tavern drinking beer, and may have been at the MacNeil home earlier that evening drinking wine.

Seale and Marshall knew each other casually, but were not good friends and did not travel with the same crowd. Seale and Marshall did meet in the Park that evening and while together came in contact with Ebsary and MacNeil. Exactly what took place during the next several minutes is something which Your Lordships will have to decide. What is known is that

Sandy Seale was stabbed in the abdomen by Roy Ebsary, and Donald Marshall, Jr. was stabbed in the arm by Ebsary. As a result of the stab wound inflicted upon him by Ebsary, Sandy Seale died the following night. Donald Marshall was taken to the hospital where his wound was stitched and he went home.

M. D. Mattson, a resident of Byng Avenue, called the Sydney Police at 12:10 a.m, having overheard a conversation between Marshall and Maynard Chant, who were standing in front of Mattson's home, and discussing a stabbing which occurred in the Park. Marshall had run from the scene of the stabbing on Crescent Street, around the ponds, north on Bentinck Street, and east on Byng Avenue until he overtook Chant who had been walking along Byng Avenue. Chant and Marshall flagged down a car which took them back to the place where Seale was lying on the street, and shortly thereafter the police and the ambulance arrived. Seale was transported to the hospital by ambulance, and Marshall by police car. All the police left the scene of the stabbing without having obtained a listing of witnesses who were in the area, without having made any search of the area and without carrying out any investigative work of any kind. The area was not cordoned off, and except for Detective M. R. MacDonald who walked around the area that night, there was no

police search of the area until the following day.

Sergeant Detective John MacIntyre took over the conduct of the investigation on behalf of the Sydney Police on May 29, 1971. On June 4, 1971 Maynard Chant, a Louisbourg teenager, and John Pratico, a Sydney teenager, gave statements to MacIntyre stating that they had witnessed Donald Marshall stab Sandy Seale on May 28, 1971. Marshall was arrested, tried and convicted of the murder, and sentenced to life imprisonment.

On November 15, 1971 James MacNeil attended at the Sydney Police Station and gave a statement to Mr. MacIntyre wherein he told of an altercation taking place in Wentworth Park on May 28, 1971 during which Roy Ebsary stabbed Sandy Seale. MacIntyre arranged for a statement to be taken that day from Roy Ebsary, his wife and son, and Ebsary denied having stabbed Seale, although he did confirm that there had been an altercation taking place with Seale and Marshall.

The R.C.M.P. were requested to carry out a reinvestigation and Inspector Al Marshall was dispatched to Sydney. He arranged for polygraph examinations to be conducted of James MacNeil and Roy Ebsary, and the results of those examinations were

inconclusive with respect to MacNeil and positive for Ebsary when he denied stabbing Seale. Inspector Marshall did not question any of the other persons involved in the incident, or those who gave evidence at trial, and concluded based on the polygraph examinations only that Donald Marshall, Jr. had in fact stabbed Sandy Seale, and thereby committed murder for which he had been convicted.

Donald Marshall, Jr. was jailed at Dorchester Penitentiary, and for part of the time at the Springhill Penitentiary, until 1982. At that time based on additional evidence that Roy Ebsary had in fact stabbed Sandy Seale, a further R.C.M.P. reinvestigation was ordered. During this investigation, conducted mainly by Staff Sergeant Harry Wheaton and Corporal James Carroll, interviews were conducted of Chant and Pratico and both of these people admitted having lied at the Marshall trial. Wheaton and Carroll concluded Marshall had not committed the murder of Seale, and their conclusions were accepted by their superiors and the officials of the Attorney General of Nova Scotia. The Minister of Justice submitted a Reference to the Appeal Division of the Nova Scotia Supreme Court. Evidence was heard at a Reference Hearing and finally, after having been incarcerated for 11 years for a crime he did not commit, Donald Marshall, Jr. was acquitted.

Negotiations were carried out between Marshall and the Province of Nova Scotia and ultimately Marshall was paid the sum of \$270,000.00 as compensation for his wrongful conviction. Roy Ebsary was tried and convicted of manslaughter for the stabbing and subsequent death of Sandy Seale. After all Appeals had been exhausted on behalf of Roy Ebsary, the Province of Nova Scotia commissioned this Inquiry specifically to determine why Donald Marshall, Jr. had been wrongfully convicted and to make recommendations, if possible, for changes which may be required in the administration of justice system to prevent a reoccurrence of this tragedy.

#### THE SYDNEY POLICE DEPARTMENT - 1971

Evidence from members of the Sydney Police Department who were members of the Department in 1971 indicated that people could become members of the Department with a Grade 10 education. Once on the job, to put it in the words of now Chief Walsh, they were given a "flashlight, set of handcuffs and were on the street" (p.1286). Evidence of members of the Sydney Police Department was consistent that the only training received by members of the Department was on-the-job training (Ambrose MacDonald, p.1153; Howard

Dean, p.1472; John MULLOWNEY, p.1550; M. B. MacDonald, pp.1613-1615). Officers were promoted to the Detective ranks at the time, based solely on seniority (M.B. MacDonald, p.1613-1615; Ed MacNeil, p.2604; R. Walsh, p.14264).

As set out in other sections of this Submission dealing with the facts which occurred on the night of May 28, 1971, members of the Sydney Police Department did not take many of the basic steps that one would expect of police officers trained in the investigation of serious crimes. We consider this failure was a direct result of a lack of training.

As indicated by Chief Walsh, the situation in Sydney has now changed (p.14260 and following). In order to be considered as candidates for the Sydney Police Department at the present time, persons must either be graduates of the Atlantic Police Academy or another accredited police college or have had previous police experience. At the present time, promotion to the rank of Detective is based on many factors including seniority. This is intended to result in the most qualified candidate being promoted (14264).

RESPONSE OF THE SYDNEY POLICE IN MARSHALL CASE

In another part of this Submission we refer to the general training, or lack thereof, provided to members of the Sydney Police Force. The response of the Force on the evening of May 28, 1971 when contacted concerning an alleged stabbing in Wentworth Park was prompt, but it appears that none of the basic steps which one would expect to be taken by police when confronted by a serious crime were taken. There was no attempt to cordon off the scene; names of potential witnesses were not obtained; no statements of any kind were taken; no search was conducted of Marshall to determine if he was carrying any weapon; no requests were made of the Hospital officials to obtain samples of the blood of Sandy Seale for analysis; no attempt was made to secure the clothing which was worn by Sandy Seale; no immediate search of the area where the stabbing occurred, or house to house canvass was conducted. Surprisingly, no criticism appears to have been directed to any members of the police force for this failure to follow these most basic investigative steps. These failures vividly illustrate the results which can occur when untrained persons are expected to handle matters which require skill and expertise.

JOHN MacINTYRE

The Sergeant in charge of the Detective Division in 1971 was John MacIntyre. He assumed charge of the investigation of the Seale murder on May 29, 1971. (5929). From the evidence presented to the Commission, including the evidence from senior R.C.M.P. Officers, Mr. MacIntyre was a competent policeman who had experience in investigating crimes, and there is no suggestion that he was a "typical" Sydney policeman. In investigating this particular crime, however, MacIntyre also failed to follow many of the basic steps which would be expected from a competent detective in charge of a murder investigation. Unless one were to conclude that he became incompetent for the time period this investigation was underway, the only reasonable explanation for his failure to follow basic practices in this case is that he concluded immediately upon becoming involved in the case that Donald Marshall, Jr. had stabbed Sandy Seale, and Mr. MacIntyre was interested only in finding evidence which would support his belief.

Your Lordships must analyze in some detail the evidence given to this Commission by Mr. MacIntyre. This is the first time he has given public testimony under oath. Earlier he had been subjected to a Discovery Examination in the course of the civil proceeding wherein he alleged he had been slandered by broadcasts carried

by the Canadian Broadcasting Corporation. That proceeding was settled prior to Trial. In our opinion, it will be necessary for Your Lordships to make findings concerning the credibility of Mr. MacIntyre. There are innumerable instances where he denies statements made by other witnesses to this Commission, and in our opinion it is not possible to reconcile the differences, or to explain them away by suggesting the events occurred many years ago and memories have faded.

Courts have commented frequently that it is not sufficient for a finder of fact to state that a particular witness is not to be believed. Reasons must be stated saying why the testimony of a witness is not acceptable. When assessing credibility, there are many factors to take into account. Some of the best descriptions of such factors are found in Wigmore on Evidence, Chadbourn Revision, Vol. 5 (1974) where the authors when discussing the importance of having a witness appear personally to give evidence state as follows at pp. 153,4:

"There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. The subordinate advantage has

been expounded in the following passages:

Putnam, J. in Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 439 (1836):  
 «Even» if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony.

Ryland, J., in State v. McO'Blenis, 24 Mo. 402, 421 (1857): There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition.

Campbell, J., in People v. Sligh, 48 Mich. 54, 57 (1882): The production of witnesses in open court is one of the best means of trying their credit; and every one knows how difficult it is to judge from written testimony of the demeanor and appearance which strike those who examined them. Still more difficult must it be to have the testimony reproduced.

Chief Justice Appleton, Evidence 220 (1860): The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. ... The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control fear, love, hate, envy, or revenge are all open to observation,

noted and weighed by the jury."

It is our submission, having reviewed, on several occasions, the transcript of his evidence, that Mr. MacIntyre was evasive, contradictory, and less than prompt in answering questions. There are instances where he takes apparent firm positions, but when confronted with evidence and documents which contradict the position he then changes his testimony. One of the most vivid examples of this practice occurred when reference was first made to the Affidavit which was sworn to by Mr. MacIntyre and filed in the Appeal Court during the Reference proceedings. After having been questioned on some of the contents of the Affidavit, Mr. MacIntyre said he obtained the Affidavit from Mr. Edwards. (6105). The following questions and answers then appear.

"BY MR. MACDONALD:

Q. Did you not have Mike Whalley available as well as your solicitor or acting on your behalf?

A. We weren't present. We weren't present when those affidavits were made up. We were given them. Mr. Whalley was up there, I believe, on one occasion.

Q. Did you not give instructions to Frank Edwards in order that he could prepare the affidavit?

A. I did not.

Q. Did you not discuss it with him?

A. No. No.

Q. So he just prepared it himself and called you in?

A. That's right.

BY MR. CHAIRMAN:

Q. Can you just take me through that again? Mr. Edwards who prepared the affidavit must have gotten --

A. I don't know. The day I was there Mr. Edwards and Mr. Wheaton was there, the Staff Sergeant of the R.C.M.P., and the Crown Prosecutor.

Q. Yes.

A. And we were given those and they weren't made up in my presence. That's all I have to say, sir - My Lord.

Q. No, but you did meet with them -with Mr. Edwards I understand -I assume?

A. That's right.

Q. Before the affidavits were prepared?

A. Before this was written down?

Q. Yes.

A. No.

Q. Well, would he have gotten the information?

A. They made them up.

BY MR. MacDONALD:

Q. Chief, let me refer you to volume 17.

BY MR. CHAIRMAN:

Q. Well, what do you mean they made them up? They -- They --

- A. They made up this so --
- Q. You mean they prepared them?
- A. Prepared them, yes.
- Q. But in preparing them they must have gotten the information contained therein from somewhere and the question is, did they get it from you?
- A. They weren't talking to me before that, My Lord.
- Q. Well --

BY MR. MacDONALD:

Could I have volume 17?

BY MR. MacDONALD:

- Q. Do I understand you to say you didn't meet with Frank Edwards for a period of time in order that he could get the information to prepare that affidavit?
- A. The information from me?
- Q. Yes.
- A. I don't recall meeting with him, no."

It was only after Mr. MacIntyre was referred to the extensive notes prepared by Frank Edwards detailing the process followed in obtaining instructions, and the fact that the draft Affidavit was reviewed by MacIntyre, and all suggested changes made before a final draft was presented for execution, that MacIntyre conceded giving full instructions to Frank Edwards,

and having the opportunity to review the contents of the Affidavit before swearing to the contents. Interestingly, MacIntyre admitted having the Edwards notes before giving evidence to the Commission and says he had reviewed them before taking the stand. (6592,3).

If Mr. MacIntyre's evidence is to be believed in total, Your Lordships must conclude that a large number of witnesses gave untrue evidence to the Commission. There are direct conflicts, for example, between Mr. MacIntyre and John Pratico, Maynard Chant, Mrs. Chant, Patricia Harris, Mrs. Harris, Wayne Magee, Catherine Soltesz (O'Reilly), Mary Csernyik (O'Reilly), Scott MacKay, Barbara Floyd, Mrs. Clemens and Debbie MacPherson. Most of these people would have no possible reason to give other than completely accurate, truthful evidence to the Commission. Their demeanour on the stand certainly did not lead us to conclude that their evidence was suspect.

There is no requirement to make a general finding concerning the credibility of MacIntyre. There are, however, several crucial findings of fact which we consider Your Lordships must make and which will require a determination of credibility. With respect to those particular matters we will refer to the evidence

of various witnesses, including Mr. MacIntyre and state specifically those instances where we conclude that the evidence of Mr. MacIntyre should not be accepted.

### Tactics Employed By MacIntyre In Questioning Witnesses

Before dealing with the evidence of particular witnesses, it is useful to review generally the procedures followed by MacIntyre when dealing with witnesses. He testified that his normal practice is to advise witnesses generally of the reason for their presence and the requirement to take a statement from them and then to take down as accurately as possible everything that is said by the witness or MacIntyre. (5991, 6115, 6147, 6155). On numerous occasions MacIntyre testified that he never would suggest to a witness giving a statement, and did not suggest to particular witnesses in this case, that another independent witness had given a story which was inconsistent with that now being told; or that another witness had placed the person being interviewed at the scene of the crime and therefore the person must know something; or that the parents of young witnesses should leave the room to make the questioning of their child easier; or that the person would be in serious trouble if they did not tell the truth and could end up in jail or be charged for perjury. (5892, 5978,

6117, 6118, 6145, 6146, 6148, 6149, 6150, 6151, 6153, 6154, 6222).

Barbara Floyd, John Pratico, Maynard Chant, Mrs. Chant, Wayne Magee, Mrs. Harriss, Patricia Harriss and Robert Patterson all gave evidence to this Inquiry that at some time MacIntyre told persons from whom he was taking statements that he had statements from another witness inconsistent with that now being told or that he had evidence from another witness placing the person being interviewed at the scene of the crime. (855, 866, 868, 872, 943, 944, 961, 962, 964, 2064, 3130, 3534, 3540, 3634, 3647, 3648, 3649, 6226, 6227, 10020).

Mrs. Clemens, John Pratico, Maynard Chant, Mrs. Chant, and Patricia Harriss all testified that at some time MacIntyre threatened witnesses with serious consequences, including jail or juvenile court, if the witnesses did not tell the truth, and that reference was made to perjury. (2064, 2806, 3541, 5892).

Mrs. Chant and Mrs. Harriss both testified they were asked to leave the room where their children were being interrogated by MacIntyre. (2960, 3535, 3538).

While we do not consider it essential that a general finding be made whether MacIntyre employed the type of tactics referred to by these witnesses, it is useful to keep the conflict in evidence on this point in mind when considering the obtaining of evidence by MacIntyre from various key witnesses.

#### Discussions With M. R. MacDonald

Chronologically speaking, the first finding of fact we consider must be made concerning Mr. MacIntyre and his involvement in the Marshall wrongful conviction is whether MacIntyre met with Detective M. R. MacDonald on the morning of May 29, 1971, was briefed by MacDonald on the events of the previous evening, and taken through the information contained in MacDonald's notebook. (Exhibit 38).

MacIntyre says he was called by MacDonald on the night of the stabbing (Friday) and he told MacDonald to look at the scene; to do his investigation and pick up any evidence; to get the names of anybody he could; and to go as far as he could that night. (5911). MacIntyre said he did not see MacDonald on Saturday, and never discussed what the latter did on the evening of the stabbing, and never saw MacDonald's notes, and could not recall going over them with him.

(5916, 5917, 5922). MacIntyre knew people in his Department kept notes, and he would expect MacDonald would have kept notes of what he did during the night of May 28, 1971. MacIntyre did make it a point to be at the Sydney Police Station at or about midnight on May 29 to talk to the patrolmen who had been on duty, and involved in the initial investigation, the night before. (5949).

On the other hand, Mr. MacDonald said that while he was not scheduled to work on Saturday, he did come out specifically because of the case and worked a full day. The following evidence of MacDonald is found at page 1672:

"Q. And when did you first speak to Sgt. MacIntyre about the case?

A. When he came out in the morning.

Q. Do you know how early that was?

A. It could have been close to 8:30, 9:00 o'clock.

Q. 8:30, 9:00 o'clock and where did you speak to him?

A. In the Detective office.

Q. And what did you tell him?

A. I explained to him what took place. I read my report to him and I read this - this report ... and from there ...

Q. You read over your notes?

A. Yes sir."

Mr. MacIntyre said MacDonald must be mistaken. (5924). We consider it is inconceivable that Mr. MacIntyre would instruct MacDonald on the steps to be taken on the night of the stabbing but, knowing that MacDonald would keep notes, would not have spoken to MacDonald and obtain the details of what was done by MacDonald. MacDonald would have no reason to invent his evidence about working the entire day on Saturday, May 29, 1971. If he worked that day, is it reasonable to conclude that MacIntyre would not discuss with him the details of MacDonald's efforts of the night before? We conclude that Mr. MacIntyre's evidence on this point cannot be accepted.

### When Was Donald Marshall, Jr. The Prime Suspect

The next important fact to be determined is whether Sergeant MacIntyre concluded from the first time he became involved in the case on Saturday, May 29, 1971 that Donald Marshall was the person who stabbed Sandy Seale. Mr. MacIntyre consistently testified that he did not consider Marshall to be a suspect until some time during the following week after he had obtained the jacket which Marshall had worn on the night of the stabbing and spoken to Dr. Virick who had stitched Marshall's arm. (6041, 6056). At that time he says he considered the wound to Marshall's arm was self-inflicted. On the other hand, he said he saw Marshall's injury on May 29 at the Police Station when Marshall pulled down the bandage to permit the wound to be seen and, at that time, MacIntyre thought it was a very shallow injury (5942). We consider his explanation of how he could reach this conclusion while viewing a wound which had been stitched closed to be less than convincing. (5943).

