Aronson, MacDonald Barristers & Solicitors

Stephen J. Aronson
Leo I. MacDonald

Dartmouth Professional Centre · Suite 305 · 277 Pleasant Street · Dartmouth, N.S. Canada B2Y 4B7 - (902) 463-9131

May 9, 1983

Mr. Donald Marshall, Jr.

Dear Junior:

Please find enclosed a copy of a letter to Felix Cacchione. As you have retained him to act for you after May 13, 1983, I have forwarded all the necessary documentation to him concerning your case, both criminal and civil.

I want you to understand quite clearly that I will provide every assistance and co-operation to both you and Felix insofar as I am able to in Ottawa. However, I can no longer act as your solicitor or provide advice on which you may act.

I hope to see you in the future when I visit the Halifax area and in the event that you are in Ottawa I would most sincerely ask that you get in touch with me and we can get together. If I can give you any advice it is to do everything in your power to have your book written and published and of course in this regard Michael Harris, yourself and I have expressed the desire that the book be written and published.

I also want to tell you that it has been for me a great privilege and honour to have acted for you in the last year and a half or so and I wish you the best of luck and health in the future.

Yours sincerely,

Stephen J. Aronson

SJA:md
Enclosure

RS. I enclose the Assignment concerning fees.

Aronson, MacDonald Barristers & Solicitors

Stephen J. Aronson
Leo I. MacDonald

Dartmouth Professional Centre · Suite 305 · 277 Pleasant Street · Dartmouth, N.S. Canada B2Y 4B7 · (902) 463-9131

DELIVERED BY HAND

May 9, 1983

Felix A. Cacchione, Esq.

Dear Felix:

Re: Donald Marshall, Jr. - S.C.C. No. 00580;
Marshall v. City of Sydney et al - S.N. No. 02790

Further to discussions with Donald Marshall, Jr., myself and you, it was agreed on May 4, 1983, that you would act for Junior from May 16, 1983, forward.

I have enclosed a copy of the Notice of Change of Solicitor which will be filed by me on May 13, 1983, in regard to S.C.C. No. 00580.

In addition, I enclose the following documentation relating to the civil action in Marshall v. City of Sydney, MacIntyre and Urquhart:

1. Letter to Sydney City Clerk of July 28, 1982, with Notice of Intended Action;
2. Letter from Michael G. Whalley, Sydney City solicitor, of July 30, 1982;
3. Letter of January 19, 1983, from Aronson to Sydney Prothonotary;
4. The original issued copy of the Originating Notice (Action) and Statement of Claim in S.N. No. 02790, dated January 19, 1983, and file copy.

Respecting the civil action please note that the Originating Notice (Action) and Statement of Claim has not been served on the Defendants. Please also note that the action was filed and issued out of the Prothonotary's Office in Sydney, on January 24, 1983. In this regard please pay particular attention to Civil Procedure Rule No. 9.07 and such other

...2

SA 126

Rules as may be applicable. My present understanding is that one has six months from the date of issue to serve the Originating Notice (Action) which would require service on or before July 23, 1983. In the event that you decide not to serve the document on the Defendants before this latter date, please note carefully Civil Procedure Rule 9.07. In addition, you should file a Notice of Change of Solicitor with the Prothonotary in Sydney pursuant to Rule 44. I accept no liability for the civil action subsequent to May 13, 1983, and you should therefore govern yourself accordingly.

Any financial arrangements concerning your fees for any work on behalf of Donald Marshall, Jr. should be arranged between you and him directly. I enclose a signed copy of an Assignment from Donald Marshall, Jr. to myself concerning legal fees owed by Junior to me concerning the Reference in S.C.C. No. C0580. No other fees are owed me by Donald Marshall, Jr.

There is of course a substantial amount of material all of which I will provide to you on or before the 13th day of May, 1983, for your review. Please be assured of my continued assistance, although at a distance, in this difficult and in many respects unprecedented case. Once I have settled in Ottawa I shall provide you with my telephone number and a temporary mailing address.

Kindest regards.

Yours very truly,

Stephen J. Aronson

SJA:md
Enclosures
c.c. - Donald Marshall, Jr.

THIS ASSIGNMENT made this 4TH day of ~~April~~ MAY, A.D. 1983.

BETWEEN:

STEPHEN J. ARONSON, of Halifax, in the County of Halifax and Province of Nova Scotia; (the Assignee)

OF THE FIRST PART

- and -

DONALD MARSHALL, JUNIOR, of Halifax, aforesaid; (the Assignor)

OF THE SECOND PART

WHEREAS Donald Marshall, Junior, retained Stephen J. Aronson to act for him in the judicial proceedings known as Reference Re R. v. Marshall, S.C.C. 00580;

AND WHEREAS Donald Marshall, Junior, acknowledges his indebtedness to the said Stephen J. Aronson for legal fees and disbursements in the amount of Seventy-eight Thousand, Six Hundred Eighty-five Dollars and Forty-two Cents ($78,685.42);

AND WHEREAS Donald Marshall, Junior, intends to pursue a claim for compensation concerning his conviction for the murder of Sandy Seale in Sydney in May, 1971;

KNOW ALL MEN BY THESE PRESENTS that I, the undersigned, Donald Marshall, Junior, of Halifax, aforesaid, in consideration of the sum of One ($1.00) Dollar paid to me by Stephen J. Aronson, of Halifax, aforesaid, the receipt of which sum I hereby acknowledge, hereby assign to the said Stephen J. Aronson, all my right,

title and interest in and to the monetary compensation received from the claim arising out of Donald Marshall, Junior's conviction for the murder of Sandy Seale in Sydney in May, 1971, to the extent of Seventy-eight Thousand, Six Hundred, Eighty-five Dollars and Forty-two Cents ($78,685.42) together with interest thereon at the rate of ten (10%) per cent per annum from the date of this Assignment to the date paid.

