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 Practico'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 Practico'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 testifed 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 memberes 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 vigoriously 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 eyewitnesses.

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. Is 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 dislosure 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. <u>The 1983 "Evidence"</u>

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

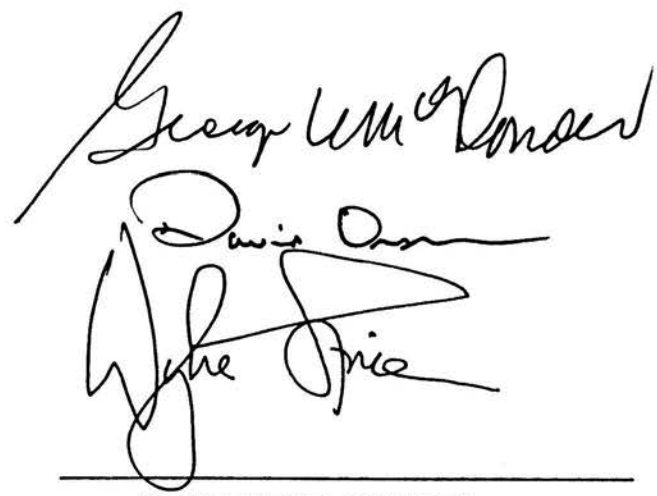
comments of the Appeal Court of this Province in 1983 blaming Donald Marshall, Jr., for having spent 11 years in jail for a murder which he did not commit. We cannot forget the way in which the Attorney General's Department paid so little attention to the plight of Donald Marshall, Jr.

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.



COMMISSION COUNSEL