There is very telling evidence from other witnesses which would tend to negative the evidence of Mr. MacIntyre that he was keeping an open mind. Exhibit 40 contains notes from the notebook of Constable Wood of the R.C.M.P. The following is the note recorded

of Wood's visit to the Sydney police station on the morning of May 29, 1971.

"Stabbing in Wentworth Park early A.M. this date two youths, Seale and Marshall.

Conversation with Edward MacNeil & Det. MacIntyre feeling at this time Marshall was responsible and incident happened as a result of argument between Seale and Marshall ...".

Edward MacNeil was a Sydney Police Constable at the time. MacIntyre testified that he does not recall MacNeil saying anything in his presence about a suspect and if he did, MacIntyre would recall it and would have wanted to know where MacNeil obtained his opinion, and why he had made up his mind. (6077, 6078). MacNeil has testified that he would not make any such statement in the presence of MacIntyre who would be in charge of the investigation. (2620). Unless one is to conclude, therefore, that Constable Wood fabricated the note contained in his notebook the only logical conclusion one can draw after assessing all the evidence is that MacIntyre made the statement recorded by Wood.

The fact that MacIntyre believed Marshall was a suspect from the beginning is further corroborated by evidence of events which took place late Saturday night and early Sunday morning. (May 29 and 30). In Volume 16 at page 90 is a telex from the Sydney detachment

of R.C.M.P. to the Halifax Division asking for a search to be carried out of the records of MCIS. The information contained in that telex, which was sent at 3:11 a.m. on Sunday, May 30, 1971, could only have been provided to the R.C.M.P. by someone from the Sydney police. The crucial statement in the telex is as follows:

"Circumstances presently being investigated by Sydney P.D. Investigation to date reveals Marshall possibly the person responsible however Marshall states he and deceased were assaulted by an unknown male approximately 5'8" and 6' tall, grey hair approx. 50 yrs. who stated he did not like Indians or Negroes..."

MacIntyre testified that he was at the Sydney police station after Seale died (approximately 8:00 p.m. Saturday evening) to speak to the policemen who had been on duty the previous night when they reported for work. That shift would commence at midnight on Saturday. (Ambrose MacDonald, 1127-30 and 1135; Walsh, 1290 and 1338; Dean, 1473, 1489; Mallowney, 1558; Michael B. MacDonald, 1623). MacIntyre has testified that he spoke to Junior Marshall several times on the Saturday, and while he did not take a statement from him, the description given of the event by Marshall on Saturday did not differ greatly from the contents of Marshall's statement which was taken on May 30. (5991). The only investigation work MacIntyre did on Saturday was to supervise a search at the Park, and to have a discussion

with Marshall. MacIntyre says he knew the R.C.M.P. had a store of material on crimes through their MCIS network, and that he had used this resource in other cases. (5958).

Having analyzed the contents of the R.C.M.P. telex (Vol. 16, page 90), and considering the evidence given at this Inquiry, we conclude that the information contained in the telex could only have been provided to the R.C.M.P. by MacIntyre. The written statement taken from Marshall on Sunday (May 30, 1971) (Vol. 16, page 17) refers to a man 5'9" to 5'10", weighing 190 lbs., having grey hair, and being 50 years of age. A similar description was given by Marshall to MacIntyre on May 29 and corresponds very much with the description contained in the R.C.M.P. telex. The May 30 written statement from Marshall also contains the only recording of the fact that the person who stabbed Seale said he did not like negroes or Indians.

There is no evidence that anyone else in the Police Department spoke to Marshall on Saturday, nor that any other member of the Sydney police force would ask the R.C.M.P. for assistance with an investigation which was under the control of MacIntyre. Indeed, MacIntyre says that when he was in charge of an investigation, he took control of it and no one else took statements or did anything else unless he told

them to. (6076-77).

The evidence is that MacIntyre was at the Sydney Police Station after midnight on the Saturday night and the R.C.M.P. telex was forwarded to Halifax several hours thereafter. In our view the only reasonable conclusion to draw is that MacIntyre passed the information along to the R.C.M.P. seeking their assistance. Further, as noted earlier we conclude that MacIntyre told Constable Wood early in the morning on Saturday, May 29, before Sandy Seale had died, that Marshall was probably responsible, and that the incident happened as a result of an argument between Seale and Marshall. It is significant in our view that there was no reference of any kind from other persons that there had been an argument between Seale and Marshall. The importance of the alleged argument having occurred will be evident later in this Submission.

In our opinion the evidence establishes that MacIntyre concluded early on May 29, 1971 that Donald Marshall, Jr. stabbed Sandy Seale. From that point forward it appears MacIntyre was interested only in obtaining evidence which would support his theory, and lead to the conviction of Marshall.

Robert Patterson

During the investigation carried out by MacIntyre the name of Robert Patterson came up on several occasions. He is referred to in the May 30 statements of Donald Marshall, Jr. and John Pratico. Marshall stated that he and Seale had spoken to Patterson who recognized them. Pratico said Patterson told him that the two persons Pratico allegedly saw stabbing Seale were from a particular Toronto gang. Patterson was also named in the statements taken from Patricia Harriss and Terence Gushue on June 17. It appears obvious that a competent detective in carrying out his investigation would speak to Patterson. In his evidence, however, MacIntyre on numerous occasions said he never spoke to Patterson, and even went so far as to say he did not know Robert Patterson, or know where he lived. (6010, 6013, 6014, 6020, 6216 and 6230).

After Mr. MacIntyre concluded giving his evidence we were able to locate Robert Patterson who now resides in Toronto. In addition, we obtained copies of Mr. Patterson's criminal record and these were introduced as Exhibit 120.

These records reveal that on February 1, 1971 John MacIntyre prosecuted Robert Patterson in the Police Court in Sydney. Further, records taken from the Sydney

police files (included with Exhibit 120) indicate that Robert Patterson and others were arrested and charged on March 17, 1971 with break and enter and MacIntyre, and others, prosecuted that matter in Police Court on March 18, 1971. Further, Patterson was sentenced to four months in County jail on September 1, 1971 and this is the same time that Donald Marshall, Jr. was in jail awaiting trial on the murder charge.

William Urquhart, who was MacIntyre's principal assistant in the conduct of the investigation arising out of the Seale murder, testified that he knew Bobby Patterson and his mother, whose name he gave without difficulty, and that he knew where Patterson lived (9549, 50).

Mr. Urquhart was referred to the documents showing the various charges against Patterson and following those references these questions and answers appear on page 9556:

"Q. Can I take it from that, Mr. Urquhart, that Robert Patterson was well known to the Sydney police?

A. Yes.

Q. And if he was well known to the Sydney police to your knowledge would he be well known to John MacIntyre?

A. I would believe that he'd be well known to John MacIntyre.

Urquhart also said that Patterson was never interviewed by him or by him and MacIntyre. (9558). Patterson, on the other hand, says he was interviewed by MacIntyre and Urquhart. (10018). Patterson paints a rather bizarre scene and says he was handcuffed to a chair and treated very roughly. He was told that the police had two statements from other witnesses saying that Patterson was in the Park on the night of the stabbing, and saw what happened, and he was presented with a statement which had already been typed which he was told to sign. In response to his question he was told the statement said that he had seen Junior Marshall stabbing Seale. (10020-22). Donald Marshall, Jr. said Patterson told him that he had been interviewed by the Sydney Police. This conversation occurred when Marshall and Patterson were both in the County Jail in the fall of 1971. (14383). No details of the interview were given by Patterson to Marshall.

It is our view that MacIntyre cannot be believed when he says he did not know Patterson, nor know where Patterson lived. The evidence of Urquhart that Patterson would be well known to the Sydney police, including MacIntyre, is compelling given the record of Patterson, and the fact that MacIntyre himself was involved in arresting Patterson several months prior to the Seale

stabbing. Douglas Wright, retired Assistant Commissioner of the R.C.M.P., was called, at the request of MacIntyre, to give character evidence for MacIntyre. Wright knew MacIntyre well and said if the R.C.M.P. wanted to know anything about what was on the move in the criminal circles of Sydney MacIntyre was a good person to contact. (5254). We must conclude that MacIntyre would know Patterson, and would know where he lived.

To reach this conclusion, however, does not necessarily mean that MacIntyre and Urquhart must have interviewed Patterson. If, as we believe, MacIntyre was of the view that Marshall stabbed Seale and was interested only in obtaining evidence to support that conclusion, it could be argued that MacIntyre would not be interested in finding Patterson and interviewing him. The documentary evidence, however, shows that Patterson was "wanted", (Vol. 16, p.135) and given his previous involvement with the Police we cannot accept that he could not be found.

If Your Lordships accept our conclusion that MacIntyre did know Patterson, and knew where he lived, you must ask why MacIntyre would consistently deny such knowledge before the Inquiry. One obvious answer is that MacIntyre hoped Patterson would not be found and be able to tell his story of an interview wherein attempts

were made to force him to admit seeing Donald Marshall, Jr. commit murder.

The evidence of Patterson obviously is suspect. While other witnesses refer to the alleged tactic employed by MacIntyre of telling witnesses the police had statements from other persons who placed them at the scene of the crime, there is no evidence to suggest that MacIntyre applied physical force to any witness other than Patterson. Further, the evidence of Patterson that he had been roughly treated by police in other jurisdictions, and even thrown from speeding cars, certainly reflects on his credibility. On the other hand, Patterson did not seek us out, and never over the course of the years told his story to anyone else, even given the high public profile the Marshall case has enjoyed since 1982.

Given the fact that Patterson's name kept appearing in statements from various witnesses, the fact that MacIntyre wanted to interview him, and the recent dealings Patterson had with the Sydney Police, we consider it more probable than not that Patterson would be found and must have been interviewed. This conclusion leaves us with only the evidence of Patterson concerning the details of the interview. To accept his evidence on the substance of the interview, however, requires that a finding of credibility be made and we

leave that matter to you.

Evidence Of John Pratico, Maynard Chant, Patricia Harriss

It is generally conceded that Donald Marshall, Jr. was convicted of the murder of Sandy Seale because of the evidence of these three witnesses. All of these witnesses now say the evidence they gave at Trial was untrue and they have admitted committing perjury. Virtually everyone now believes that Sandy Seale was stabbed by Roy Ebsary. Two exceptions are Michael Whalley who openly admitted his view that Marshall had stabbed Seale, (11186) and John MacIntyre, who we suggest also continues to hold that view.

On several occasions Mr. MacIntyre was asked who he believed killed Sandy Seale. On most occasions he avoided the question and merely stated his willingness to accept the decision of the Appeal Division. (5903, 5997, and 6399). The evidence of Ambrose MacDonald and Richard Walsh was that MacIntyre still believed Donald Marshall, Jr. to be guilty. (1188, 1362, 1363). MacIntyre told Frank Edwards he "would go to his grave believing that Marshall had inflicted the wound to his left arm himself". (Vol. 17, page 16). Whether MacIntyre believes Marshall is innocent is not of fundamental importance to this Commission. However, the inability

of MacIntyre to publicly state that he believes Marshall did not stab Seale, or that he believes Roy Ebsary stabbed Seale, is illustrative of the mind set of MacIntyre, and perhaps is useful in explaining some of the actions he took over the years.

In his address to the jury, the Crown Prosecutor on several occasions referred to the fact that two independent witnesses who had no opportunity to colloborate came up with the same story; that is that Junior Marshall stabbed Seale. (Vol. 1, page 58, 59, 63). The evidence of Patricia Harriss was used with devastating effect by the Crown Prosecutor in the cross-examination of Donald Marshall, Jr. The Assistant Crown Prosecutor, Lewis Matheson, testified he could not conceive of the three witnesses not telling the truth since there was no connection between the three and they could not have the same story unless there was truth to it. (4946). In his charge to the jury, the Trial Judge noted that the Crown's case was based principally upon the evidence of Chant and Pratico, and he instructed the jurors to ask themselves what possible motive those two witnesses would have in implicating Donald Marshall, Jr. Further Mr. Justice Dubinsky told the jury he did not think there was the slightest suggestion that Chant and Pratico had acted in cahoots to concoct a story. (Vol. 1, pages 88, 94,

95, 99). The Trial Judge also referred to the evidence of Patricia Harriss and the importance of her evidence in collaboration with that of Chant and Pratico. (Vol. 1, pages 100 and 101).

The Nova Scotia Supreme Court, Appeal Division, heard an appeal from the conviction of Donald Marshall, and in its Decision the Court noted as well that two very important independent eyewitnesses, with no apparent motive for collusion, and no evidence to give the slightest support to any suggestion of collusion, had given mutually corroborative testimony having a direct bearing on the issue to be decided by the jury. (Vol. 1, pages 125, 126, 131).

In the evidence given by John MacIntyre during the Discovery Examination in the C.B.C. proceeding, which was given in September, 1984, the following evidence appears:

"... I never knew the boy ■Chant■ until I, you know, interviewed him the first time, and he was a clean cut young chap and he didn't know Pratico and Pratico didn't know him and they weren't together in the same place. They lived 31 miles apart, and what I'd like to ask is how they could pinpoint Marshall and this other chap on Crescent Street at that time of night on that particular date in the same spot along with Harriss and Gushue and not be there. I know I couldn't do it."  
(Vol. 15, p. 133).

"... They ■Pratico, Chant, Harriss■ all point out that driveway there as to where they were standing. Now what I say is if they weren't there how could they have picked this location, you know, at that time." (Vol. 15, p. 171).

"He ■Pratico■ was a nervous type and the way I looked at that when he - what he said in his second statement was collaborated by somebody else. You have to take notice of it, of what he said he'd seen and then what the story that Chant gave, and neither one of them are buddies, didn't know one another, were several hundred feet apart and lived 31 miles apart, and within a 10 - from quarter to 12 to 12 o'clock they have those two on Crescent Street, in one spot, standing, and then the Harriss girl and Gushue, they come along at that time and they verify that, you know." (Vol. 15, p.179, 180).

We know now that Chant and Pratico were not in the Park at the time of the stabbing, and did not see the stabbing take place. We know also Patricia Harriss did see Donald Marshall, Jr. on that night, and with him were two individuals, one of who she described in a way which closely matched the description of Ebsary. Further, we know that Roy Ebsary stabbed Sandy Seale. What has not changed, however, are the facts that Chant and Pratico did not know each other; had no opportunity to collaborate; lived 31 miles apart; and would have no motive to concoct a story implicating Donald Marshall, Jr. in the stabbing of Sandy Seale. How could they independently invent a story which had Junior Marshall stabbing Seale; Marshall and Seale standing in a particular location on Crescent Street; Marshall and Seale participating in an argument? Why

did Patricia Harriss change her story and say that she saw Marshall and Seale alone in the very area where the stabbing occurred? Answers to these questions must be given, and will be of fundamental importance in determining why Donald Marshall, Jr. was wrongfully convicted. It is necessary, therefore, to analyze the evidence in some detail in order to attempt to determine how these individuals obtained the untruthful stories which they told to the jury and which led directly to the conviction of Donald Marshall, Jr. for the murder of Sandy Seale.

#### John Pratico

In June, 1971 John Pratico was 16 years old and was known to be a heavy drinker. On the night Sandy Seale was stabbed Pratico attended the dance at St. Joseph's Hall after having consumed a large quantity of alcohol. He continued to drink during the course of the evening and at one time during the evening was somewhere in Wentworth Park drinking a beer behind a bush.

According to Barbara Floyd and Sandra Cotie, Pratico was in the parking lot at St. Joseph's Church Hall following the dance when the story of the stabbing of Sandy Seale was being circulated. The day following

the stabbing Pratico asked his mother who had been stabbed in the Park when he learned of the incident. Pratico says he never witnessed the stabbing and the evidence of other witnesses appears to support Pratico's story.

For some reason Pratico was summoned to the Sydney Police Station on Sunday, May 30, to give a statement. Mr. MacIntyre is not able to say exactly why Pratico was called but he believes someone told him Pratico had some knowledge of the events of the night before. On page 127 of Volume 16 there is a handwritten note indicating that Rudy Poirier had seen Marshall at Pratico's home on Sunday morning (May 30, 1971) "re story to tell". A statement was taken from Poirier on July 2, 1971 (Vol. 16, p. 85) wherein Poirier talks about a conversation with Marshall on May 30 where John Pratico was in attendance.

In any event Pratico attended at the Police Station and gave a statement on May 30. The only similarity between the information contained in Pratico's statement, and that given by Poirier approximately one month later, is a reference to a white Volkswagen. The description given by Pratico of the people involved does not compare in any way with that given by Marshall and Chant a short time previous to the Pratico statement. There was no attempt made by MacIntyre to obtain details

of the persons allegedly seen by Pratico and he was not asked, for example, the age of the people or the color of their hair, both of which topics were covered in the statements by Chant and Marshall. Contrary to MacIntyre's usual practice, the time when he commenced taking Pratico's statement is not noted. Given the length of the statement, however, there could not have been a long period of time involved from the start to finish.

MacIntyre says he had difficulty accepting the contents of Pratico's statement and attended at the Park one night at midnight to satisfy himself that Pratico could not be telling the truth and he decided to talk to him again. (6083). By this time MacIntyre had formed the view that the cut on Marshall's arm was self-inflicted (6079), and that Marshall had given Pratico the story which was told to MacIntyre by Pratico on May 30. (6114).

The evidence of MacIntyre with respect to the second statement taken from Pratico on June 4, 1971 deserves careful analysis. He first said that he could not recall who brought Pratico to the police station on June 4 but that when Pratico arrived, he would be told by MacIntyre that the latter thought he wasn't getting the truth in the first statement, that he wanted

the truth and MacIntyre would have taken down everything Pratico said after these initial remarks were made. (6115). MacIntyre also testified that he had not seen Pratico from the time he had taken the May 30 statement until Pratico was brought to his office on June 4. That evidence is found on pages 6115, 6116 as follows:

"Q. Had you seen him since you had taken the statement on May 30 until he was brought to your office on June 4, which was a Friday?