Donald Marshall, Junior, understands that the sum of $78,685.42, represents legal fees and expenses relating only to the conduct of Reference Re R. v. Marshall, S.C.C. No. 00580.

This Agreement may be assigned by Stephen J. Aronson, and the Assignee shall have all the rights and be subject to all the obligations thereof in favour of or against the party of the first part.

That Donald Marshall, Junior, covenants that he will execute and do all such further documents or things as may be required or by the Assignee deemed advisable to give full effect to this Assignment.

IN WITNESS WHEREOF the said Donald Marshall, Junior, has signed, sealed and delivered this Assignment on the day and year first above written.

Witness

DONALD MARSHALL, JUNIOR

SA 17

1983

S.N. No. 02790

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

DONALD MARSHALL, JUNIOR

PLAINTIFF

- and -

THE CITY OF SYDNEY, a body corporate and John L. MacIntyre and William Urquhart

DEFENDANTS

NOTICE OF CHANGE OF SOLICITOR

TAKE NOTICE that the Solicitor for the Plaintiff, Donald Marshall, Junior, is changed from Stephen J. Aronson to Felix A. Cacchione, Barrister & Solicitor, 5194 Blowers Street, Halifax, Nova Scotia, B3J 1J4.

DATED at Halifax, Nova Scotia, this 20th day of June, A.D., 1983.

FELIX A. CACCHIONE

TO: The Prothonotary
The Supreme Court of Nova Scotia

TO: Michael G. Whalley
Solicitor for the City of Sydney

TO: Stephen J. Aronson

1983 S.N.No. 02790

SA 17

146

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

DONALD MARSHALL, JUNIOR

PLAINTIFF

- and -

THE CITY OF SYDNEY, a body corporate, and John L. MacIntyre and William Urquhart

DEFENDANTS

NOTICE OF CHANGE OF SOLICITOR

FELIX A. CACCHIONE
BARRISTER & SOLICITOR
5194 Blowers Street
Halifax, Nova Scotia
B3J 1J4

ALEXA MCDONOUGH, MLA
HALIFAX CHEBUCTO

LEADER, NOVA SCOTIA
NEW DEMOCRATIC PARTY

HOUSE OF ASSEMBLY
NOVA SCOTIA

P. O. BOX 1617
HALIFAX, N. S.
B3J 2Y3

(902) 424-4134
LEADER'S OFFICE
(902) 425-8272
CONSTITUENCY OFFICE

NEW DEMOCRATIC PARTY

P.O. BOX 1617
HALIFAX, NOVA SCOTIA
B3J 2Y3

147

SH 11

OPEN LETTER

May 9, 1983. MAY 11 1983

The Honourable Harry How
Attorney General
Province of Nova Scotia
Halifax, Nova Scotia

Dear Mr. Attorney General;

I am writing to you to express my concern about the situation in which Donald Marshall finds himself. Almost exactly a year ago, I urged you to do whatever was necessary to ensure that the apparent miscarriage of justice which resulted in Donald Marshall spending eleven years of his life in prison was rectified. To date, he still lives under a cloud.

I understand the importance of the independence of the judiciary and recognize your reluctance to appear to be interfering in any way with that independence. Surely, however, you must be able to determine when the justices' decision is expected. As you must surely realize, the delay is interminable to Mr. Marshall and his family.

There is another question, however, which I do not think it would be inappropriate for you to address now. In the event that the justices of the Nova Scotia Court of Appeal acquit Mr. Marshall what provisions are you prepared to make to compensate Mr. Marshall for the time he spent in jail and defray his legal costs?

Thank you for your attention to this matter.

Yours sincerely,

Alexa McDonough

Alexa McDonough, MLA
Halifax Chebucto
Leader, Nova Scotia NDP

(dictated by Ms. McDonough; signed in her absence)

On May 28, 1971, Sandy Seale was murdered in Wentworth Park in Sydney. Donald Marshall, Jr. was arrested on June 4, 1971, charged with this murder for which he was convicted on November 5, 1971. From the date of his arrest until July 29, 1982, Marshall was a prisoner and let there be no mistake about his status - He was a convicted murderer. Today, the Appeal Division of the Nova Scotia Supreme Court, set aside his conviction and ordered that an acquittal be entered. Junior has always known he was innocent, but now his innocence is acknowledged by the Court and he is free of at least one albatross. It has been a lonely twelve (12) years for him, without question. Prison records indicate Junior consistently denied his guilt, ~~yet he persisted,~~ knowing full well that his parole would, in all likelihood, never be granted without an admission of guilt. After all, he could not be rehabilitated without facing his guilt, which was impossible. His courage and inner strength in these bizarre circumstances is the source of much of today's result.

In addition, there are, ~~however~~ many people who have helped, in the last year or so, to bring us here today. Junior would like particularly to express his gratitude to S/Sgt. Harry Wheaton and Cpl. Jim Carroll of the R.C.M.P. who, in a most professional and competent manner, re-investigated the Seal[2] murder. The Minister of Justice, then Jean Chretien, who acted out of concern for both

Junior and the system of justice, in a timely and co-operative manner, also deserves credit. The Chief Crown Prosecutor for Cape Breton County, Frank Edwards, acted throughout honourably and it is to be hoped that all Prosecutors might reach his standards of thoroughness and candour in dealing with defense counsel. The Carleton Centre staff, have helped, and continue to help, Junior in re-adjusting to life on the outside and thanks are owed, in particular to Jack Stewart, Terry Hatcher and Gerry Smith.

One man was however outstanding in his efforts and was always at Junior's side for many months after Junior was released from Dorchester. I speak of Charlie Gould, a social worker with the U.N.S.I. whose concern and understanding gave Junior guidance and faith. Finally, there is Junior's family and friends, particularly Roy Gould, who never gave up and supported Junior for the many years when he had no other help.

THE FUTURE:

It must also be remembered that today the case does not end. There are other issues that must be addressed, which Junior has no real power over. One issue which the Attorney-General must address is whether another person is to be charged in the Seale murder. There is no doubt that facts exist to charge another individual and Junior would

certainly like to see that charge laid.

There is also sufficient information on which charges of perjury could be laid against witnesses who testified at the 1971 trial of Donald Marshall, Jr. These charges must be considered having regard to all the circumstances. But even more than the perjury charges, there remains a dark cloud hanging heavily over the original police investigation in 1971 by the Sydney City Police Department and many questions remain unanswered.

It is our considered view that the Attorney-General initiate a public inquiry in Cape Breton, to consider how an innocent man can be charged and convicted of a murder. What went wrong in the original police investigation in 1971 and how to avoid such tragic results in the future are two questions of general importance. Ultimately however, such an inquiry is necessary to clear the air and allow the citizens of Sydney to once again place complete faith in their police force. We call on the public ~~will~~ to support the request for a public inquiry. Such an inquiry would also allow the police to tell their side of the story which [illegible] Marshall [illegible] was unable to do at the hearing in 1982. Indeed they have filed [illegible]

COMPENSATION

Finally, we would like to address briefly the matter of compensation. Although a civil action has been filed against the City of Sydney and two officers of the Sydney Police Department, the concern was to protect Junior's

interest in bringing those proceedings in a timely manner. No decision has been made at this time as to whether to actually proceed in the courts or to look to other avenues of seeking compensation. No decision has been made on an amount to be claimed as compensation. It is quite possible that other legal counsel will be retained to handle the whole issue of compensation and there is no desire to publicly discuss this issue at this time.

Many people have stressed compensation from the outset of the Marshall case in March of 1982 and have mentioned various figures. It is, in our view, more important to consider Junior's loss of freedom for twelve (12) years from the age of 17 to 29 and the tragic consequences which resulted from his imprisonment. If each of you were to consider being placed in jail for over a decade for a crime which you had not committed, then possibly you would understand and appreciate, in some small way, Junior's feelings and thoughts. Society cannot ever repay Junior for his loss, but certainly all efforts should be made to see that he is given fair compensation under the circumstances.

1,76 57

Nova Scotia

Attorney General

Memorandum

From Martin E. Herschorn
Assistant Director (Criminal)

Our File Reference 09-84-0257-01

To File

Your File Reference

Subject Donald Marshall, Jr.

Date May 13, 1983

On May 11th at approximately 12:00 noon, I spoke with Mr. Frank Edwards and requested that he review the decision of the Appeal Division to determine what evidence exists which might support:

a) charges of perjury
b) a charge of attempted robbery against Donald Marshall, Jr., together with Mr. Edwards' recommendation as to whether any such charges should be proceeded with.

Finally, Mr. Edwards requested the instruction of the Attorney General as to the laying of a charge of second degree murder against Roy Newman Ebsary. I indicated to Mr. Edwards that this matter would be discussed and he would be contacted within the next few days.

On May 12th, I spoke to Mr. Edwards and instructed him to proceed with the 2nd degree murder charge against Roy Ebsary.

MEH:if

M. E. H.

Nova Scotia

Attorney General

Memorandum

From Martin E. Herschorn
Assistant Director (Criminal)

Our File Reference
09-84-0255 — 09

To Gordon F. Coles, Q.C.
Deputy

Your File Reference

Subject Assessment of Possible Charges Stemming from the Appeal Division's Decision of May 10, 1983 in the Case of Donald Marshall, Jr.

Date June 1, 1983

I enclose a Memorandum dated May 16, 1983 to me from Mr. Frank Edwards on the above-noted subject.

I would appreciate an opportunity to discuss this Memorandum with you after you have had an opportunity to assess it.