A. No, No.

Q. So this was your first contact with him from the first statement until the second. And you told him, "I don't think you", or words to this effect, "you weren't telling me the truth before, I want the truth"?

A. That's right yes. Some words to that effect."

MacIntyre denied the evidence of Pratico that the latter was threatened with jail, or being in real trouble, if he didn't tell the truth, or that Pratico was told the police had a witness who said Pratico was in the Park the night of the stabbing and saw what happened. (6117, 6118).

Mr. MacIntyre was then referred to the actual statement which he took from Pratico (Vol. 16, p.41). When referring to this statement, it is important to recall that Pratico was not in the Park, and did not

see the stabbing of Seale. One must ask, therefore, where he obtained the details and the information which is contained in the statement.

Mr. MacIntyre was referred to the sentence in the third paragraph of Pratico's statement where it says "on the tracks, I stopped where I showed you" and was asked what Pratico meant. At that time, and for the first time, MacIntyre admitted that he had taken Pratico to the Park prior to bringing him to the Police Station to take the second statement. The following evidence was then given by MacIntyre (6121), after MacIntyre said he had no recollection of being in the Park with Pratico.

"Q. Did you walk about the Park with him?

A. Yes.

Q. Did he take you to the place on the tracks that he "showed" you?

A. I know where he was supposed to be on the tracks.

Q. Where?

A. I think it was the -- the bush in front of the second house.

Q. How do you know where he was supposed to be?

A. I -- he says, "I stopped where I showed you", so --

Q. I know he says that but you just said you knew where he was "supposed" to be. How did you know where he was

supposed to be?

- A. I'm saying I have no recollection of it now; but he must have taken me over there. That's as far as I can go on that, Mr. MacDonald."

On several other occasions in his evidence Mr. MacIntyre refers to the place where Pratico was "supposed to be". (6123, 6124, 6128, 6134). In Pratico's Statement it is then recorded that "Donald Marshall and Sandy Seale were up where the incident happened". Here again is evidence that MacIntyre must have been in the Park with Pratico prior to taking the second statement. Since Pratico was not there on the night of the incident, and there is no evidence to support a finding that he knew precisely where "the incident happened", we must conclude that this location must have been pointed out to him by MacIntyre during the visit to the Park.

In the statement Pratico then goes on to refer to an argument between Marshall and Seale. This is the first reference in any statement or report to an argument between Seale and Marshall, with the exception of the note contained in Constable Wood's notebook. Earlier we expressed our view that MacIntyre made the comments which were recorded by Wood.

Pratico's statement contains fairly detailed

information as to how Seale and Marshall were facing each other, the distance between them, how Marshall stabbed Seale and where on Seale's anatomy the knife struck, etc. William Urquhart is noted to be present at the taking of Pratico's June 4 statement, although there is no indication that Urquhart accompanied MacIntyre when he walked through the Park with Pratico. Urquhart has very limited recollection of the taking of the statement from Pratico. MacIntyre says he never took another statement from Pratico after June 4. (6142).

#### Maynard Chant

After having received the second statement from Pratico, MacIntyre wanted to see Chant because he thought he was not getting all the truth from him either. (6143). MacIntyre and Urquhart proceeded to Louisbourg and arranged for the Louisbourg Chief of Police, Wayne Magee, to bring Chant and his mother to the Louisbourg Town Hall. MacIntyre says he made a preliminary statement that he did not believe he was getting all the truth, and that he wanted the truth, and Chant started to talk and MacIntyre took down everything that was said. MacIntyre says he has a vivid recollection of taking the Chant statement. (6147).

MacIntyre denies he made a remark to Chant that he had someone who saw Chant at the scene or had a statement from someone who saw Chant in the Park on the night of the stabbing. (6148). Chant testified MacIntyre told him he had a witness who saw Chant at the Park. (855, 866, 868, 872, 943, 944, 961, 962, 964). Mrs. Chant gave evidence to the same effect. (3534, 3540). Wayne Magee testified that MacIntyre told Chant the information contained in Chant's first statement did not correspond with other information which was obtained afterwards (3634), and that during the course of taking the June 4 statement, MacIntyre would tell Chant that answers he was giving were not quite correct because of what had been said by another individual. (3647, 3649, 3650). MacIntyre, however, consistently said the statement from Chant contains everything that was said, other than his initial comments.

Once again it is important to remember that Chant was not present in the Park when the stabbing occurred and did not see the incident. It is necessary to ask, therefore, where he obtained the information and detail which is contained in the statement. (Vol. 16, p.46).

The statement starts out with Chant describing

a very circuitous route he took to get to George Street from the bus station. The first statement from Chant (Vol. 16, p. 18) describes a route which was much more reasonable, and which is a route which Chant showed to MacIntyre on May 30 during a visit to the Park prior to Chant giving his first statement. (5993). In the June 4 statement Chant says he was walking down the track when he "noticed a dark haired fellow sort of hiding in the bushes about opp. the second house on Crescent St.". Significantly, Pratico is a dark haired fellow, and even though Pratico's statement refers to his being on the tracks about 30 to 40 feet from where Seale and Marshall were standing on Crescent Street, according to MacIntyre Pratico was "supposed to be" behind a bush opposite the second house on Crescent Street. (6124, 6135).

Chant says in his June 4 statement that he saw Pratico at the Police Station in Sydney on Sunday afternoon. MacIntyre testified he would have made certain that Chant, Pratico and Marshall would not have seen each other at the Police Station on the Sunday. (5992). In Chant's statement there is also reference to an argument between Marshall and Seale and the fact that the stabbing of Seale occurred during the course of the argument.

William Urquhart was present during the taking of this statement as well. He also says he has a vivid recollection of the taking of this statement, although it is one of the few incidents Mr. Urquhart recalled vividly throughout the giving of his evidence. His only explanation for his vivid recollection of the Louisbourg statement taking is that this was the second eyewitness account of a murder in one day and that would be unusual. (9535). We do not consider that explanation to be believable.

Patricia Harriss

On June 17, 1971 Patricia Harriss, who was 14 years old, was at the Sydney Police Station accompanied by her mother. There is a partially completed statement taken from Miss Harriss by William Urquhart at 8:15 p.m. (Vol. 16, p.63). A further written statement was taken from her by Mr. MacIntyre commencing at 12:07 a.m. on June 18 (Vol. 16, p.67).

There are significant differences in the evidence of the various persons who were present when these statements were taken. Miss Harriss and her mother say both Urquhart and MacIntyre were present early in the evening, and many statements were started but when Patricia Harriss mentioned that she saw two persons with Donald Marshall on the night of the stabbing, and described one of those men to be a short person having grey hair and wearing a long coat, the statement would be crumpled up and thrown on the floor. (2954, 2955, 2957, 2798). This procedure was followed on numerous occasions and the police were not prepared to accept her story that there were two people with Marshall in the Park on the night of the stabbing. (2804). Ultimately, after several hours of badgering, threats of perjury and jail (2806), raising of voices, and pounding on the table, during which time Mrs. Harriss was asked to leave the room, (2956, 2960)

Patricia Harriss finally gave a story which the police accepted, namely that Junior Marshall and Sandy Seale were alone on Crescent Street when seen by Patricia Harriss and Terry Gushue on May 28, 1971. Both Mrs. Harriss and Patricia Harriss say MacIntyre and Urquhart were present throughout the entire evening when the questioning occurred. (2954, 2796).

Mr. MacIntyre says he was not present when the first statement was taken from Patricia Harriss early in the evening of June 17, but did recall talking to her later that evening. (6200). He denied that Mrs. Harriss was asked to step outside the room so he and Urquhart could question Patricia. (6206, 6207). He acknowledged he could have told Patricia Harriss that he didn't think he was getting the truth (6220), but denied her evidence that she was told if she did not tell the truth, she was going to be in trouble, might be going to jail and was told about perjury. (6222). To the extent he could remember the details of the interrogation of Patricia Harriss, Urquhart generally agreed with the evidence of MacIntyre.

MacIntyre said he told Harriss that Gushue had been interviewed and MacIntyre was getting two different stories and wanted to see if Harriss was telling the truth. At that time Harriss was quite adamant that there were

two other parties with Marshall, but at no time did he write down what she was saying about the two people. (6223, 6224). MacIntyre says that at some time Patricia Harriss was sent out of the room, after she had been adamant about having seen two people with Donald Marshall, and MacIntyre had been telling her he had a statement from someone else that there was only one person present. (6226, 6227). The only statement the Sydney Police had saying there was one person present with Junior Marshall at the relevant time was the statement taken from Terry Gushue on June 17, 1971 (Vol. 16, p.69).

The statement from Terry Gushue was taken by Mr. MacIntyre commencing at 11:40 p.m. and ending at 12:03 a.m. on June 18. The handwritten statement (Vol. 16, p.72) is in the handwriting of MacIntyre and there is no witness noted to be present. The typewritten copy indicates that the statement had been signed by William Urquhart. The statement of Patricia Harriss taken by MacIntyre (Vol. 16, p.65) commenced at 12:07 a.m. and concluded at 12:25 a.m. on June 18. Here again, the handwritten statement makes no reference to William Urquhart although the typewritten copy indicates that Urquhart was present. Urquhart testified that if his signature was not on the handwritten copies of statements, then he was not present when they were taken. (9583, 9584). MacIntyre would say Urquhart was present when the second

statement was taken from Harriss. (6240).

It is obvious that MacIntyre's evidence on the taking of the second statement from Harriss cannot be correct. We do not consider it would be possible for MacIntyre to conclude taking the statement from Gushue at 12:03, to meet with Harriss for a time when she was being adamant that there were two people present with Marshall, to tell her he had a statement saying there was only one person present, send her out of the room, and then have her come back and give the written statement which he commenced taking at 12:07. Yet this is exactly what he said took place. (6227).

In our opinion, there can be no doubt Mr. MacIntyre questioned Patricia Harriss on several occasions throughout the evening at which time she was being adamant about having seen two people with Donald Marshall, Jr. on Crescent Street on May 28, 1971. The description of one of those persons corresponded very closely to that given to MacIntyre by Marshall on May 30, 1971, and that given by George and Alexander MacNeil on May 31, 1971. (Vol. 16, p. 26). MacIntyre testified that his practice, which he invariably followed, was to make a general statement to witnesses and then take down everything that was said by witnesses and himself. There is no statement, or partial statement, from Patricia Harriss in the handwriting of MacIntyre

where Patricia Harriss is saying there were two men present with Marshall.

Patricia Harriss said it was "not acceptable" for her to have seen two men with Marshall (2804) and both she and Mrs. Harriss said whenever she mentioned two men, the paper would be crumpled up and thrown to the floor. (2798, 2954, 2955, 2957). MacIntyre admits Patricia Harriss was adamant in her story, and one must conclude that this means she was insistent, and that she repeated her story over and over. Why wouldn't MacIntyre follow his usual practice of taking down everything that was said by witnesses, and himself. Is this not concrete evidence of MacIntyre and Urquhart employing a tactic of telling a young, frightened person that the story she is giving cannot be true because they have a witness who is telling them a different story which must be the truth, until finally they obtain the statement which they want? (6220, 6223, 6224, 6225, 6226). It is our view that MacIntyre and Urquhart employed reprehensible techniques and conduct in their questioning of Patricia Harriss and that they coerced her to give a statement which they knew she did not believe, and one that in fact was completely different than she wanted to give.

One cannot conclude an assessment of the Patricia Harriss involvement in this matter without referring to

the O'Reilly twins. On July 26, 1982 MacIntyre swore an Affidavit for use in an Application to have evidence called at the Reference Hearing. (Vol. 15, p. 10). In that Affidavit in paragraphs 16 through 22, MacIntyre refers to the statements given by Patricia Harriss and a statement taken from Mary O'Reilly on June 18, 1971, wherein it is stated that O'Reilly told Patricia Harriss about the grey haired man referred to by Harriss in her first statement, and it was likely he knew what O'Reilly was going to say before he took the second statement from Harriss. Further, he deposed that the questioning of Patricia Harriss continued because he believed she was not truthful in her first statement and his belief was probably based upon his knowledge of what O'Reilly was going to say.

In the second statement taken from Patricia Harriss, there is no reference to Mary O'Reilly and MacIntyre did not ask Patricia Harriss if she had been told by Mary O'Reilly to tell the police about the grey haired man, and did not even ask if she knew Mary O'Reilly. MacIntyre says he did not know Patricia Harriss, or speak to her, before taking the statement on June 17, and that is the only time he met with Patricia Harriss and talked to her about this case. (6238, 6233). MacIntyre could not say why he did not ask Patricia Harriss if she knew Mary O'Reilly. (6232).

On page 129 of Volume 16 there is an undated note in the handwriting of MacIntyre. The note provides as follows:

"Mary O'Reilly said to Miss Harriss that Sandy Seale ran up to the corner where Polletts is to tell his girlfriend that he was going with Junior. Mary is Margaret O'Reilly's sister

The O'Reilly twins told me to tell the story about the grey haired man

Jr. is a good friend of theirs They hang around with the Indians Mary told me that in school last Thursday she went with Pius Marshall now she goes with Steve ?".

When he was referred to this note, MacIntyre agreed that the phrase "the O'Reilly twins told me" must be a referenceto Patricia Harriss, and agrees that the note can only be a result of something that Patricia Harriss told him. (6235, 6236). He cannot recall, however, any discussion with Patricia Harriss where she told him that the O'Reilly girls told her to tell the story about the grey haired man, and it is difficult to conclude that had Patricia Harriss told him such a story on the only occasion when he met with her (June 17), that he would not have recorded that fact.

The statement from Mary O'Reilly, in its typewritten form, is found in Vol. 16, p. 74. This is another case where the typewritten copy shows William

Urquhart to be present but the handwritten one, in MacIntyre's writing, does not. Mary Csernyik (O'Reilly) testified that she did not tell MacIntyre that she told Patricia Harriss about the old grey haired man and that Harriss should tell the police that such a person was with Marshall on the night of May 28. (3302, 3304). The following evidence of Mrs. Csernyik is important. (3308, 3309).

"Q. Now the statement that you gave to the police says quite clearly and you did sign it, it says quite clearly that you discussed the matter with Patricia Harriss and that you told her about the grey haired man. I can think of three possibilities of how that got there. The first possibility is that you, in fact, made the statement. The second possibility is that someone perhaps suggested it to you and you agreed. Another possibility is that you didn't make the statement at all and somebody put it there. Are there any other possibilities that you can think of as to how that got on that piece of paper?

A. No. Your third possibility is right. Somebody must have put it there because I didn't."

At the time this statement was taken Mary O'Reilly was 14 years old and she was at the Police Station unaccompanied by her parents. Also there was her sister, Catherine, who was 16 years old at the time. A statement was taken from Catherine (Vol. 16, p. 78) by Sgt. MacIntyre and on this occasion Urquhart did sign the statement as

a witness. Catherine O'Reilly was not asked if she had any discussions with Patricia Harriss, or even if she knew Patricia Harriss. MacIntyre says he did not ask these questions because of his belief it was Mary O'Reilly who had been talking to Patricia Harriss. (6249). MacIntyre was not able to give any explanation why he held that belief.

If MacIntyre's evidence is to be accepted, you must conclude that he was told on June 17, 1971 by Patricia Harriss that the O'Reilly twins, and specifically Mary O'Reilly, told her to tell the story of the grey haired man, and that Mary O'Reilly confirmed the story the following day. You obviously would have to ask yourselves, however, why MacIntyre would not have taken a statement from Patricia Harriss confirming that fact since obviously it would be of great significance in the prosecution of Donald Marshall, Jr.

If Mr. MacIntyre's evidence is rejected, however, and that of Patricia Harriss and Mary Csernyik accepted, you must somehow explain the note on page 129 of Volume 16. Conceivably, MacIntyre could have been recording information being given to him by someone else who was interviewing Patricia Harriss. Urquhart does not recall passing on any such information to MacIntyre, and says if Harriss had told this to him he would have written

it down. (9601, 9602). There is no evidence before this Inquiry that any other members of the Sydney Police were interviewing witnesses or potential witnesses at this time. The only other possible explanation we can suggest is that MacIntyre fabricated the entire story about Mary O'Reilly telling Patricia Harriss to lie to the Sydney Police concerning the grey haired man and was creating documents which could be used to support this theory. We take no firm position on this particular issue.

Conclusions Re John MacIntyre's Securing Evidence Of Key Witnesses

In our opinion, the same factors that were considered compelling by the Crown Prosecutor, the Trial Judge, probably the Jury, and the Appeal Division of the Nova Scotia Supreme Court in 1971 to support the conclusion that Donald Marshall, Jr. had stabbed Sandy Seale are equally compelling today to support the conclusion that John MacIntyre put evidence in the mouths of John Pratico, Maynard Chant and Patricia Harriss. We do not consider any other conclusion can be supported by the evidence before this Inquiry if one begins with the assumption that Donald Marshall, Jr. did not stab Sandy Seale.

Pratico and Chant did not know each other, had no opportunity to collaborate, lived approximately 30 miles apart, and would have no motive to concoct a story to implicate Marshall in the stabbing. They did not see Marshall stab Seale and yet these two independent, unconnected witnesses came up with a story which placed Seale and Marshall on Crescent Street arguing immediately before Marshall allegedly stabbed Seale. Further, Chant placed Pratico in a location viewing the fictional scene, not where Pratico said he was, but where MacIntyre said Pratico was "supposed to be". We do not consider it would be reasonable to find that these independent

witnesses somehow independently invented a story having many key similarities.

We have already urged you to conclude that on the morning of May 29, 1971 MacIntyre formed the view that Marshall had stabbed Seale during the course of an argument. This theory is later supported by the untrue statements of Chant and Pratico. Pratico gave his statement implicating Marshall only after having been taken to the Park by MacIntyre where he allegedly pointed out, (a) where he was when he viewed the event that he did not see; (b) where the event he did not see had happened; (c) where Seale and Marshall were involved in an argument which did not occur; and (d) where he saw Marshall stab Seale, although this did not happen.