M. E. H.

MEH:if
Enclosure
c.c. Gordon S. Gale, Q.C.

AG 55

77 Kings Road
Sydney, Nova Scotia
B1S 1A2

M E M O R A N D U M

TO: Mr. Martin E. Herschorn, Asst. Director (Criminal)

FROM: Mr. F.C. Edwards, Crown Prosecutor

RE: Donald Marshall Jr.

DATE: May 16, 1983

This is further to our telephone conversation of May 11, 1983, wherein you requested my opinion on perjury charges in light of the Appeal Division's decision of May 10, 1983.

I. Donald Marshall Jr.: On page 65 of the decision, the Court observed: "In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged." Two points are of some interest:

(a) The Court stops short of recommending that Marshall be charged with perjury.

(b) The Court does not cite specific instances of alleged perjury except insofar as outlined below.

I have approached the problem by attempting to answer two questions:

(1) Did Marshall commit perjury in 1971?

(2) Did he commit perjury in 1982?

AG 55

Section 120 of the Criminal Code reads:

> Every one commits perjury who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false.

In Farris v The Queen (1965) 3 C.C.C. 245 (Ont. C.A.), it was held that it was no defence if the accused's statement is literally true if he well knew and intended that the statement should be taken in another sense.

In the Farris sense, therefore, the answer to question one is yes, Marshall did commit perjury in 1971. His evidence, though possibly literally true, was intended to give the Court the impression of a casual meeting and not an attempted robbery in 1971. The Appeal Division was harsher in their interpretation of the 1971 evidence when they noted at p. 65:

> "By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief." (Emphasis added)

The Court seems to treat Marshall's omission of facts pertaining to the attempted robbery as lies. Further they say that Marshall now admits the 1971 version is false. With respect, the latter proposition is dubious because Marshall at no time admitted in court that he and Seale had been attempting a robbery. The closest he came to making such an admission in Court is noted on p. 57 of the recent decision:

> Q. Well in what way does your testimony differ in 1971 to today?
>
> A. In 1971 I did not mention anything about hitting somebody or robbing somebody or something like that. I did not mention that.
>
> Q. Why didn't you speak of that?
>
> A. The robbery didn't happen. It wasn't even an attempt of a robbery. I wasn't dealing with a robbery and I was afraid that one way or the other they would put the finger at me saying -- one way or the other they would have found a way -- in my opinion, they would have found a way to put it on me whether I told them or not.

Q. To put what on you?

A. Attempted robbery. Maybe the murder probably -- the robbery would have probably tried to cover up for the murder.

Marshall, of course, had admitted the attempted robbery in a statement dated March 9, 1982, to the R.C.M.P. at Dorchester Penitentiary. (See p. 61 of Decision) Under cross-examination, he refused to adopt those portions of the statement dealing with the robbery. (Transcript Dec. 1-2 , 1982 pp. 73-77 inclusive)

The answer to the second question, "Did Marshall commit perjury in 1982?" is also difficult. Again, in accord with Farris, the answer is yes. As noted above, he contradicted his March 9, 1982, statement and gave a story which rivalled that of 1971 for incredibility. He noted that when he and Seale met MacNeil and Ebsary, MacNeil stumbled on the curb and Marshall grabbed him apparently to prevent him from falling. (See Decision p. 55) One is expected to read into that that Ebsary then formed the mistaken impression that a robbery was in progress and stabbed Seale. In apparent reference to Marshall's new evidence, the Court had this to say at p. 63.:

> "However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James MacNeil's story ..." (Emphasis Added)

It must be emphasized that to say that Marshall committed perjury in either 1971 or 1982 involves a rather technical extension of the term perjury. For this reason as well as the fact that Marshall has already spent eleven years in prison, my recommendation is that he not be charged with either perjury or attempted robbery.

II. The question of what to do about the witnesses who admittedly lied in 1971 will now be addressed. In this category fall John Pratico, Maynard Chant and Patricia Harriss.

(a) John Pratico: - this witness was at the time, and still is, under the care of psychiatrist, Dr. M.A. Mian. In an affidavit dated July 19, 1982, Dr. Mian stated in part:

Paragraph 4. "That my medical diagnosis of the said John L. Pratico since August, 1970, is that he suffers from a schizophernform illness manifested in his case by liability to fantasize and thereby distortion of reality and rather childish desire to be in the limelight or center of attraction."

Paragraph 7. "That it is my medical opinion that the said John L. Pratico was, in 1971, and has been continuously to date, a wholly unreliable informant and witness with regard to any subject or event but more particularly in the Sandy Seale murder case of 1971."

In view of the foregoing, I submit that charging Pratico with perjury is hardly worthy of consideration. Indeed, one of my problems has been trying to understand how Pratico could possibly have been put forward by the City Police in 1971, as a credible witness. Curiously, in July, 1982, when I was drafting an affidavit for Chief MacIntyre, he had me delete a paragraph dealing with his lack of knowledge of Pratico's mental condition.

(b) Maynard Chant: - this fellow gave a statement on May 30, 1971, which was consistent with Marshall's story. There is no question but that this statement was false and was given to police after Chant had spoken to Marshall. Then, on June 4, 1971, Chant gave a second statement in which he said that he saw Marshall stab Seale. This statement was given at the Louisbourg Town Hall allegedly in the presence of the police, Chant's mother, his probation officer, and Wayne Magee, the present Sheriff of Cape Breton County. Chant was 14 at the time, was on probation and was caught in a lie. No doubt he was acquainted with the fact that earlier that morning Praticc had given a statement in which he said he saw Marshall stab Seale. In these circumstances, he likely saw no alternative to telling the police what he believed they wanted to hear.

For the same reasons, he repeated his June 4 story at the Preliminary Inquiry on July 5, 1971. But it is significant that at the trial in November, 1971, Chant had to be cross-examined under Section 9 of the Canada Evidence Act. Only by resorting to that section was the Crown able to get the June 4 story before the jury.

(c) Patricia Harriss: - this girl, who was 14 years of age in 1971, was taken to the police station at approximately 8:00 p.m., June 17, 1971. At 8:15 p.m. she gave a statement to police indicating that she saw two other men with Marshall on the night in question. That statement was discontinued and never signed. Questioning continued until 1:20 a.m. June 18, 1971, at which time Harriss gave a second statement indicating that she saw only one other person with Marshall at the crucial time and that person was Sandy Seale. Harriss was not accompanied by an adult during this interrogation and, in fact, says her mother was sent away from the police station. It is probable that after such extensive questioning, she, like Chant, told police what she believed they wanted to hear. Her subsequent testimony basically reiterated her second statement though she did not name Seale as the one other person with Marshall.

CONCLUSION: In these circumstances, with respect to both Chant and Harriss, it is the opinion of the undersigned that neither had the criminal intent necessary to support a conviction for perjury. In other words, they probably did not have the "intent to mislead" because they believed they were telling the Court what the police were convinced was the correct version. It is submitted that the Department should nevertheless keep its options open re charging these two individuals pending the findings of an independent inquiry into the 1971 investigation. The necessity of an inquiry while beyond the writer's purview appears inextricably linked with the degree of culpability to be assessed to Chant and Harriss. If the Department feels I can be of some assistance, I am prepared to recommend the form of any such inquiry as well as its proposed terms of reference. I would note that the Mayor of Sydney has publicly stated that he would welcome an inquiry.

If you have questions re the foregoing. please do rot hesitate to contact the undersigned.

Very truly yours,

F.C. Edwards
CROWN PROSECUTOR

FCE:ami

1615A

DEPARTMENT OF ATTORNEY GENERAL

AG 222

MEMORANDUM

Our File No.
09-84-0257-01

FROM: Hon. Harry W. How, Q. C. TO: Mr. Gordon F. Coles, Q. C.

Will you start to formulate considerations we ought to take into account if we receive a request from Donald Marshall for some form of compensation.

Also, in this connection, would you see what precedents there are throughout Canada and possibly in the United States.

In addition to this, we should be looking into the question of the performance of the Police and Crown in the prosecution of Donald Marshall originally.

Finally, we must make a decision as to whether he or any of the other witnesses in the trial, who allegedly committed perjury, ought to be charged.

May 25, 1983

Attention: Gordon S. Gale, Q. C.

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FC.67

Province of Nova Scotia

JUN 1 1983

OFFICE OF REGISTRAR OF JOINT STOCK COMPANIES NOVA SCOTIA

pd by cheque $20.00 Registration B.C.

PARTNERSHIPS AND BUSINESS NAMES REGISTRATION ACT

(Chapter 225, Revised Statutes of Nova Scotia, 1967)

Declaration to be used where there are two or more partners

PROVINCE OF NOVA SCOTIA
COUNTY OF

We, Stephen Aronson (Name) of 6165 Jubilee Road, Halifax, N.S. (Street) (City or Town and County)

Barrister (Occupation), and Donald Marshall, Jr. (Name), of 5651 Ogilvie Street, (Street)

in Halifax (City or Town and County), Plumber (Occupation), and Michael Harris of RR#1, Windsor, Nova Scotia BON 2TO, Journalist

Add Names addresses and occupation of additional partners, if any.

hereby, each for himself, make oath and declare,

1. That we are and each of us is of the full age of nineteen years —(if otherwise in the case of any partner, state exact age.)

2. That we are in partnership under the name and firm of Junior Isaiah and Associates,

at 5194 Blowers Street, Halifax, N.S. B3J 1J4
(Give Street and No., if any, and name of City or Town and County)

for the following purposes and objects, namely:

Author - Editor, ee Book + Movie Rights agent

3. That the said partnership has subsisted in Nova Scotia since the 12th day of May, one thousand nine hundred and Eighty-three.

4. And that we Stephen Aronson, Donald Marshall, Jr. and Michael Harris are and have been since the said day the only members of the said partnership.

Sworn to at Halifax
in the County of Halifax,
this 31st day of May,
A. D., 19 83.
Before me, Felix Cacchione
(Notary Public, or Commissioner, etc.)
FELIX ANTONIO CACCHIONE
A Barrister of the Supreme Court of Nova Scotia

S. Aronson
STEPHEN J. ARONSON

Donald Marshall J.
DONALD MARSHALL, JR.