The session in Louisbourg occurred only after the statement was obtained from Pratico following his visit to the Park with MacIntyre. MacIntyre's evidence, concurred in by Urquhart, that every word that was uttered at Louisbourg was taken down and is contained in Chant's second statement is not capable of belief, in our view. While one could argue that Chant, and even his mother, may have reason to give untrue evidence, surely even MacIntyre would not suggest the evidence of Wayne Magee is tainted. Magee says that MacIntyre conveyed to Maynard Chant that information Chant had given in his

prior statement did not correspond with other information the Police had obtained afterwards (3634); that MacIntyre may have said we were talking to this individual and they said this (3647); that Maynard was getting confused and was given advice such as "this one in this statement didn't say that" (3649); that some of Maynard's answers MacIntyre knew weren't correct and didn't correspond with other information MacIntyre had so Maynard would then be quizzed more; that at times there would be periods of approximately two minutes of questioning before any answer was written down (3662).

Then there is the evidence of Harriss, which was considered to be of great importance at the time of Marshall's Trial. Obviously her initial statement that two persons were with Marshall on Crescent Street, and that one of those persons fit the description of the old man described by Marshall on May 30 could not be allowed to stand in the face of the evidence of Chant and Pratico. In our view, any objective reading of the evidence of MacIntyre concerning the interrogation of Patricia Harriss must lead one to conclude that she was not going to be permitted to stand by the evidence that she was adamant to give, that she was told her evidence of seeing two men with Marshall could not be the truth and that the Police had a statement from someone else that there was only one person present with Marshall.

Ultimately this 14 year old child bowed to the pressure being exerted by MacIntyre and Urquhart, and told them what they wanted to hear.

We are of the opinion that MacIntyre formed a theory on the morning of May 29, 1971 and then set out to find evidence to support his theory. We believe his actions in obtaining the untrue second statements from Pratico, Chant and Patricia Harriss are to be condemned, and constitute malicious conduct by a senior Police Officer.

We have asked ourselves why MacIntyre would deliberately set out to obtain evidence to convict Marshall but have been unable to reach any conclusion. It would be simple to suggest that he was motivated by malice toward Marshall because of his previous dealings with him, and there is evidence from Mrs. Clemens to support such a conclusion. (5892, 5893, 5894, 5895). To fall into this trap, however, would require us to ignore the fact that, on two occasions, MacIntyre asked for an independent review of his investigation by the R.C.M.P. It also would leave unanswered the question why MacIntyre would not have destroyed the partially completed first statement taken from Patricia Harriss. These are not the actions one would expect from a person who deliberately fabricated evidence, but rather support a conclusion that

MacIntyre honestly believed Marshall was guilty of the stabbing of Sandy Seale, and was not prepared to consider any evidence which would shake that belief.

In the result, we do not consider it necessary to determine whether MacIntyre deliberately set out to convict Marshall, or was acting on a honestly held belief in Marshall's guilt. Whether MacIntyre honestly believed that Marshall had stabbed Seale is, in our view, of no importance. Surely it cannot be correct for a Police Officer to coerce youngsters to give evidence which he believes to be true. No one in authority has yet analyzed MacIntyre's conduct and considered whether it constitutes criminal action which would support laying of charges.

If our conclusions are correct that MacIntyre deliberately coerced witnesses to give evidence which was untrue, we are of the view that a prima facie case would exist to support a charge for obstructing justice contrary to the provisions of Section 127(3)(a) of the Criminal Code, which provides in part that:

"... everyone shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed, dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence."

In R. v. Walker (1972), 17 C.R.N.S. 374 (Ont. Prov. Ct.) it was held that this subsection covers attempts to dissuade a witness from testifying in a certain way, as well as attempts to dissuade the witness from testifying at all. Furthermore, where "corrupt" means are used, it is immaterial whether the accused believed that the evidence he was suppressing was true or false.

In R. v. Silverman (1908), 14 C.C.C. 79 (Ont. C.A.) in commenting on a predecessor's section of the Code, the Court dealt with an accused who offered a defence that he had only corruptly attempted to persuade the witness to give true evidence. At p. 81 of the Decision it is stated:

"Whether the accused was honest in his belief or not is immaterial. It would not have been unlawful for him, by argument or explanation, to have attempted to dissuade the witness from giving what the accused may have honestly believed to be an untrue account of the transaction, and to give what may have appeared to him to be the true one. The offence consists in doing it corruptly, whether by threats, bribes, or other corrupt means, which have a direct tendency to influence the witness not to give the true version of the facts, as it may really have appeared to him, but what may be, so far as the knowledge or belief of the witness himself is concerned, a false one, and thus to interfere with or obstruct the administration of justice."

If Your Lordships conclude that the evidence given at Marshall's Trial by Pratico, Chant and Harriss was put

in their mouths in the first instance by MacIntyre, we  
urge you to go further and to recommend that  
consideration be given to laying charges against John  
MacIntyre for obstruction of justice, together with any  
other charge which may be supported by the conclusion  
which Your Lordships reach. To do less would be  
tantamount to acknowledging that our law does not  
prohibit the deliberate securing of untrue evidence.

WILLIAM URQUHART

As noted elsewhere in this Submission, Mr. Urquhart was the principal assistant to John MacIntyre as this investigation was carried out. For the most part, Mr. Urquhart played a passive role and was a witness to many of the statements taken by MacIntyre from various persons. It is necessary, however, to determine whether he should bear any responsibility or be criticized in any way, for any of the actions of MacIntyre which we have suggested should be condemned.

In the main, Mr. Urquhart supported the evidence of MacIntyre, although on most occasions Urquhart admitted having very limited recollection of the events which took place. We consider it surprising that he did have very good recollection of the Louisbourg statement and noted earlier our dissatisfaction with his explanation for his vivid recollection of those events. We have urged you to conclude that the evidence taken from Maynard Chant at Louisbourg was largely evidence that was put into his mouth by MacIntyre. Mr. Urquhart would have to share equally in any blame to be attached to that conduct since he was present, and must be taken by his silence to have acquiesced in the activity of MacIntyre.

There is no suggestion in the evidence that Urquhart accompanied MacIntyre during the visit to the Park with Pratico before Pratico gave his second statement. Neither is there any suggestion that he would be aware that the details of the event which Pratico described could not be truthful and had to be put into Pratico's mouth by someone else.

We are of the view that Urquhart did participate throughout the evening in the interrogation of Patricia Harriss on June 17, 1971. We consider the activity of Urquhart and MacIntyre on that evening to be reprehensible and that consideration should be given to laying any charges which could be supported as a result of such activity.

CROWN PROSECUTOR

The only substantive allegation of misconduct made with respect to the way in which Donald C. MacNeil, Q.C., handled the prosecution of the Donald Marshall, Jr., case was the suggestion that he had an obligation to disclose the first statements of Chant and Pratico to defence counsel independent of any request being made of him to do so. Gordon Gale's testimony was to the effect that the failure to disclose those statements would constitute "a real injustice". Gale did however say that his comments with respect to the duties of prosecutors in 1971 would now be "on reflection". "I am not sure in 1971 that things were dealt with as fully as they are now" (13369).

Leonard Pace testified with respect to contradictory statements that they should have been disclosed to the defence, that that would have been the appropriate practice (12811), although he was not prepared to go so far as to say that that in fact was department policy in 1971 (12812).

We do not conclude that it was department policy in 1971 for prosecutors to disclose contradictory

statements to the defence in the absence of a request to do so. We are, however, of the view that this was the law at the time and that it should have been department policy to require such disclosure by Crown Prosecutors. This conclusion is based on the authorities referred to in the March 23, 1961, letter from Malachi Jones (Exhibit 81).

#### DEFENCE COUNSEL

Donald Marshall, Jr., was represented by the late C.M. Rosenblum, Q.C., and S.J. Khattar, Q.C. Those who gave testimony concerning the capabilities of these two counsel were generally of the view that they were both competent and well-respected counsel. In the conduct of the Marshall case, however, we conclude that in preparation for Trial their conduct fell below the standard which one could expect of a reasonably competent practitioner in Sydney at that time.

The evidence given by Mr. Khattar indicates that no investigative work was done on behalf of Marshall by either himself or Mr. Rosenblum. Marshall, in custody from the time of his arrest until the Trial, was asked by Khattar and Rosenblum to give them any information

that he thought might help in his defence. No independent inquiries were made by counsel (4803). Although it seems to have been a practice of certain defence counsel not to talk to the Crown witnesses, it is inexplicable that no attempts whatsoever were made to investigate the background of any of the witnesses. By way of example, Khattar was not aware that John Pratico had been in the Nova Scotia Hospital for a long period of time between the Preliminary and the Trial and when he was advised of this at the Hearings and asked whether he thought it would have been of any use to him in conducting his defence, he responded that it might have helped them (4719). In the defence of a murder case, where as here, there were no financial restraints placed on the conduct of the defence (4693), it is simply unacceptable for no independent inquiries to be made by defence counsel.

During the course of Mr. Khattar's examination, he was asked whether or not defence counsel would have done anything differently if Donald Marshall, Jr., had told them that he and Seale had accosted Ebsary and MacNeil and that it was their intent to take money off them. Khattar indicated that their investigation and conduct of the case would have entirely changed

(4788). Khattar and Rosenblum had the May 30 statement of Donald Marshall, Jr. (4714). This statement contains descriptions of Ebsary and Jimmy MacNeil, and it also refers to Bob Patterson. Consistent with their lack of investigative initiative, there is no evidence to indicate that Khattar and Rosenblum made any efforts whatsoever to follow up on the descriptions and information provided in Marshall's statement. In order for Your Lordships to conclude that Khattar and Rosenblum would have handled this matter differently if they had any information about an altercation in the park, you must be prepared to find that this one fact would have altered what we urge you to find to be an otherwise incompetent handling of Marshall's defence.

According to Khattar, the practice in Sydney in 1971 was that defence counsel would not approach the Crown and request copies of witness statements and that it was not the practice of either himself or Mr. Rosenblum to do so (4783; 4857). As noted above, the only statement that was in the possession of defence counsel was that of Donald Marshall, Jr. (4714). Even where they were aware that a witness had given a written statement, no request was made by Khattar or Rosenblum to get that statement from the Police. By way of

example, the testimony of Patricia Harriss at the Preliminary confirmed that she had given a written statement to the Police but, notwithstanding that knowledge, no request for that statement was forthcoming from Khattar or Rosenblum (4712).

The testimony of other lawyers who practiced in Sydney at about the same time did not generally support the view given by Mr. Khattar. Lou Matheson testified that most defence lawyers would ask for and be shown statements (4924). Upon being referred to Mr. Khattar's testimony, Matheson testified as follows in response to questions from Commission counsel (4926):

"Q. Mr. Khattar testified, if I remember correctly, to the effect that it was certainly his practise and he believed Mr. Rosenblum's practise not even to request statements because even if you asked for them you wouldn't get them?

A. Well, if it was his practise not to ask for them, then -- well, then probably he didn't get any from me and obviously I didn't go out and volunteer to give him one. But I --

Q. Is he --

A. -- And I'm not saying that what Mr. Khattar is saying is not true. All I'm saying is that I, in my experience, that was not what the general practise of the Cape Breton Bar was."

Arthur J. Mollon who practiced with Legal Aid in Sydney made a regular practice of requesting information from Donald C. MacNeil and, in his experience, he always received it (5420-1). Melinda MacLean, on the other hand, who also practiced with Legal Aid in Sydney, testified that by and large witness statements were not produced by Donald C. MacNeil in response to request (7246).

In the section of this Submission dealing with the errors made by the Trial Judge, we refer to the error made by the Trial Judge in connection with his interpretation of s.11 of the Canada Evidence Act. That error was described by Professor Archibald as having "significantly contributed to the conviction" (Exhibit Volume 30, p. 5521). This matter was not raised or argued by Mr. Rosenblum on the Appeal from Donald Marshall's conviction. In our view, Mr. Justice Dubinsky's misinterpretation of s.11 was so basic that it should have been picked up by defence counsel and argued on Appeal.

The evidence indicates that if defence counsel did less than a competent job in preparation, it may have been due to the fact that at least Mr. Rosenblum

considered that Donald Marshall, Jr., was guilty of the offence (comments of Rosenblum, Exhibit 69 referred to in examination of Khattar at Volume 25, p.4761). Evidence of M. Veniot (Volume 38, p.7043) who spoke to Rosenblum at the Appeal of Marshall's conviction:

"I had the very clear impression that Mr. Rosenblum thought that Donald Marshall had done what he had been convicted of, no question about that."

In addition, Barbara Floyd testified that she had occasion to read The Cape Breton Post during the course of Donald Marshall, Jr.'s, Trial and to note the evidence of John Pratico. Barbara Floyd's view, which was supported by Sandra Cotie, was that the testimony that Pratico had given could not possibly have been true because Pratico had been at the dance and Barbara Floyd had seen Pratico that night subsequent to the time when she heard that something had happened in the park that night (3139). Ms. Floyd testified that she called Rosenblum's office and asked to speak to Marshall's lawyers. Her testimony as to what occurred then is as follows (3140):

"A man came back on the phone and didn't -- I don't remember him identifying himself. He just said 'May I help you?' and I told

him that I had just read the paper, and I was calling about John Pratico, that he couldn't possibly be a witness because he was at the dance, and he said, 'You're too late.' And I said 'I beg your pardon.' and he just repeated himself and then hung up.

(3141)

Q. "Do you recollect what the man's attitude was on the other end of the phone? Can you describe what his voice was like?

A. He was just blunt.

Q. Blunt?

A. 'You're too late', he said and I remember thinking 'It's not too late because he's not convicted yet'. It hadn't come over the radio that he was guilty.

In answer to a question from counsel for Donald Marshall, Jr., Ms. Floyd indicated that she "felt" that she was speaking to Mr. Rosenblum (3160). The issue of The Cape Breton Post to which Ms. Floyd referred was that of November 5, 1971 (Exhibit 52). Ms. Floyd thinks that she was looking at this paper about noon (3137) on her lunch break. The Trial concluded at 3:18 on the afternoon of November 5 and the jury address commenced at 3:30 p.m. (Exhibit Volume 2, pp.36-37). The lunch break on that day was from 12:15 p.m. to 2:00 p.m. (Exhibit Volume 1, p.216 and Volume 2, p.4).

THE TRIAL JUDGE

Mr. Justice L. Dubinsky presided over the Trial of Donald Marshall, Jr. During the course of the Trial, he made rulings based on what was "fundamental misapprehension of the nature of what is hearsay" (Volume 30, p.5502). He ruled that a statement made out of Court which was not made in the presence of the accused was inadmissible as hearsay. His error in this respect was shared both by defence counsel and the Prosecutor. Professor Archibald testified that he knew of no such rule (5499).

Prior to testifying at Trial, John Pratico had told a number of people outside the Court Room that Donald Marshall, Jr., did not stab Sandy Seale. This was a statement inconsistent with Pratico's prior testimony at the Preliminary Hearing and accordingly this prior inconsistent statement should have been able to be used to challenge Pratico's testimony that Donald Marshall, Jr., had stabbed Sandy Seale. Defence counsel should have been permitted to cross-examine Pratico as to whether or not he made the statement, why he made it and the circumstances surrounding the statement. We know now that Pratico wanted to be able

to tell defence counsel Khattar the truth (2102). Pratico was prevented from telling the truth by the misapplication by the Trial Judge of s.11 of the Canada Evidence Act which provides:

"Where a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

The proper application of this section, according to Professor Archibald (at p.26 of Exhibit 83), would have been to permit testimony from other witnesses about what John Pratico had said outside the Court Room if he had denied making the statement once back in the Court Room (which it was clear he was not going to do). The Trial Judge, however, used the section to limit the cross-examination of Pratico himself in the following manner:

"So you have the right to ask him about any statement which he made to anyone inconsistently - but Mr. Khattar, let us limit ourselves to anything that he said that was inconsistent."

(Exhibit Volume 1, p.187)

Khattar's cross-examination of Pratico was accordingly limited to the strictures imposed by s.11 and he was not able to pursue the reasons for Pratico's having made the statement outside the Court Room.

Professor Archibald testified with respect to this ruling:

"There is no question that it was -- significantly contributed to the conviction".  
(Volume 30, p.5521)

We agree with this conclusion.

#### THE JURY

At the time of Donald Marshall, Jr.'s, Trial, it was not possible for Indians living on reserves to be members of juries. This was because the legislation in force at the time selected juries from the municipal tax rolls (Simon Khattar, 4886). That requirement has now been removed from the Juries Act but the evidence indicates that it is still very rare that a native person would appear as a member of a jury panel (Arthur J. Mollon, 5324).

We raise for your consideration whether or

not a Trial by a jury of "your peers" occurs when an all-white jury sits on a case where the accused is a native person.

R.C.M.P. REINVESTIGATION - 1971

Ten days after Marshall's conviction, James MacNeil went to the Sydney Police Department and told them that Seale had been murdered by Roy Ebsary. The Sydney Police Department took statements from MacNeil, Roy Ebsary, Jim MacNeil's brothers (John and David MacNeil), Roy Ebsary's wife (Mary Ebsary) and their son Greg. No statement was taken from the daughter, Donna.

Sub-Inspector E.A. Marshall of the R.C.M.P., then stationed in Halifax, was requested by his immediate superior, Superintendent Wardrop, to go to Sydney and determine whether there was any substance to the allegations being made by Jimmy MacNeil (5607). Inspector Marshall thought his job was to "get to the bottom of it" (5607), to determine whether there was any substance to MacNeil's story (5606).

Inspector Marshall went to Sydney and concluded that in order to better assess Jimmy MacNeil's story, a polygraph test should be administered. In the end, polygraphs were given to MacNeil and Roy Ebsary by Corporal E.C. Smith, an R.C.M.P. polygraphist. MacNeil's

polygraph was inconclusive and Roy Ebsary was found to be truthful in answering "no" to the question whether or not he stabbed Sandy Seale.

Inspector Marshall acknowledged that the polygraph is only an aid to investigation, should not be used as the sole investigative technique, and should be used in conjunction with other methods of investigation (5641). In this case, however, Sub-Inspector Marshall accepted the polygraph result on Ebsary as the sole determining factor in deciding whether or not Ebsary was telling the truth (5647).