Michael Harris
MICHAEL HARRIS

This document is to be filed with the Registrar of Joint Stock Companies, P. O. Box 1529, Halifax, N. S. B3J 2Y4

(over)

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PARTNERSHIPS AND BUSINESS NAMES REGISTRATION ACT FC 58

(Chapter 225 R.S.N.S. 1967)

and

IN THE MATTER OF Junior Isaiah & Associates
(Insert Firm Name)

Appointment of Agent under Section 17 of said Act.

Felix A. Cacchione of Number 5194 Blowers Street

Halifax in the County of Halifax

Province of Nova Scotia, is hereby appointed the recognized Agent of
Junior Isaiah & Associates
(Insert Firm Name)

resident within Nova Scotia, service upon whom of any writ, summons, process, notice or other document shall be deemed to be sufficient service upon the partnership and each member thereof and this appointment shall be and remain in force until notice in writing by the Partnership that he has ceased to be such Agent is filed with the Registrar of Joint Stock Companies at Province House, Halifax, N.S.

Dated the 31st day of May A.D. 19 83

(ALL THE PARTNERS MUST SIGN BELOW)

STEPHEN J. ARONSON - [signature]
DONALD MARSHALL, JR. - [signature]
MICHAEL HARRIS - [signature]

This document is to be filed with the Registrar of Joint Stock Companies, P. O. Box 1529, Halifax, N. S., B3J 2Y4. $1.00 fee for filing this document.

The Agent must be a person, not a firm or Company.

A penalty not exceeding $100. is incurred by each member of the partnership, if the partnership fails to appoint and have an Agent as required by Section 17 of said Act.

Reg'd & filed.....

REGISTRY
OF
JOINT STOCK
COMPANIES /
SECURITIES
07/06/87

RGSTY# 1516188 #
SUP # 2 #
REGISTER 20.00
SUBTOTAL 20.00

CHECK TL 20.00

THANK YOU
#03349 0123 R01 T14:09

162

Fc 72

PROVINCE OF NOVA SCOTIA

CERTIFICATE OF REGISTRATION

Partnerships and Business
Names Registration Act
Chapter 225, R.S.N.S. 1967

1516188
Number

JUNIOR ISAIAH AND ASSOCIATES
Name of Registration

I hereby certify that the above-mentioned is registered under the provisions of the Partnerships and Business Names Registration Act.

Acting Registrar of Joint Stock Companies

June 01, 1983
Date of Registration

628

163

FC 29-1

No. .....

Province of Nova Scotia

PARTNERSHIPS AND BUSINESS NAMES REGISTRATION ACT

(Chapter 225, R.S.N.S., 1967)

DECLARATION OF DISSOLUTION OF PARTNERSHIP

PROVINCE OF NOVA SCOTIA

County of Halifax

I, Donald Marshall, Jr. formerly a member of the firm carrying on business as Junior Isaiah and Associates (HERE INSERT BUSINESS NAME) at Halifax in the County of Halifax do hereby make oath and declare that the said partnership was on the ..... day of ..... A.D. 19 84 , dissolved, and I request that the registration be revoked.

Sworn to at Halifax
in the County of Halifax
this day of
A.D. 19 84
Before me,

DONALD MARSHALL, JR.

(Notary Public, J.P., Commissioner, etc.)

$1.00 fee for filing this document. Declaration and filing fee to be forwarded to Registrar of Joint Stock Companies, P. O. Box 1529, Halifax, N. S.

Reg'd & filed .....

FC 71

AGREEMENT FOR LEGAL REPRESENTATION

THIS AGREEMENT made under Nova Scotia Civil Procedure Rule 63.17 this 31st day of May, A.D., 1983.

BETWEEN:

DONALD MARSHALL, JR., of Membertou Indian Reserve, in the County of Cape Breton, Province of Nova Scotia;
(hereinafter called the "Client")

- and -

FELIX A. CACCHIONE, of 5194 Blowers Street, Halifax, in the County of Halifax, Province of Nova Scotia, Barrister and Solicitor of the Supreme Court of Nova Scotia;
(hereinafter called the "Solicitor")

WHEREAS the Client desires to institute and either prosecute or settle the claim for damages suffered by the Client by reason of his wrongful conviction for the murder of Sanford William (Sandy) Seale and subsequent imprisonment.

IT IS HEREBY AGREED AS FOLLOWS:

1. That the Client retain the Solicitor and his Agents to institute and either prosecute or settle the claim and agrees to pay the Solicitor for professional services rendered the remuneration specified below.

2. That the Solicitor agrees to act for the Client in instituting and either prosecuting or settling the claim for the remuneration specified below.

3. The Client agrees to pay the Solicitor for his services to be rendered in this matter an amount equal to 25% of whatever monies may be collected for the Client in this matter by suit or otherwise together with whatever reasonable and necessary expenses the Solicitor may pay out or incur on behalf of the Client.

4. If the Client dismisses the Solicitor before the Solicitor has settled the claim, the Client shall pay the Solicitor 100% of the Solicitor's costs, taxed as between the Solicitor and his own Client plus 100% of the costs and disbursements.

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5. This Agreement may be reviewed by a Taxing Officer at the Client's request, and may either at the instance of the Taxing Officer or the Client be further reviewed by the Court, and either the Taxing Officer or the Court may vary, modify or disallow this Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Agreement on the day and year first above written.

SIGNED, SEALED AND DELIVERED)
- in the presence of -)

Michael Ferri)
WITNESS)

Donald Marshall Jr.)
DONALD MARSHALL, JR.)

Michael Ferri)
WITNESS)

Felix Cacchione)
FELIX A. CACCHIONE)

FC 82

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

ACTION REQUES
FICHE DE SERVIC

To – À

Erhis

Date

July 7/83

- ☐ Approval / Approbation
- ☐ Signature
- ☐ Comments / Commentaires
- ☐ Information
- ☐ Draft Reply / Projet de réponse
- ☐ May we discuss / Discussion avec nous
- ☐ As Requested / Selon indications
- ☐ Note and Forward to / Noter et faire suivre à
- ☐ Action / Donner suite
- ☐ Note and Ret / Noter et reto
- ☐ Note and Fil / Noter et clas

☐ Please call / Prière d'appeler ☐ Will call again / Doit rappeler ☐ Wants to see you / Désire vous voir ☐ Returned your / Retourne votre

Name - Nom	Tel. No. Nº de tél. Ext. Poste	Time-H

Nice to talk to you. If Barbara comes this way she can reach me at work at 994-3741.

Here's the note on Hanson and Marshall

From Your Information.

IAND 132 (4-78)
7530-21-036-4240

From - De

S.O. 21

HIGHWAY SAFETY

COUNCIL'S ANTI-ACCIDENT PROGRAM

Mr. Stanley Hudecki (Parliamentary Secretary to Minister of National Defence): Madam Speaker, a harsh reality, road trauma, accounts for a greater loss of productive working years than either cancer or cardio-vascular disease. It is the most common cause of death and disability of Canadians under the age of 35 and should, therefore, be a matter of great concern to all Members of the House.

Aggressive community action programs are necessary across Canada to help prevent road accidents. An excellent model is the Council on Road Trauma of Hamilton-Wentworth which has been operating since 1981, and which is the only organization of its kind in Canada. The Council consists of community members, and involves the Academy of Medicine, Regional Police, the Hamilton Auto Club, and the Ministry of Transport. Its action program includes efforts to secure and restrain infants and children in vehicles, to investigate passenger restraints in school buses, to provide emergency care education, to educate high school students on the hazards of impaired driving, to increase awareness by cyclists and motorists of the hazards of cycling, and to assist the police department in evaluating the vehicular related deaths and injuries.

It is a matter of concern to me that this type of organization operating at grass roots levels is not yet utilized by communities across the nation in order to promote road safety measures and to foster accident prevention.

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MINES AND MINING

YUKON PLACER MINES—POSTPONEMENT OF HEARINGS RECOMMENDED

Mr. Stan Schellenberger (Wetaskiwin): Madam Speaker, the Yukon has supported, to various degrees, placer mines since 1886, and over $365 billion worth of gold has been put on the market by small enterprises and prospectors. Only a very small part of the Yukon area is considered to be viable for this type of mining, about one-tenth of 1 per cent.

At this time, in particular, with all significant hard rock mining shut down, placer mining is tremendously important to that economy and its people, yet the federal Government seems to be doing everything possible to chastise, demoralize, and potentially drive those miners out of business because, environmentally, it has been alleged that there may be some potential danger to some fish in a very few streams which are mined. Two reports, one slightly redone, have placed doubts in miners' minds about the priorities of the Government and its seriousness on coming to realistic grips with the problem—this, after 90 years of mining.

The problem is that public hearings, extremely important to the future of placer mining, are being held at the very time that the mining season begins. These miners need the hearings to put their case forward, which they feel is excellent. The situation is explosive, and the House must recommend the cancellation of these hearings until late Fall.

• • •

• (1410)

MEDICAL CARE

FUNDING FOR RESEARCH—EFFECT OF GOVERNMENT'S RESTRAINT PROGRAM

Mr. Bill Blaikie (Winnipeg-Birds Hill): Madam Speaker, the Canadian Nurses Association has made an important contribution to the debate about the future of medicare in Canada by calling on Canadians to reflect on the inadequacies of the physician-dominated health care model that is now in place, and the way in which this domination contributes to increased health care costs. Their call for a greater variety of points of entry into the health care system, through the insuring of services provided by other health care professionals, and for more emphasis on health promotion and disease prevention, reminds us that a great deal of the cost strains on medicare are not related to the principles of medicare but rather to the prevailing health care model, a model which is not changed but rather reinforced by practices such as extra billing and user fees.

In this respect the Government's shortsighted application of six and five to funding for medical research is particularly tragic. Not only does it deny employment opportunities to the many who would like to work in this vital field, and seriously damages the long-term viability of medical research in Canada, but it precludes any expansion of research into the efficacy of various health care delivery models, research which desperately needs to be done if we are to find an alternative to the costs which our present model generates.