The report prepared by Inspector Marshall (Exhibit Volume 16, page 204) states that he conducted "a thorough review of the case". His report concludes (in paragraph 9) that Donald Marshall, Jr., murdered Sandy Seale.

"A thorough review of the case" was however exactly what Inspector Marshall did not do. By his own admission before this Commission, he "botched the investigation" (5709). The extent of Marshall's review was to:

1. Discuss the case with Sergeant MacIntyre;
2. Review the file material given to him by MacIntyre; and
3. Arrange for the taking of the polygraph tests.

#### Discussions with MacIntyre

Inspector Marshall testified that the work he was to do in Sydney was to be done "independently of the Sydney Police Department" (5610) and independent of any direction from the Sydney Police Department (5610). Marshall said that MacIntyre was very confident that he had the right man (5611), and he relied very heavily on explanations given to him by MacIntyre. Time after time in reviewing information contained in Marshall's report, he stated that the source of his information was Sergeant MacIntyre. In many of these cases, there was in fact no support in the material before Inspector Marshall for these statements. For example:

1. There was the consensus of opinion that Marshall and Seale were bent on robbing someone (Marshall's Report in Exhibit Volume 16, p.206 and Inspector Marshall at 5695).

2. Marshall's removal of his bandage and flushing it down the toilet (Volume 16, p.207 and Marshall at 5698).
3. Inspector Marshall's firm conviction that Donald Marshall, Jr.'s wound was self-inflicted (Volume 16, p.207 and Marshall at 5701).
4. Ebsary and MacNeil being somewhat intoxicated (Volume 16, p.207 and Marshall at 5702).

### Review of File Material

Marshall accepted that the material he received from MacIntyre was the "crucial material related to the eye witnesses". Marshall's recollection is that he had the June 4 statement of John Pratico (5612), the June 17 statement of Gushue (5612) and the June 4 statement of Maynard Chant (5613). His recollection is that he also had a copy of the Transcript of the Preliminary Hearing (5613) and perhaps some of the exerpts from the Trial testimony quoted by the Trial Judge in his charge to the Jury (5614), although he was unable to identify the specific material in question (5614). He also had copies of the November, 1971, statements of J. MacNeil and Roy Ebsary. Sergeant MacIntyre was not asked to turn over his entire file to Inspector Marshall whose explanation for this was that he was seeking the co-operation of MacIntyre.

It is apparent from Inspector Marshall's testimony that all he did was review the material given to him and did not go any further. If Inspector Marshall had conducted any investigation based on the written material before him, he might have discovered:

1. The fact of Roy Ebsary's prior arrest for a dangerous weapons charge (5672);
2. From Jimmy MacNeil's statement, the fact that MacNeil and Ebsary were seen by Ebsary's wife, daughter and son and that these people could have been talked to by Inspector Marshall (5673);
3. Gushue's statement mentions the name of Patricia Harriss. No effort was made to interview her and discover whether or not she had given any statements (5674). The Preliminary Hearing Transcript disclosed that Patricia Harriss had given a statement but it was not asked for by Inspector Marshall (5676).
4. From a review of the Preliminary, he could have discovered that Donald Marshall, Jr., had given a statement and from that have read the descriptions contained in that statement (5682).

### The Polygraph Tests

As already stated, Inspector Marshall used the polygraph as the sole determining factor as to the truth of MacNeil and Ebsary's stories. Marshall knew that he should not rely on the polygraph alone,

extent of other investigative techniques.

What is disturbing about the manner in which Inspector Marshall carried out his review is that if, by his own admission he had carried out his job properly, Donald Marshall, Jr., might only have spent a couple of weeks in jail and not 11 years (5705).

It is our conclusion that the investigation carried out by Inspector Marshall was done incompetently.

Why did this happen? The threads which run through the testimony of Inspector Marshall are that:

1. He assumed that the work done by Sergeant MacIntyre had been done properly. As Marshall testified:
  - Q. Is it fair to say, sir, that you just -- you assumed that because of your knowledge of John MacIntyre that any investigation he would have carried out would have been an intensive investigation?
  - A. From my knowledge and my experience with the man and his aggressiveness, I'd have to say that is the case (5687).
2. He relied completely on the polygraph results to the exclusion of any other investigative technique.

and should employ other investigative techniques as well.

What is disturbing about the manner in which Inspector Marshall carried out his review is that if, by his own admission, he had carried out his job properly, Donald Marshall, Jr., might only have spent a couple of weeks in jail and not 11 years (5705).

#### Who had Knowledge in Attorney General's Department

Jimmy MacNeil went to the Sydney Police Department on November 15, 1971, to tell the Police his story that Roy Ebsary had murdered Sandy Seale. This information was conveyed to Robert Anderson, the then Director of Criminal in the Attorney General's office in Halifax. Mr. Anderson's recollection is that he was called by the Prosecutor, Donald C. MacNeil, (9136) but his memory of that was not complete and he was prepared to agree that it may well have been the Assistant Prosecutor, Lou Matheson, who called him in Halifax. This was Matheson's testimony (5019).

The polygraph tests on Ebsary and MacNeil were carried out on November 23, 1971. Inspector Marshall's recollection is that Donald C. MacNeil called

then Attorney General Leonard Pace to advise him of the polygraph results (5653). Mr. Pace's recollection is that MacNeil did not call him (12805). Anderson was made aware of the results of the polygraph tests and indicated in his testimony that he may well have been called by Donald C. MacNeil (9148).

Inspector Marshall's report is dated December 21. His superior, Inspector Wardrop, testified that Marshall gave the report to him by hand (6760). Inspector Wardrop's recollection is that he would have taken this report over to his regular meeting at the Attorney General's office and handed it either to Gordon Gale or Robert Anderson (6763). He, however, has no recollection of any discussions about the report with anybody in the Attorney General's office (6764) and he cannot for certain say that he delivered the report but rather that it is his best recollection (6788).

Gordon Gale, who took over as Director of Criminal from Robert Anderson when he left on December 16 to become a County Court Judge, testified that in the normal course R.C.M.P. reports would have gone to the Deputy Attorney General (13342). Gale testified that he certainly never received Wardrop's report (13343)

and never saw it until 1982 at which time he had to get it from the R.C.M.P. because the Attorney General's files respecting Donald Marshall, Jr., had been destroyed (13344). Gale further testified that he was never told at the time of the results of the 1971 R.C.M.P. review of the Donald Marshall case (13595). The Deputy Attorney General at the time, Innes MacLeod, testified that he had no recollection of ever having seen Inspector Marshall's report (7342) and further that if it had been in the Department, he expects that he probably would have seen it (7343).

Based on a review of all the evidence, we cannot conclude with any degree of certainty that Inspector Marshall's report was ever transmitted to anybody in the Attorney General's Department. There are no documents in the record indicating that the report was sent to the Attorney General's Department. It seems unlikely that if the report had been passed to the Attorney General's Department, that someone in that Department would not have had a recollection of having seen it. As it is, nobody in the Department has any recollection at all of ever having seen the report until 1982.

Regardless of what happened to the report, however, there is no doubt the fact that Jimmy MacNeil had come forward and named Roy Ebsary was known to people in the Attorney General's Department in 1971. This information, we conclude, should have been disclosed to defence counsel acting for Donald Marshall, Jr. Although persons in the Attorney General's Department in 1971 differ as to whose obligation it would have been to disclose the information, there is no disagreement that it should have been disclosed. Leonard Pace, Attorney General at the time, testified that if this information was available, it should have been disclosed by Anderson (12813) and if it was not disclosed by him, that this would have been an injustice (12814). Gordon Gale testified that the results of the investigation should have been disclosed to the defence either by MacNeil or by persons in the Attorney General's office in Halifax if they were aware of the results (13344) and that to not do so was a breach of a fundamental obligation owed by the Attorney General's office to see that justice was done (13345). Robert Anderson was of the view that the obligation to disclose would have rested with MacNeil even if the information had been in the possession of persons in the Attorney General's office in Halifax (9144-5). Finally, the

then Deputy Attorney General Innes MacLeod was of the view that information brought forward by Jimmy MacNeil should have been disclosed to defence counsel by persons in the Halifax office of the Attorney General's Department (7347).

It is our conclusion that the failure to disclose to defence counsel the fact that Jimmy MacNeil had come forward with information concerning Roy Ebsary was a breach of a fundamental obligation to disclose on the part of the Attorney General's Department, whether that fault be placed at the doorstep of the local Crown Prosecutor or of the Halifax Office.

#### THE NOVA SCOTIA COURT OF APPEAL - 1972

It was suggested during the Hearings that there was a duty on the Appeal Court which heard the Appeal from Marshall's conviction, on its own initiative to direct counsel to the misinterpretation of s.11 of the Canada Evidence Act made by the Trial Judge. Although we have located cases where an Appeal Court has directed counsel to deal with a matter not raised by them, we do not support the view that there is a duty on the Appeal Court to identify and raise issues

of its own volition and accordingly, we do not criticize the Court which heard Marshall's Appeal for failing to identify the error of the Trial Judge.

### CORRECTIONAL SERVICES CANADA

The only substantial issue concerning the Correctional Services of Canada which we intend to address is the policy contained in Exhibit 150, the operative portion of which reads as follows in 5.7.2:

"Inmates sometimes state their innocence at the panel hearing but the Board's policy is to advise them that the Board must accept the verdict of the Court and that their guilt or innocence is not a factor to be considered at the hearing. Therefore, a claim of innocence does not rule out a favourable decision."

Ms. Diahann McConkey, currently an employee of the National Parole Board and previously employed by Correction Services Canada as a Parole Officer, gave testimony concerning the effect of this policy on whether or not a person would have to admit guilt in order to get parole.

We do not criticize the assumption of Correction Services Canada that persons incarcerated in

institutions are guilty. It seems to us that no other assumption makes any sense. The issue then becomes whether in a case where a person is in fact innocent, the policy quoted above would prevent them being granted parole in the absence of an admission of guilt. Ms. McConkey denied that this was the case and pointed to the fact that Donald Marshall was in fact granted day parole as soon as he became eligible regardless of his claim of innocence (12498).

Ms. McConkey was Donald Marshall's Parole Officer for a considerable period of time. In our view, the following exchanges best sum up her evidence (12576-77):

"Commissioner Poitras - yeh. My reflection or understanding, I think, is that obviously in order to allow a person to be released, you want him to come to terms with the various factors again which led to the commission of the offence. And that makes sense, it seems to me. Because after all if a man is in jail and has been found guilty of an offence, then you have to assume that he is guilty of the offence. But there is just that small possibility that he may not be guilty of the offence, yet during the entire length of stay in jail, you have to presume that he is guilty and accordingly get him to come to terms with the factors that led to that offence. You've got to act that way.

Ms. McConkey - To a certain extent, yes. And if he does not ever acknowledge his guilt,

it may well be seen as one negative factor, but by no means an overriding factor, ever at any time."

And immediately following this, question from counsel for Donald Marshall:

Q. "But surely, Ms. McConkey, the effect of this approach is that for the prisoner claiming innocence, he has a harder time getting released.

A. I would think so yes."

We would agree with this as a fair summation of the evidence on this issue.

#### R.C.M.P. INVESTIGATION - GARY GREEN

Corporal Green was an R.C.M.P. Constable working in the Sydney Detachment in the years 1973-1977 (7076). David Ratchford was a friend of his.

In the Fall of 1974 (7083), Constable Green met with David Ratchford and Donna Ebsary (Roy's daughter). Green was advised that Donna Ebsary had seen her father wash blood from a knife on the night Sandy Seale was stabbed. Green advised Ratchford and

Ebsary to go to the Sydney Police Department and give them this information. Green's recollection is that they did so and then told him that they didn't get anywhere (7087). This prompted Constable Green to go to the Sydney Police Department himself, where he testified that he met Inspector Urquhart (7089). Green testified that Urquhart's reaction was:

"In his opinion Donna Ebsary was a disturbed, disgruntled young lady who had just left home, and he wasn't going to reopen this file or this investigation based on another rumour" (7089).

Inspector Urquhart testified that the incident involving Corporal Green did not happen. He said:

"I didn't even know Donna Ebsary and I wouldn't know if she left home or if she was living with her parents at that time or anything about the girl."

Green left the Sydney Police office and went to the R.C.M.P. G.I.S. office in Sydney. He doesn't recall who he saw there (7091). Green advised the Sydney G.I.S. office of the story that was being told by Donna Ebsary. For the first time, Green was also advised of the polygraph tests that were carried out

by the R.C.M.P. in 1971 (7093). Green had the impression that the investigation was closed (7094). He did nothing further.

R.C.M.P. INVESTIGATION - 1982-1986

The 1982 R.C.M.P. investigation headed by Sergeant Wheaton and Corporal Carroll was in our view conducted competently. There are three matters arising out of this investigation which require comment. These are:

1. The taking of the statement of Junior Marshall at Dorchester Penitentiary.
2. Reluctance of the R.C.M.P. to investigate MacIntyre and the Sydney Police Department.
3. The testimony concerning the meeting involving MacIntyre, Wheaton and Herb Davies.

1. Donald Marshall, Jr.'s, Dorchester Statement

Donald Marshall, Jr., gave a statement to Wheaton and Carroll while he was still in Dorchester. It was in that statement (Exhibit Volume 34, p.52) that Marshall referred to the fact that he and Seale were in the Park to roll someone. There can be little doubt that this statement given by Marshall was not

"voluntary". At the time, Marshall knew that Wheaton and Carroll were at Dorchester to get his story to see whether or not there was evidence to support the view that he had not murdered Sandy Seale (Wheaton and Carroll had been to Dorchester a couple of weeks before, but they had been interrupted in the taking of their statement). Donald Marshall, Jr., was under pressure at the time of the statement. (Wheaton testimony 7966-7).

In our view, this statement should not have been used by Frank Edwards at the Reference Hearing to cross-examine Donald Marshall, Jr., even though its use was admitted by the Court.

## 2. Reluctance of the R.C.M.P. to Investigate MacIntyre and the Sydney Police Department

As noted elsewhere in this Argument, the Attorney General's Department through Gordon Gale had, in April, 1982, suggested to the R.C.M.P. that they hold in abeyance any interviews of MacIntyre and the Sydney Police Department. Those interviews were never concluded and no investigation of MacIntyre, or other members of the Department, was ever carried out.

The evidence on this issue supports the following conclusions:

1. The R.C.M.P. were concerned in 1982 that there may have been improprieties in the way the original investigation of Donald Marshall, Jr., was conducted (Wheaton at 7677; Carroll at 8858; Scott at 9223; Christen at 9983-4).
2. The R.C.M.P. thought they needed a direction from the Attorney General's Department to conduct an investigation of MacIntyre and the Sydney Police Department (Wheaton at 7677; Carroll at 8861; Scott at 9223; Christen at 9982).

This issue of relationship between the R.C.M.P. and the Attorney General's Department is dealt with more extensively in a separate section of this Argument.

3. The Testimony Concerning the Meeting involving MacIntyre, Wheaton and Herb Davies

During the course of the 1982 reinvestigation, Sergeant Wheaton and R.C.M.P. Sergeant H. Davies visited the office of Mr. MacIntyre. The date on which this occurred, and what happened at that meeting, were the subject of conflicting testimony at the Hearings. We have been unable to reach a conclusion as to which version of these events should be believed. Accordingly, in this section we merely summarize the relevant test-

imony. The two major issues are whether the meeting occurred on April 16 or 26, 1982, and whether at that meeting Mr. MacIntyre purposely attempted to hide from Wheaton and Davies the first statement of Patricia Harriss.

Sergeant Davies' testimony on this point (commencing at 8647) is that the meeting took place on the afternoon of April 26. Davies was there with Wheaton to observe Mr. MacIntyre's file being handed over to Staff Sergeant Wheaton. Davies' says that Mr. MacIntyre went through the files that he had and passed various documents to Wheaton. On one occasion, Davies observed MacIntyre with a document in his hand that did not go to Wheaton. This document, according to Davies, was placed on the floor. Davies says that this was done deliberately (8650). Davies testified that when Wheaton received what he thought was everything, Wheaton asked Mr. MacIntyre on at least two occasions whether MacIntyre had given Wheaton everything, to which Mr. MacIntyre responded affirmatively. When Wheaton and Davies left MacIntyre's office, Davies told Wheaton that Mr. MacIntyre had dropped a document on the floor (8652). According to Davies, Wheaton and he then went back into MacIntyre's

office and told him that Davies had seen a document being dropped on the floor, to which the Chief responded to the effect that "I might just as well give you it all" (8652). Davies' recollection is that the document was a statement from Patricia Harriss (8655).

Staff Sergeant Wheaton's notebook was brought to the attention of Sergeant Davies. Wheaton's notebook indicates that this meeting took place on April 16, 1982 (8656). Davies testified that that date could not have been correct because they went to Mr. MacIntyre's office subsequent to April 20, 1982, that being the date that the Attorney General had written to Mr. MacIntyre and directed him to turn over his file (8656). Sergeant Davies was directed to Mr. MacIntyre's testimony in which he denied Davies' recollection of the incident (8658). Davies indicated that MacIntyre was not telling the truth. During questioning by counsel for Mr. MacIntyre, Davies testified that he was positive he had read the April 20 letter of the Attorney General before going to Mr. MacIntyre's office (8687). Davies also indicated that he knew the meeting took place after April 20 because the list prepared by Mr. MacIntyre (Exhibit 88) was dated April 26, 1982 (8687). Davies did recognize

Staff Sergeant Wheaton's initials on Exhibit 88A where Wheaton signed for statements given to him.

Staff Sergeant Wheaton testified (commencing at 7741) with respect to this meeting and said that the meeting took place on April 26. Wheaton says that he showed a copy of the Attorney General's letter of April 20 to Davies and asked him to come along as an observer. When they got to Mr. MacIntyre's office, MacIntyre produced an index (Exhibit 88) and began handing documents across to Wheaton. The initials on Exhibit 88 confirmed Wheaton's receipt of the items as handed across (7743). Wheaton confirms Davies' testimony that Davies advised Wheaton when they left Mr. MacIntyre's office that Wheaton had not received anything (7749). Wheaton testified that he went back into MacIntyre's office and so advised MacIntyre, who then said words to the effect "You may as well have all of it" (7749).

Staff Sergeant Wheaton testified that he read the statement on the way back to the R.C.M.P. office and found that it was a partially completed statement of Patricia Harriss (7750). Wheaton testified that he has absolutely no doubt that that was the state-

ment given to him by Mr. MacIntyre (7751). Wheaton testified that as far he was concerned, MacIntyre's denial of this incident given at the Hearings was perjury (7751).

Staff Sergeant Wheaton was unable to offer any explanation as to the discrepancy between his hand-written and typed notes (7751). In the second paragraph in the hand-written note with reference to Harriss it is indicated "Corporal Davies see them placed on floor". In the typed version, the "them" has been changed to "it".

Staff Sergeant Wheaton was also referred to Frank Edwards' notes (Exhibit Volume 17, p.9) which refer to a telephone conversation between Edwards and Wheaton on Saturday, April 17, 1982, as follows:

"Also told me that Herb Davies had noticed Chief slip some of the information on floor behind desk. Believes it was some information with transcript attached relating to threat by Christmas against Pratico. Believes that it was a charge against Christmas at the time."

Wheaton testified that he had no recollection of relating this to Edwards and that Edwards' note was incorrect (7753).

Sergeant Wheaton was directed to Exhibit 88 by Commission counsel and in particular to a reference on that Exhibit under the head of "ORIGINAL STATEMENTS":

"P. A. Harriss one statement given to S/S Wheaton already".

Sergeant Wheaton initialled this and testified that it meant that he received an original statement of Patricia Harriss on the 26th of April (7770). When he was referred to this notation, Sergeant Wheaton testified as follows:

"Q. The fact that the wording is 'One statement given to Staff Wheaton already,' would that not lead you to the conclusion that there was more than one of them around?

A. It could lead one to believe that, yes.

Q. And if one were led to believe that that's not consistent with the Chief poking this other one under the table, is it? This doesn't appear to be hiding anything. That's what I'm getting at.

A. It could mean numerous things, I

would think. One, that he had already given me a copy of a statement and was giving me now the original of the statement. Two, that he knew that the second statement did exist. I don't know.

- Q. What does your initial indicate?
- A. It indicated that I received that.
- Q. That you received an original statement.
- A. Original statement of P.A. Harriss.
- Q. Sometime prior to...
- Q. I beg your pardon, sir?
- Q. Sometime prior to the 26th?
- A. No. On that date.
- Q. So you received an original statement of Miss Harriss on that date. What does the word then 'already' refer to?
- A. I would assume that he had already given me one on the 26th of February.
- Q. I really don't know. I don't think it was an original. As I remember it it was a typed copy. I don't know why that's there, but it is there and it is different. I agree with you 100 percent.
- Q. I agree that it's different, I'm simply trying to understand what the affixing of your initial means because you're the only one that can tell us that.
- A. It would mean that I received an original statement of P.A. Harris.
- Q. On?

A. On the 26th of April 1982.

Q. How many original statements of Patricia Harriss exist, to your knowledge?

A. There should be two.

Reference to this incident does not appear in any of the reports filed by Staff Sergeant Wheaton at the time nor was there any indication in the testimony of Inspector Scott or Christen that Staff Sergeant Wheaton had brought this incident to their attention at the time.

Sergeant MacIntyre vigorously denied the Wheaton/Davies recollection of this meeting (6375 and following). Sergeant MacIntyre denied that there was ever a document on the floor or that he was ever asked for such a document by Staff Sergeant Wheaton (6698 and 6700).

Michael Harris testified that he interviewed Staff Sergeant Wheaton in connection with the preparation of his book "Justice Denied" and with reference to this incident, Harris indicated that Wheaton had mentioned it to him on a couple of occasions and that this incident had occurred at a time when Wheaton was

picking up materials in response to Attorney General How's letter (14483). These interviews took place between the end of March, 1982, and the middle of May, 1983 (14481). According to Michael Harris, Sergeant Wheaton advised him that to his recollection, it was Patricia Harriss' first statement and that it was dropped on the floor and kicked under a desk (14483). Reference to this incident does not appear in Mr. Harris' book because people consulted by Mr. Harris felt that this incident was "an interpretative matter" (14486). In response to questions from counsel for Mr. MacIntyre, Mr. Harris stated (at 14490):

Q. "And on the basis of the information Staff Sergeant Wheaton gave to you, it was left to you, or indeed to anyone else, to surmise what, in fact, had happened.

A. And that is why it wasn't used.

Q. Quite so. And indeed, it was not sufficiently strong, the information given to you by Wheaton was not sufficiently strong to warrant you to talk to Sergeant Herb Davies.

A. That's correct."

Frank Edwards testified that he was confident that the date in his notes of April 16 as the date when the material was turned over was correct (11791).

Edwards indicated that at no time did Staff Sergeant Wheaton or Corporal Davies tell him that MacIntyre had slipped the June 17 statement of Patricia Harriss on the floor (11793). Edwards' notes for April 19 indicate that on that date Frank Edwards was given the June 17 statement of Patricia Harriss (Exhibit Volume 17, p.10). Edwards confirmed that on April 19 he was given that statement by Staff Sergeant Wheaton (11795).

In reviewing the testimony concerning this incident, Your Lordships should review the cross-examination of Mr. Edwards by Mr. Outhouse, counsel for Staff Sergeant Wheaton. At several places in that cross-examination, the dating of Mr. Edwards' notes is pointed out to him as being incorrect, although Mr. Edwards does not agree that the dating of his note with respect to this incident is incorrect (12365).

#### R.C.M.P. Review of File Material - 1983 & 1986

Almost immediately following the rendering of the decision on the Reference, Gordon Gale wrote to the R.C.M.P. in Halifax (Exhibit Volume 20, p.1) on May 13, 1983 and asked the R.C.M.P. to review their

files with respect to the handling of the original investigation and prosecution in 1971, and to point out whether there were any improper police practices or procedures carried out by the Sydney Police Department, and also to indicate to the Attorney General's Department what would have been proper police practices or procedures. Gale testified that he did not intend by this letter to request the R.C.M.P. to carry out any further investigation (13589).

Superintendent Christen directed a file review to be carried out and then wrote to Gale on June 24, 1983 (Exhibit Volume 20, p.26). Christen thought that at some point the Attorney General's Department would direct an investigation of the Sydney Police Department be carried out (9932). That was never done.

In 1986, the question of an inquiry into the Sydney Police Department came up again and R.C.M.P. Superintendent Vaughan wrote to Gordon Gale on August 1 (Exhibit Volume 20, p.72). It was Vaughan's view that "no useful purpose would be served in initiating a further investigation into the allegations of counselling perjury" (at p.75). On August 11, Coles wrote back to Vaughan and indicated to him that he agreed that

there was no necessity for any investigation (Exhibit Volume 20, p.97).

THE NOVA SCOTIA COURT OF APPEAL - REFERENCE HEARING

The Decision of the Nova Scotia Court of Appeal in the Reference concerning Donald Marshall, Jr., has haunted Marshall since the Decision was rendered. The comments of the Court of Appeal that "Donald Marshall's untruthfulness throughout this whole affair contributed in large measure to his conviction" (Exhibit Volume 4, at p.146, p.66 of the Decision) and that "any miscarriage of justice is, however, more apparent than real" (Exhibit Volume 4, p.145, p.65 of the Decision) were referred to in public statements by the Attorney General (Exhibit Volume 38, p.34 and p.36) and were used by Reinhold Endres in negotiating compensation on behalf of the Government of Nova Scotia. There can be little doubt that these comments of the Court have affected the way in which Nova Scotians view Donald Marshall.

To this point we have not been able to interview the Judges who sat on the Reference, and, therefore, we must base our comments by reference to

the Decision itself, and the evidence which has been given by others who appeared before the Court. On the whole, we are of the view that the Decision insofar as it attacks the behaviour of Donald Marshall, Jr., is not supported by the evidence before the Court and that such comments are gratuitous and unnecessary to support the decision to acquit Donald Marshall, Jr.

Before reviewing the comments of the Court, it is necessary to determine what evidence was before the Court in respect of the Reference Hearing itself. Since the matter was dealt with as an Appeal, the Court had before it the evidence of the original Trial. In addition, oral evidence was taken from seven witnesses at the Reference Hearing. Various affidavits were filed with the Court either in respect of the Application to hear new evidence or in connection with the Reference Hearing itself. However, with the exception of an Affidavit of Patricia Harriss (and perhaps those of Dr. Mian and John Pratico, Volume 3, p.231), none of these affidavits were entered as exhibits at the Reference Hearing. Some of the affidavits were used for purposes of cross-examination, but not entered as exhibits. On several occasions the Court, during the Hearing, commented that the affidavits had not

been filed or admitted (pp.154, 160 and 231-233, Exhibit Volume 3). Notwithstanding the fact that the affidavits were not part of the record before the Court and, therefore not accepted as evidence, many of the critical comments referring to Donald Marshall, Jr., can only be supported by the conclusion that the Court looked at, and accepted, portion of the contents of the affidavits. There was also material in these affidavits which contradicts the findings made by the Court and it is striking that the Court seems only to have relied upon the material in the affidavits which could support findings critical of Marshall.

We now refer to various portions of the Judgment which are critical of Donald Marshall, Jr. These comments are followed by our conclusions as to the material before the Court (including the unadmitted affidavits) upon which the Court could base its findings. (The page references are to the pages of the Judgment.)

- 32 The Court comments that the jury in the Court's opinion must have drawn an inference that uncertainty of eyewitnesses and failure to promptly advise police was "caused by some pressures brought to bear upon them on behalf of the accused".

The only evidence at Trial concerning pressure felt by the eyewitness Chant

is at p.116 where he said "I told police an untrue story because I was scared". The other eyewitness, Pratico, refers at Trial in the presence of the jury to Artie Paul, Tom Christmas and Theresa May Paul (172). At 173, he says that he made his statement outside the Court because he was "scared of his life being taken" and then at 174 he indicated that he was not scared because of anything said by the accused. In Donald C. MacNeil's jury address, he strongly suggested Pratico was threatened by Indians and at p.244-5 he suggests that Marshall went to Pratico's house on Sunday to threaten him. The Trial Judge's charge to the jury at p.278 suggests that Pratico was threatened.

- 34 There is a reference to James MacNeil being unknown to Khattar and Rosenblum and that he could not have been known to them "in light of their client's instructions".

This comment ignores the contents of MacIntyre's Affidavit (Exhibit Volume 39, p.81) which indicates that he had the descriptions given by George and Sandy MacNeil in their statement (which statement is itself appended to MacIntyre's Affidavit) but that the MacNeils descriptions of Jimmy MacNeil and Ebsary were superceded by the stories of the eyewitnesses.

- 47 The Court says that no reference to Chant's May 30th statement was made at Trial and "counsel did not know of its existence".

This conclusion can only have been based on Khattar and Rosenblum's Affidavits (Exhibit Volume 39, p.129-30, paragraph 7 and 131-2, paragraph 7). There is reference at Trial to Chant's initial untrue

story although not specifically to the May 30th statement (Exhibit Volume 1, p.153).

- 47 The Court indicates that Chant's explanation for changing his story (from May 30 to June 4) was that "he was scared and being pressured".

There is no reference to the source of this pressure.

The transcript of the Reference at p.178-186 makes it clear that Chant was being pressured by the police. This is ignored by the Court in favour of putting the blame on Marshall.

- 51 Patricia Harriss' Affidavit was admitted as an exhibit (p.147-150 of the Reference Transcript).

Patricia Harriss' Affidavit includes references to the conduct of MacIntyre/Urquhart as does the statement attached to her Affidavit and given to the R.C.M.P. Harriss' testimony at the Reference indicates that she was scared, her statement was changed and there is mention of perjury (p.145, 170, 172). This evidence is simply ignored by the Court.

- 51 The Court refers to Marshall wilfully holding back facts from the Court.

The pejorative focus is on Marshall and there is absolutely no corresponding reference to the lying eye-witnesses.

- 61 The Court indicates that there was "evidence before us to the effect that counsel for Marshall had no knowledge of prior inconsistent statements given to police by Chant, Pratico & Harriss".

The only "evidence" to that effect is in the Affidavits of Khattar and

Rosenblum. There is evidence to the contrary in the Statement of Facts (Exhibit Volume 1, p.78-83), in Chant's testimony at trial and in P. Harriss' testimony at the Preliminary.

- 63 Marshall is accused by the Court of "outright lies".

No specifics of this accusation are given. The Reference transcript at p.28 says that Marshall didn't mention robbery because it didn't happen. We are not aware of any other evidence before the Court which could support this conclusion.

- 65 The Court refers to Marshall's "admitted" perjury for which he could still be charged.

Marshall at no time admitted perjury. Strikingly, there is no reference to any of the eyewitnesses who did admit perjury.

- 65 The Court comments that with respect to Marshall "by lying he helped secure his own conviction".

There is no reference to the eyewitnesses who say they were pressured by the police to give untrue evidence.

- 65 The Court comments that Marshall "misled his lawyers".

There is absolutely no evidence to support the finding that Marshall misled his lawyers.

- 65 The Court refers to Marshall having "effectively prevented development of the only defence available to him".

There is no onus on the accused to develop a defence. In the face of the perjured testimony of two

eyewitnesses saying Marshall stabbed Seale, how can the accused be blamed for his own conviction.

- 66 The Court refers to Marshall having a good description of Ebsary and that "with this information" the police might have uncovered the truth.

This totally ignores the George and Sandy MacNeil statement which contained good descriptions of Ebsary and Jimmy MacNeil. This also ignores the reference in MacIntyre's Affidavit to the fact that he was aware of these descriptions.

- 66 The Court comments that Marshall "contributed in large measure to his conviction".

This is a conclusion not borne out by the evidence available and one that should not in any event in our view have been made without a full inquiry into all the facts. The evidence was to the contrary:

1. Harriss, Chant and Pratico lied at Trial and this lying cannot be attributed to Marshall.

- Evidence at the Reference has Harriss and Chant indicating that the lying can be attributed to the police.

- Pratico's Affidavit, especially paragraph 9, clearly attributes his lying to pressure exerted on him by MacIntyre

2. The Affidavits of Khattar and Rosenblum possibly attribute the conviction to non-disclosure of statements but this cannot be blamed on Marshall.

As stated at the outset of this Argument, we have concluded that Donald Marshall, Jr., was in

not responsible for his own conviction. The Reference decision found that he was in large measure responsible. We have concluded and urge Your Lordships to conclude that this finding of the Appeal Court was completely unsupported by the evidence and is wrong.

#### ATTORNEY GENERAL'S DEPARTMENT - 1982 TO THE PRESENT

The involvement of the Attorney General's Department in 1982 commenced with a telephone call from Chief MacIntyre to Frank Edwards on February 3. Chief MacIntyre was seeking to set up a meeting between Frank Edwards, himself and R.C.M.P. Inspector Scott (11712).

From this point forward, it is in our view most appropriate to review the involvement of the Attorney General's Department by reference to a number of the specific issues that arose from February, 1982, to 1986. These are dealt with in this section of the Argument in the chronology in which they occurred.

#### Payment of Stephen Aronson's Account

Stephen Aronson made a request to the Attorney General's Department in April, 1982 (Exhibit Volume 27, p.1) for payment of legal fees incurred in connection with the representation of Donald Marshall, Jr. The response of the Attorney General's Department was to direct Mr. Aronson to Nova Scotia Legal Aid (Exhibit Volume 27, p.46). Gordon Coles testified that although he was aware that the Attorney General had the option of paying Mr. Aronson's account, this was not a recommendation that he ever made to the Minister. Coles' explanation as to why he felt the fees should be dealt with pursuant to the Legal Aid arrangement was:

"It was a kind of criminal proceeding in which the client's liberty was in jeopardy and the kind of situation that was contemplated by the agreement." (13751)

Coles was advised by the Director of Legal Aid that the amount payable to Aronson pursuant to the Legal Aid Plan would be about \$5,000.00. Aronson's account was in the vicinity of \$70,000.00. Coles testified that he did not consider Aronson's account in the context that the Legal Aid amount was not reasonable considering that Aronson was attempting to get a man out of jail

in connection with a situation where he was saying that he had not committed the murder (13753)

### Aronson's Request for Information

In March, 1982, Mr. Aronson wrote to Martin Herschorn (Exhibit Volume 27, p.13) and requested a copy of the final R.C.M.P. report. In June, 1982, Mr. Aronson met with Frank Edwards and was provided by him with copies of all the information which Mr. Edwards had received from the R.C.M.P. (Exhibit Volume 31, p.68). Gordon Gale indicated that he had authorized Edwards to turn this information over to Stephen Aronson. It was Gordon Coles' view that Mr. Edwards had no authority to release this report and he testified that he did not have any knowledge of Gale's authorization to do so at the time (13965).

The issue of the release of the police report to Aronson came up in 1984, when it became public during an election campaign that the R.C.M.P. report had been released to Aronson. Gordon Gale wrote to Frank Edwards to inquire as to how and why the report had been released to Aronson in 1982 (Exhibit Volume 28, p.1). In the

correspondence which follows this initial request, there is no statement from Mr. Edwards that he had been authorized to release the report by Gordon Gale and it would seem that at no point did Gale say to Coles that the release of the report had been authorized by him in 1982 (13779).

### The Reference

With respect to constituting the Reference, this process seems to have gone quite smoothly, resulting in the Reference being framed as a Reference pursuant to s.617(b) of the Criminal Code by the then Minister of Justice Jean Chretien on June 16, 1982 (Exhibit Volume 31, p.64).

Frank Edwards had for some time prior to June, 1982, been of the view that Donald Marshall, Jr., was innocent and that the Reference should be disposed of by way of an acquittal of Marshall on the basis that there had been a miscarriage of justice. He had set this position out as early as April 5, 1982, in a memo to Gordon Gale (Exhibit Volume 31, p.22). Gordon Coles was aware that Edwards held this view

(13764). Coles testified that he was not aware until January, 1983, that Edwards was recommending a verdict of acquittal on the basis of a miscarriage of justice (13771).

Coles testified that in July he had received a call from Mr. Whalley, the City Solicitor in Sydney, on the basis of which Coles met with Whalley and Whalley expressed to him the view that Edwards had pre-judged the situation and was showing an approach that, in the opinion of the Sydney Police Department, was something less than fully impartial (13761).

In January, 1983, subsequent to the hearing of the Reference but prior to the Argument, Mr. Edwards wrote to Martin Herschorn to advise of certain matters which he considered should be dealt with at the Argument. These matters were:

1. That Marshall must bear considerable responsibility for the predicament in which he found himself. Edwards argued that Marshall should have told the police or his lawyers in 1971 that he and Seale were attempting a robbery.
2. The police bona fide believed that Donald Marshall was guilty.

3. Edwards firmly believed that his submission to the Court should be that Donald Marshall, Jr., should be acquitted.

Gordon Coles saw this letter and arranged for Edwards to come to Halifax. Coles was very strongly of the view that Edwards should take no position with respect to disposition of Marshall's Appeal and should just leave it up to the Court (13792). Coles sought no advice from either Gale or Herschorn as to the merits of the Prosecutor taking such a view (13796) but he vigorously tried to get Edwards to change his position and adopt his view at a meeting in Halifax attended by Edwards, Coles, Gale and Herschorn (13806).

At this meeting, Edwards refused to back down and ultimately did take the position before the Court of Appeal that Marshall should be acquitted. This, however, was not the position that the Deputy Attorney General wished Mr. Edwards to take. In our view Coles, a person who by his own admission had no expertise in the criminal law, should not have taken it upon himself to urge Edwards to present a No Crown position to the Court of Appeal. Other witnesses who testified stated that to take no position in the matter

was a most unusual tack for the Crown to take (Edwards at 11959; Gale at 13310, 13404).

More serious, however, was the failure by anybody in the Attorney General's Department to deal with the first two issues referred to in Edwards' letter of January 18, 1983. Edwards incorporated these submissions in his Factum and urged the Court (Exhibit Volume 4, p.40) to:

"Make it clear that what happened in this case was not the fault of the criminal justice system or anyone in it including the police, the lawyers, the members of the jury or the court itself".

Edwards did not believe this submission to be true at the time (12009). Edwards believed that even though both parties were urging that the Appeal be allowed, that unless the Court was permitted or urged to blame Donald Marshall, Jr., the Court might well order a new Trial, which was something which Edwards did not think was reasonable (12010). It was Edwards' sense of the Hearing before the Court of Appeal that they simply would not acquit Marshall unless they were given a way to blame him.

Coles testified that he had assumed that Gordon Gale would have addressed issues 1 and 2 with Edwards and that insofar as these positions found their way into Edwards' Factum, this was something that he assumed Gale would have looked at (13825). In retrospect, Coles testified that because of the fact that Gale had not addressed them, he now considers that he should have done so (13827)

This lack of initiative on the part of persons in the Attorney General's Department with respect to the Reference is striking. Martin Herschorn testified in connection with the fact that the attempted robbery issue was left before the Appeal Court:

"Again, I didn't formulate a view on that. Mr. Edwards had the carriage of the case and I and the Department, with one exception, which you're going to get to, left the carriage of the matter to him." (11319)

Gordon Gale, on the question of whether or not anybody ought to be blamed by Edwards in his Factum, said (13406):

"... I didn't follow the case closely at all. It was turned over to Mr. Edwards at the time of the Appeal and I was not going to second guess him on the matter."

Coles expressed surprise as to the apparent lack of exercise of responsibility by Gale and Herschorn with respect to Edwards' conduct of the Reference (13838).

As is set out elsewhere in this Argument, the fact that the Appeal Court did blame Marshall has haunted his case ever since. In our view, it was a serious failure on the part of the Attorney General's Department to allow Edwards to make the argument that Marshall was to blame. It was also in our view wrong for Mr. Edwards to put before the Court a position which he believed to be untrue.

#### Request for a Public Inquiry

Following the decision in the Reference, Felix Cacchione wrote to Attorney General Harry How in connection with the setting up of a public inquiry and he also requested a meeting with the Attorney General. Mr. How turned this matter over to Gordon Coles who, on October 25, 1983, sent a memo to the Attorney General (Exhibit Volume 32, p.272), in which he set out his views as to whether or not there ought

to be an inquiry into the manner in which the Sydney Police Department had investigated the Marshall case. In our view, the views expressed by Coles in this memo are indicative of his attitude towards the Marshall case throughout and, for that reason, require detailed comment. Mr. Coles was opposed to an inquiry. The reasons he gave in the memo and his testimony concerning those reasons are as follows:

1. Reason - The only police officers who were involved and who are presently available are the present Chief, John MacIntyre, who is due to retire shortly, and Mr. Urquhart, who is now retired.

Testimony - Coles did no investigation to see whether there were any other police officers who might have had knowledge of that investigation and he indicated that he was aping what Mr. Herschorn had said in an earlier memorandum (13888).

2. Reason - Crown Prosecutor, Mr. Donald MacNeil, undoubtedly was much involved as he had a reputation of acting more like a "D.A.", is deceased. Accordingly, it will be almost impossible to thoroughly and fairly investigate the activities of the principals involved in the investigation and prosecution at this point in time.

Testimony - Coles had given no consideration to interviewing Mr. Matheson, Mr. Khattar, Mr. Rosenblum or Donald Marshall, Jr., himself. He agreed that this reason was perhaps a "little overstatement" (13890) and that in not having done anything to determine whether or not anybody other than Mr. MacNeil might know something, was in hindsight not an ade-

quate response (13890).

3. Reason - Evidence presented at the Preliminary Inquiry, Grand Jury and Trial was what put Marshall to his Trial and convicted him of the offence. The Appeal Division of the Supreme Court upheld the conviction. The subsequent events which led to a further review by the Appeal Division resulted in the Court's commenting adversely on the evidence of Marshall and the credibility of other witnesses and made no adverse comment on the role the Police in their initial investigation.

Testimony - Coles' recollection was that the Police reports that he had did not indicate that there was anything to substantiate the suggestions from Chant and Harriss that they had been pressured (13891). He testified at 13892 in response to questions from Commission counsel:

- "Q. Well, it's the only comment... It's the comment that you made in connection with the role of the police in the initial investigation. You don't choose to comment on whether there are allegations against the police outside of the terms of the Appeal Court decision. You make the judgement as to what it is that you're going to tell the Attorney General and that's what you choose to tell him. And I'm asking you why you don't mention to him any of the other suggestions that was in the material that was in the Attorney General's Department concerning the role of the police.
- A. Well, I can't offer you any explanation except that that's what I said and...
- Q. If you had chosen to, you certainly could have done that. You could have raised that with him.
- A. I don't think it was selective in any sense. that's what my information that came to mind when I dictated the letter.

4. Reason - This is not a situation where there may be an ongoing or present Police practice which needs to be scrutinized publicly and corrected.

Testimony (13893)

- "Q. What did you understand... Why did you understand that there was not any ongoing practice which needed to be scrutinized?
- A. Well, I suppose I was simply responding to the fact that this was a case that was before us. There is no, I wasn't aware of similar allegations being made and that I considered the allegations to be peculiar to this particular case.
- Q. How would you know if you didn't check that to see whether or not there was an ongoing police practice which needed to be checked into?
- A. Well, I suppose I relied on the fact that nothing more had been brought to my attention, is my recollection, to give me cause to think that it was otherwise.
- Q. You're not aware of the suggestions that there was some pressure exerted on juveniles with respect to the taking of evidence... Sorry, the taking of statements?
- A. No, not to my recollection.
- Q. You weren't aware of the ages of Chant, Harriss, and Pratico at the time?
- A. Well, I mean apart from this particular... You're still talking about the Marshall case?
- Q. I'm talking about Marshall, yes.
- A. Oh, yes, I'm saying I wasn't aware that there was any other case apart from the Marshall case that would give rise for me to believe that there was an ongoing practice that needed

to be addressed.

- Q. Insofar as the Marshall case was concerned, were you aware that there may be some questionable practices?
- A. Well, to the extent that the R.C.M. Police reported on them and my reading of the report was that there could be a misunderstanding on the part of these young people as to the role of the police.
- Q. Did you do anything to check and see whether or not that practice that you had seen referred to in the Marshall case was still being utilized by the Sydney Police Department?
- A. No.
- Q. So how would you know whether or not there was an ongoing or present police practice which needs to be scrutinized?
- A. Only to the extent that no other such allegations were brought to my attention in respect to other cases.
- Q. Did you not consider that you had a positive obligation to check it out?
- A. No, I did not.
- Q. Did you think the Attorney General was supposed to infer from your note that you had done that? You say very positively that this is not a situation where there may be an ongoing or present police practice.
- A. Well, you must remember that the Sydney Police is a municipal police. They have their own police commissioners. They have their own council to which they're responsible and there's grievance procedures available to people who feel that they are grieved and none of those avenues brought forth any cause for me to think...
- Q. Did you check with the Sydney Police Department to see whether or not there had been any grievances?

A. No.

Q. How do you know that then?

A. Well, as I say, none of this was brought to my attention and I reacted with what knowledge I had.

Q. Which wasn't very much.

A. Which was perhaps not very much."

5. Reason - It would appear that no useful purpose would be served by any such inquiry nor would the public interest be served, in my opinion, by such an inquiry.

Testimony

"A. Sounds a little presumptuous, when I read it now.

Q. Yes. Would you agree that at that time when you made that statement, that it would appear that no useful purpose would be served any such inquiry, was it based merely on the information that you're now conveying to the Attorney General? That is, your view that there was no situation which needed to be scrutinized?

A. It was based on the information which I had at that time.

Q. Yes. Why would you have thought at the time that the public interest wouldn't be served?

A. Well, I suppose it goes back to my premise. I did, I was not aware that there was any continuance of such practice and, therefore, there didn't seem to me any purpose to have a public inquiry into a matter that didn't wasn't a continuing practice. If my premise was faulty, then, of course, my conclusion was similarly affected."

Coles agreed that the effect of this memo was to place upon Donald Marshall, Jr., the onus of identifying any wrongful conduct on the part of people involved in the original prosecution (13897). He indicated that he took this position because he did not have any information that justified a public inquiry into the Police activities.

In our view, Coles' attitude, as expressed in his memo of October 25, 1983, is characterized by lack of information and is illustrative of his refusal to consider the wrongful conviction of Donald Marshall, Jr., to be a serious issue.

#### Request for Compensation

Prior to any written request from Donald Marshall, Jr., for compensation, Attorney General How requested his staff to "formulate considerations we ought to take into account if we receive a request from Donald Marshall, Jr., for some form of compensation" (Exhibit Volume 32, p.159). This request was responded to by Martin Herschorn and in a memo dated May 31, 1983 (Exhibit Volume 32, commencing at 169), the issue

is addressed. The only issue that is dealt with is the fact that any request for compensation would have to be considered in light of the comments of the Appeal Court in the Reference Decision when that Court suggested that Marshall must bear part of the responsibility for his own conviction. No other "considerations" are adverted to. No other memoranda were produced by the Attorney General's staff which addressed the issue of compensation. It was Coles himself who had been specifically requested in a memo from the Attorney General (Exhibit Volume 32, p.159) to respond to the Attorney General in connection with "considerations in respect of compensation". Coles indicated that he not think that Herschorn's memo was an adequate response to a request to formulate such considerations (13861). Coles went on to indicate that he thought that the Attorney General did get both sides of the picture at some point (13863).

When Mr. Cacchione formally made a request for compensation in November, 1983, the response of the Attorney General Mr. Giffin was that because of the commencement of civil proceedings by Marshall against MacIntyre and the City of Sydney, it would be premature for the Government to consider such a request (Exhibit

Volume 32, p.280). The Government was also of the view that because of the criminal proceedings involving Roy Ebsary being before the Courts, it would be inappropriate to consider compensation or an inquiry. On March 5, 1984, the Premier announced that Mr. Justice Alex Campbell of the Supreme Court of Prince Edward Island had agreed to head a Commission to assess Marshall's claim for compensation and legal costs (Exhibit Volume 33, p.342).

#### Cacchione's Request for Information

In January, 1984, Cacchione wrote to Gordon Coles pursuant to the Freedom of Information Act requesting access:

"To any and all personal information held by or for the Department of the Attorney General or under the direct or indirect control of the said Department."

The letter went on to specify specific areas of information requested by Cacchione. Coles testified that he did nothing to check and see whether any of the information requested was in the possession of the

Attorney General's Department (13902). Coles said the following at 13902:

- A. "And are you satisfied that a blanket denial without checking to see whether or not there was any material at all in the possession of the Department was appropriate?"
- A. I considered it so.
- Q. So regardless of what the Department had, Mr. Cacchione wasn't going to get it?
- A. No, I dealt with what he wanted in particular and that kind of information, if we had it, was from a source that, in my opinion, was protected from public access."

Coles was then directed to the preamble to the letter quoted above and in response to a question concerning this testified:

"I'm saying that the information ... if we had information that would have come from a protected source or would have been information that the purpose of our having it was protected.

- Q. How do you know that if didn't even look at the material?
- A. Well, it's a judgement I made based on the request and I informed him that there was an appeal process for my decision."

Coles was of the view that his response could be made in the absence of any review of the material held by the Department (13906).

In our view, it was impossible for Coles to know whether or not the information requested by Cacchione was protected from disclosure unless he had at least taken the time to discover whether there was any material and secondly, to look at it. His cavalier handling of this request is a further indication of his attitude towards Donald Marshall, Jr.

#### The Campbell Commission

Almost immediately this Commission was set up, it became clear that there was a difference of opinion between Felix Cacchione and Gordon Coles. Cacchione was of the view that the mandate of the inquiry should include the police investigation and charging of Donald Marshall, Jr. Coles was of the view that the inquiry should concern itself only with the period commencing with Marshall's incarceration and should not include any consideration of negligence or wrongdoing in the charging and prosecution of Marshall. To that

end, Coles wrote to counsel for the Campbell Commission (Exhibit Volume 33, p.407). Coles suggested in his letter that Commissioner Campbell not go ahead "until he has an opportunity to speak to the Attorney General". Coles thought that it was appropriate for the Attorney General to discuss the scope of the inquiry with the Commissioner (13919).

Compensation was eventually settled by negotiation and that process is dealt with elsewhere in this submission. When the final figure had been agreed upon, the Attorney General issued a release (Exhibit Volume 33, p.543) which stated that Mr. Justice Campbell had recommended and the Government had approved the figure of \$270,000. Mr. Justice Campbell's report was drafted by Mr. Coles and approved by Cacchione.

#### The Compensation Negotiations

Cacchione proposed that rather than going through the Campbell Inquiry process, the parties should attempt to arrive at a settlement between themselves. The Government agreed to this process. Reinhold Endres conducted the negotiations on behalf of the Government.

The evidence indicates that being fair to Donald Marshall, Jr., was not a concern of the Attorney General's Department. It was the view that settlement at the lowest figure possible was appropriate (Coles at 13925) and, in that respect, the negotiations were treated by the Government in the same way as negotiations for settlement of any other case. Felix Cacchione recognized that, in retrospect, he may be have been too forthcoming in his dealings with Mr. Endres.

No direction was ever given to Mr. Endres to treat these negotiations in any way differently from the usual negotiations for settlement of a civil suit. Indeed, it seems as if he was given very little positive direction at all by his superiors in the Department.

The final settlement of \$270,000 (half of which was eventually paid by the Federal Government, Exhibit Volume 33, p.565(A)) included approximately \$100,000 in legal fees, which Marshall was required to pay to Mr. Aronson and Mr. Cacchione. In our view, it is not acceptable for a person who has been wrongfully convicted of a crime to be required to pay legal fees in order to prove his innocence and to negotiate

compensation for that wrongful conviction. Surely, in such circumstances, reasonable fees should be paid voluntarily by the Government, and they should be paid promptly and without reference to compensation.

Coles was not concerned during the process of compensation that justice be done to Mr. Marshall in terms of what he was to receive (13933).

It was the view of the Attorney General's Department that the monies paid to Donald Marshall, Jr., related only to the period of time following the final disposition of his case by the Court of Appeal in 1972 (Coles at 13948), notwithstanding the fact that the Release ultimately signed by him released the Government from any claims including any that might relate to the period prior to the disposition of his case by the Court of Appeal in 1972. Accordingly, Donald Marshall, Jr., has not been paid any money for any losses he may have suffered as a result of anything which occurred prior to his conviction. Because of the findings of fact which we have urged upon Your Lordships in connection with:

1. the conduct of John MacIntyre and William

Urquhart;

2. the failure by the representatives of the Attorney General's Department to disclose the information they had concerning the fact that Jimmy MacNeil had come forward in November, 1971, (prior to Marshall's Appeal), and
3. the 1971 R.C.M.P. investigation,

we believe that a further look at the question of compensation would be in order.

#### The Attitude of the Attorney General's Department

The overall picture which we have taken away from a review of the evidence and documents concerning the involvement of the Attorney General's Department from 1982 forward is that the Department simply did not care very much about Donald Marshall, Jr., and was not prepared to make any special efforts on his behalf. This is in striking contrast to the attitude taken by the Attorney General's Department when dealing with Thornhill, MacLean and the Sydney shoplifting cases.

The evidence given in connection with both the Thornhill and MacLean cases makes it clear in our view that the Department was prepared to give the benefit of every doubt to Thornhill and MacLean.

Consider the actions of the Department in Thornhill:

- (1) Coles advising the R.C.M.P. on October 29, 1980 of the Attorney General's decision not to proceed and the fact that the Attorney General intended to make that public at 3:00 p.m. the same day (15050). The R.C.M.P. had not heard from the Attorney General's office since they had recommended a charge be laid against Thornhill at the end of August (15050). In essence, the Department through the Deputy Attorney General took the Thornhill case out of the hands of the R.C.M.P.
- (2) Gordon Coles issued a press release from Victoria (Exhibit 165, p.58) in which he referred to a "clearly understood policy and accepted practice between the R.C.M.P. and the Attorney General's Department that in matters of major, or involved criminal investigations, particularly those involving allegations of so-called commercial crime and fraud, the police investigation into the facts is referred to the Deputy Attorney General or other senior lawyers in the Department". Other witnesses in the R.C.M.P. and the Attorney General's Department testified that there was no such policy and Coles himself testified as follows (15059):
  - Q. "... Now my question to you, sir, is are there other cases where those instructions were given to the R.C.M.P.

A. Not to my knowledge."

In our view, this press release was misleading.

(3) The advice Gordon Coles gave to the Attorney General concerning the existence of a prima facie case against Thornhill for violation of s.110(c) of the Criminal Code when considered in conjunction with his evidence before the Inquiry must be considered to be misleading. Coles took the position that the opinion he gave to the Attorney General was intended to convey Coles' belief that Thornhill had not obtained any benefit and even if he had, the Premier was prepared to agree to his having been benefited. In our view, there is no possible way to glean that intention from Coles' opinion (15023-15042). In cross-examination by counsel for Donald Marshall, Jr., Coles expressed the view that the conclusion in his memo was that there was no criminal intent and that the issue of the Premier's consent was not one to which he adverted. Coles was confronted with his earlier testimony and the following occurred:

"Q. Yesterday at page 15,044 you were asked the following questions and gave the following answers, line 10,

Q. Well, the reason then you thought there could no no conviction or no reasonable grounds for conviction is because there was no benefit, in your view.

A. Yes.

Q. And also because the Premier had... was knowledgeable of it and would have consented.

A. Yeah, and the absence of any particulars about the banks' dealing with the government too.

Do you remember those questions and those answers?

- A. Yes. And my recollection in saying that... that if there had been these other elements were not...were not there to convince me that a charge could be successfully prosecuted, but I did not need to be in the view that I took of the facts, I did not need to canvass those particularly other than I made the comment that there was prosecutorial difficulties in respect to what I recall from the facts."

- (4) Martin Herschorn, the Director of Prosecutions in the Attorney General's Department, advised that he agreed with the decision of Coles that no charges were to be laid (14979). The test applied by Mr. Herschorn in agreeing with Coles was that (at 14981):

"There was no substantial likelihood of a conviction, in my opinion, in this set of facts."

This test is not in our view the normal test that is applied with respect to this type of decision, and such a test should not be adopted.

In MacLean, Gordon Gale prepared a memo for Gordon Coles on April 18, 1984 (Exhibit 173, p.9) which said that only a police investigation could establish whether MacLean's story was correct. Gale testified that he spoke to Coles about this as follows (at 15728):

I know that after I got this memo, sent this memo to Mr. Coles, he came back and asked me what's this business about a police investigation. And I said to him at the time that, 'You don't know whether these stories are true or they're not true. And if you don't have a police investigation there's always going to be

questions about it. You can only tell by the police investigation.' His response to me was, 'Well it would take forever to have a police investigation of this matter.' And I'm afraid my response to him was, 'It may take a long while but I don't really see any safe way of dealing with it without one.'

Q. What was his response to that?

A. Well his response to that, I can't recall, is that he just took the thing off and went back to his own office.

Q. Would this conversation with Mr. Coles, then, have taken place pretty shortly after the date of your memo?

A. Yes.

Q. Is that fair to say?

A. Yeah.

Q. Are you able to tell us whether or not it was before Mr. Coles' memo to Mr. Giffin on April the 18th?

A. Well, I would think it was before that one because it seemed to me that it wasn't very long after I'd written the memo that that conversation took place."

Coles then wrote a memo to the Attorney General, Mr. Giffin (Exhibit 173, p.35), in which Coles expressed the view that it was his and Gale's opinion that the irregularities of Mr. MacLean's case "are more accounting irregularities rather than such as to warrant any further

criminal investigation". Gale testified that that was not his opinion and that a police investigation was the only way to tell whether the money was properly expended and that he had told Coles that there should not be a police investigation (15730). Next, Gale went so far as to say that the opinion of Coles conveyed to Giffin insofar as it was an attempt to represent Gale's opinion was a misrepresentation of Gale's views (15737).

As in Thornhill, in our view the evidence here supports a finding that the Deputy Attorney General took the case out of the hands of the R.C.M.P. In MacLean, we are also of the view that the opinion provided by Coles to Giffin was misleading insofar as it purported to represent the views of Gale. Giffin testified that he would have wanted to know if there was a serious difference of opinion between Gale and Coles (15801). He further indicated that he was not aware of any such difference of opinion (15801).

In the Sydney shoplifting case, Coles received a telephone call from a senior lawyer in Sydney (13684) who made certain representations to him concerning a shoplifting case and asked that the prosecution be

discontinued. Coles called Gordon Gale and told him to call Frank Edwards and tell him not to proceed. Coles did this despite the fact he had no consultation with Edwards, and no verification of the facts that had been given to him over the telephone. Coles had no idea whether or not the accused had a record or whether or not it was a first, second or third offence. Coles simply accepted the representations which were made to him and had the prosecution withdrawn (13685-13690). To Coles knowledge, the accused in this case may well have committed the offence in question and yet he was prepared to have the prosecution stopped, merely on the request of a lawyer from Sydney.

Coles knew that the R.C.M.P. considered charges ought to have been laid against Thornhill and the banks. He knew that there were suggestions being made that the conduct of Billy Joe MacLean may have been criminal. Coles had no information to indicate that the accused in the Sydney shoplifting case was not guilty. Yet in all three of these situations where there were substantial questions of criminal conduct, he intervened as Deputy Attorney General and exercised his considerable power in favour of three people who may well have committed criminal offences. But in the case of Donald

Marshall, Jr., a person who not only had not committed an offence but had spent 11 years trying to get out of jail, Coles, took every opportunity to make matters more difficult for Donald Marshall, Jr., and his counsel. In our view, Gordon Coles' conduct must be condemned. There is no indication that the Attorney General's Department responded thoughtfully and positively to requests being made by Marshall through his counsel. It is simply impossible in our view to argue that Marshall was treated fairly by the Attorney General's Department.

RELATIONSHIP BETWEEN THE R.C.M.P. AND  
THE ATTORNEY GENERAL'S DEPARTMENT

The relationship between the Attorney General's Department and the R.C.M.P. is an important matter. In this section of our Submission, we will review the evidence concerning this relationship as it relates to the three major cases reviewed.

So far as the activities of the R.C.M.P. are concerned, we believe the evidence supports the conclusion that the R.C.M.P. were reluctant to either conduct an investigation (John MacIntyre and the Sydney

Police Department; Billy Joe MacLean) or to lay a charge (Thornhill) in the face of either opposition or lack of a positive direction from the Attorney General's Department. It is our view that there was in all three of these cases evidence which merited either investigation, or in the Thornhill case, the laying of charges.

Insofar as the Attorney General's Department is concerned, we consider the evidence supports the conclusion that the Department applied a different standard to its consideration of matters involving Mr. Thornhill and Mr. Maclean than it did in considering issues involving Donald Marshall, Jr.

#### The R.C.M.P.

In the Donald Marshall case in 1982, the Force was concerned that there may have been improprieties in the way the original investigation of Donald Marshall, Jr., had been conducted (Wheaton at 7677; Carroll at 8858; Scott at 9223; Christen at 9983-4). The R.C.M.P., however, did not conduct an investigation of the activities of Mr. MacIntyre and the Sydney Police Department because they felt that

they required a positive direction from the Attorney General's Department to carry out such an investigation (Wheaton at 7677; Carroll at 8861; Scott at 9223; Christen at 9982).

In the Billy Joe MacLean case, the R.C.M.P., prior to meeting with Gordon Coles and others on November 22, 1983, had concluded that the information available to them warranted an investigation (MacGibbon at 15417). MacGibbon indicated that following this meeting with Coles, the R.C.M.P. was then waiting for Coles to get back to them with information concerning the relevant regulations of the Legislature. This never occurred and MacGibbon did not inquire further from Coles (15468) or from Gordon Gale, with whom he met regularly (15469). In essence, what occurred in November, 1983, was that Gordon Coles took over the MacLean file from the R.C.M.P., and the R.C.M.P. did not pursue the matter until the end of April, 1985, when the Leader of the Opposition, Vincent MacLean, wrote to the R.C.M.P. and demanded that an investigation be carried out. In our view, the lack of independent initiative to conduct an investigation into the suspected illegal conduct of Billy Joe MacLean between November, 1983, and April, 1985, is unacceptable practice on

the part of the R.C.M.P.

In the Thornhill case, once again, independent discharge of their responsibility by the R.C.M.P. was hampered by Gordon Coles when he convened a press conference to announce that no charges were going to be laid. He did this without any consultation with the R.C.M.P. The R.C.M.P. evidence concerning the events which followed this press conference lead to the conclusion, in our view, that the major reason why the R.C.M.P. eventually concluded that they were not going to proceed with the laying of charges in the Thornhill matter was the fact that they knew that the Attorney General's Department was opposed to such a course of action.

Following a meeting of senior R.C.M.P. officials in Ottawa on November 5, 1983, it was the unanimous view that the facts available established a prima facie case of criminal conduct and that charges would be laid. Between the time of the November 5 meeting and the December 16 letter of Deputy Commissioner Quintal to Feagan, no new facts had been discovered to support the decision not to proceed with the laying of charges.

In all three of the above situations, there was reluctance on the part of the R.C.M.P. to take initiative. In respect to the potential investigation of John MacIntyre and the Sydney Police Department, the R.C.M.P.'s view was that they needed permission from the Attorney General's Department to investigate. There can be little doubt, however, that in addition they were reluctant to investigate the work of another police department. In the Thornhill and MacLean cases, they simply seemed to be reluctant to press ahead in the face of opposition from the Attorney General's Department.

#### The Attorney General's Department

In Thornhill and MacLean, the Attorney General's Department effectively took the cases away from the R.C.M.P., and positively and aggressively took the position that in Thornhill no charges should be laid and in MacLean, no investigation was warranted. We do not know why the Department chose to protect Messrs. MacLean and Thornhill from the R.C.M.P. in the way that they did.

Our system of justice is predicated on the

fair treatment of all individuals. We believe that the manner in which the Attorney General's Department intervened with the R.C.M.P. in the cases before Your Lordships demonstrated favoritism towards MacLean and Thornhill. Such favoritism necessarily means a lack of fairness to all. We believe this is what has happened in Nova Scotia.

THE INFLUENCE OF RACISM IN TREATMENT

OF DONALD MARSHALL, Jr.

Very few people are going to admit that they treat people of another race differently. Many natives, on the other hand, feel that they are treated differently by white society precisely because they are native Canadians. We did not expect much more than a reiteration of these two positions at the Hearings and, indeed, the evidence did not establish much more than that. The problems of identifying racism through the method of viva voce testimony is in large part the reason Your Lordships commissioned extensive research projects to examine the presence and effect of racism on the administration of justice in Nova Scotia.

What can we say about whether or not Donald Marshall's race affected his charging, prosecution and conviction? We cannot point definitely to testimony which will lead directly to either an affirmative or negative answer to this question. There is testimony to the effect that John MacIntyre did not think much of Junior Marshall (Emily Clemens at 3461-63) and that the native community did not like John MacIntyre (Ambrose MacDonald at 1133-34). There was reference to complaints from Indian teenagers about the Sydney Police Department (Exhibit 65). In the end, however, this area is not particularly susceptible to firm conclusions supported by testimony. It is much more a question of feeling and Your Lordships will have to decide whether your feeling is that Donald Marshall, Jr.'s, race did contribute to his charging, prosecution and conviction. Our feeling is that it would be naive and unrealistic to think that the fact that Donald Marshall, Jr., was a poor native was not a factor which contributed to his wrongful conviction.

DONALD MARSHALL, JR.

In our view, the behaviour of Donald Marshall,

Jr. must be looked at to provide answers to two questions:

1. Can it be said that he was responsible in some measure for his own conviction? and
2. Can it be said that his evidence at the Reference provided a basis for the derogatory comments made about him by the Appeal Court in their decision.

1. Responsibility for his Conviction

As noted elsewhere in this Submission, with respect to the instructions given by Marshall to his counsel, in order for you to conclude that the so-called robbery story would have made a difference if it had been related by Marshall to Khattar and Rosenblum, Your Lordships must conclude that this one factor would have altered the investigation carried out by Khattar and Rosenblum. We are not prepared to urge that finding upon Your Lordships since, as is indicated in the section of this Submission dealing with Khattar and Rosenblum, they essentially did absolutely nothing other than interview Marshall when he was in custody. Why would one additional fact have made a difference to the way they approached the discharge of their obligations?

In our view the weight of the evidence concerning the activities of John MacIntyre point so strongly to MacIntyre's having identified Donald Marshall, Jr., as the principal suspect by Saturday morning, that it is not reasonable to suggest that MacIntyre would have acted any differently if he had been told that there had been any sort of robbery attempt the night before in the park. MacIntyre has never suggested he would have proceeded any differently had he been told about the alleged robbery attempt. When he did learn about it in November, 1971, he did not take any steps to carry out an investigation, and for example, did not even check to see if Roy Ebsary had a history of offences involving knives.

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. We say this assuming that there was some sort of robbery attempt, a fact which Donald Marshall did not admit in 1971 (in his statement), and which he denied at the Reference Hearing, insofar as the meeting with Ebsary and Seale

was concerned (Volume 3, p.28). At the third Ebsary Trial, Marshall also denied a robbery attempt and in most respects confirmed his 1971 statements as to what had occurred in the park on May 28, 1971, (Volume 9, p.39-50). At this third Ebsary Trial, Donald Marshall, Jr., was put forward as a prosecution witness by Frank Edwards on the basis that his testimony concerning the events in question was more credible than that of James MacNeil (Exhibit Volume 9, p.121 and 126).

Marshall's explanation of the statement given by him to Wheaton and Carroll at Dorchester (Exhibit 114) was that by that point in time, he had been told by Shelly Sarson that Roy Ebsary was saying that there had been a robbery in progress at the time of the stabbing. Marshall testified at the Inquiry Hearings that he told Wheaton and Carroll the story about a robbery to be consistent with what Ebsary was saying. It must be pointed out, however, that when Marshall was interviewed in Dorchester in January, 1980, by Lawrence O'Neill, Marshall made references to a robbery (Exhibit 97, p.16: 14460-61).

## 2. The 1983 "Evidence"

The only other testimony given by Donald Marshall, Jr., which could be said to be causative of any repercussions towards him is the testimony which he gave at the Reference. As indicated in the section of this Submission dealing with the Reference, we are of the view that nothing that was said by Marshall at the Reference, or any of the other available "evidence", could have led to the conclusion made by the Court that Marshall was in large measure responsible for his own conviction.

#### CONCLUDING COMMENTS

We have reviewed the evidence and have indicated to Your Lordships the particular findings of fact which we urge upon you as flowing from the evidence. In our opinion, there is ample support for the three fundamental conclusions which we listed at the beginning of these submissions.

Donald Marshall, Jr., was charged, not because of anything he did wrong, but because of the deliberate acts of Sergeant John MacIntyre who made up his mind that Marshall was guilty and then set about to prove that it was so. This behaviour must be condemned and

we urge Your Lordships to do so. Donald Marshall, Jr., was convicted not because of anything he did wrong but because of perjured evidence of witnesses, together with the incompetent handling of his defence by his defence lawyers, and mistakes made by the Trial Judge. Donald Marshall, Jr., was not to blame for the perjury of Maynard Chant, John Pratico and Patricia Harriss, nor was he to blame because Messrs. Rosenblum and Khattar took no steps to find out what had actually occurred on the night of May 28, 1971, nor can Donald Marshall, Jr., be blamed because the Trial Judge made erroneous rulings which substantially contributed to Marshall's conviction.

Donald Marshall, Jr., was not responsible for the R.C.M.P. botching the December, 1971, investigation. That was the responsibility of the R.C.M.P. Marshall was not responsible for losing his Appeal in 1972. That was contributed to by the failure of persons in the Attorney General's Department to disclose to Marshall's lawyers the fact that they had information from Jimmy MacNeil naming Roy Ebsary as the murderer. It was not Marshall's fault that when during his years in jail Donna Ebsary came forward, and Constable Green of the R.C.M.P. went to the Sydney Police Department,

that they were ignored. It was not Donald Marshall, Jr.'s, fault that the Appeal Court in 1983 elected to find him largely to blame for his wrongful conviction. And it was not his fault that the Attorney General's Department from 1983 on consistently refused to treat his case with understanding and compassion.

There are very few people or institutions that can hold their heads high when they consider their involvement with Donald Marshall, Jr. Our system of administration of justice is supposed to contain checks and balances to prevent the tragedy which occurred to Donald Marshall, Jr., from occurring. Unbelievably, none of these checks and balances worked for Donald Marshall, Jr. We have concluded that they did not work in some cases because of deliberate acts, and in others, because of negligence, inattention, or just a lack of caring for the individual.

We cannot forget the purposeful way in which John MacIntyre set out to have Donald Marshall charged. We cannot forget the R.C.M.P.'s incompetence in 1971 when it had before them all the facts that should have resulted in Marshall being released from jail almost as soon as he had been put in. We cannot forget the

comments of the Appeal Court of this Province in 1983 blaming Donald Marshall, Jr., for having spent 11 years in jail for a murder which he did not commit. We cannot forget the way in which the Attorney General's Department paid so little attention to the plight of Donald Marshall, Jr.

But we also cannot forget Gordon Coles' intervening in the Sydney shoplifting case to terminate the prosecution. We cannot forget the R.C.M.P.'s reluctance to proceed in the cases of Thornhill and MacLean. We cannot forget the Attorney General's Department actively trying to ensure that matters did not proceed against Thornhill and MacLean. We cannot forget the blatant, and successful attempts by officials of the Attorney General to dictate the manner in which the R.C.M.P. discharge their duties in this Province.

It must be remembered, however, that memories are short. Even the most serious transgressions are very quickly forgotten. Your Lordships must define carefully the roles which must be played by the various persons, and institutions, which constitute our system of administration of justice system to ensure that there will be no repetition of the tragic, and

disgraceful, treatment which the system meted out to  
Donald Marshall, Jr.

DATED at Halifax, Nova Scotia, this 20th  
day of October, 1988.

*George W. McLeod*  
*Davis O...*  
*John Frie*

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COMMISSION COUNSEL