The Government should rethink its penny wise, pound foolish ways, and make up the shortfall in funding as it has been called upon to do by prominent members of the research community in Canada.

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CHARTER OF RIGHTS

COMPLIANCE WITH INTERNATIONAL TREATIES

Hon. Ray Hnatyshyn (Saskatoon West): Madam Speaker, this week the Canadian Association of Statutory Human Rights Agencies is meeting in Saskatoon. As part of its discussions this conference is analyzing how various federal and provincial laws, including the Charter of Rights and Freedoms, fare in their compliance with the provisions of international treaties signed by Canada, in particular the International Covenant on Civil and Political Rights.

For instance, the federal Government refuses to bring forward legislation that woulld end discrimination against native women under the Indian Act. Canada promised these changes after complaints of native women were taken to the United

Nations, but promises are all that this House and the native people have received.

Another example of the Government's refusal to honour treaty obligations can be found in the recent case of Donald Marshall. Article 14(6) of the International Covenant calls upon a signatory nation to provide compensation to persons who have been wrongly convicted or punished for a crime and later subsequently exonerated through new evidence. The Government's actions put the lie to its words.

I call upon the Government to honour these and many other treaty obligations as soon as possible. Canada should be a leader in securing and maintaining rights and freedoms for its citizens. To fail to do so brings shame to our nation and our goal of a free and democratic society for all Canadians.

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CANADIAN ARMED FORCES

CALL FOR PRESERVATION OF NAVAL TRADITION

Mr. Howard Crosby (Halifax West): Madam Speaker, over 15 years have elapsed since the Government of Canada, with great and grave controversy, unified our Navy, Army, and Air Force into one service called the Canadian Armed Forces. Whatever the merits or demerits of unification, the reality is that we have, today, distinctive elements in the Armed Forces under the new names of Maritime Command, Mobile Command, and Air Command.

In spite of the official nomenclature, Maritime Command has retained and maintained its status as Canada's Navy. The preservation of this tradition, so many years after unification, should be advocated, not discouraged. The existence of a distinctive naval force in Canada can be effectively publicized by utilizing the historic navy blue uniform. While the use of special insignia and the time honoured marine ranks should also be permitted, the whole world would recognize a navy blue uniform when worn by Canada's naval force.

I appeal to the Minister of National Defence (Mr. Lamontagne) to help preserve the naval tradition in Canada by allowing Maritime Command to identify itself as Canada's Navy by wearing a navy blue uniform. The cost of changing military colours is a minor expense to incur in exchange for the strengthened morale that would result by returning Canada's naval force to its navy blue.

Some Hon. Members: Hear, hear!

• • •

NEW EMPLOYMENT EXPANSION AND DEVELOPMENT PROGRAM

ASSURANCE SOUGHT ON USAGE MADE OF PROGRAM

Mr. Neil Young (Beaches): Madam Speaker, when the NEED Program was introduced in October of 1982 it was billed as a program to give Canadians who were exhausting UI

benefits a chance to work for a short period and then to requalify for unemployment insurance. It was nowhere stipulated that, instead of creating more employment, this Program would mean that other workers would lose their jobs so they could be replaced by people on the NEED Program who would be working for much less, often as little as half the original salaries for these jobs.

Recently the Minister of Employment and Immigration (Mr. Axworthy) acknowledged that there had been some slippage on this point and that he would talk to the Minister of National Defence (Mr. Lamontagne) in particular, to insist that employees hired under the NEED Program do not take employment from other workers.

In view of the situation, we, in this Party, would like a categorical assurance from the Government that it will put a stop to the practice of shuffling workers on and off unemployment insurance and calling it job creation.

ORAL QUESTION PERIOD

[*English*]

FINANCE

WILLIAMSBURG SUMMIT—COMMITMENT TO REDUCE DEFICIT—GOVERNMENT POLICY

Miss Pat Carney (Vancouver Centre): Madam Speaker, in the absence of the Prime Minister, the Deputy Prime Minister, and the Minister of Finance—

Mr. Cousineau: Who else do you have on your list?

Miss Carney: —my question is addressed to the Minister of State for Finance. At the Williamsburg Summit, seven nations delivered a joint statement which said in part:

> We must all focus on achieving and maintaining low inflation and reducing interest rates from their present too high levels.
>
> We renew our commitment to reduce structural budget deficits, in particular, by limiting the growth of expenditures.

How can the Minister square that commitment, to reduce budget deficits and limit government expenditures, with the Government's own record of increasing the deficit by a whopping 50 per cent this year, and increasing expenditures by 12 per cent, which is twice the rate of inflation?

Mr. Nielsen: Yes or no.

Hon. Paul J. Cosgrove (Minister of State (Finance)): Madam Speaker, in the absence of the former critic for finance, the Hon. Member for Etobicoke Centre, and in the absence of the former Leader of the Opposition—

Mr. Nielsen: I am here.

Mr. Cosgrove: —and, as matter of fact, in the absence of all the candidates who have any opinions on matters of finance for

Nova Scotia

09-84-0255-09

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Attorney General

Memorandum

From Martin E. Herschorn
Assistant Director (Criminal)

Our File Reference

To The Honourable Harry W. How, Q.C.
Attorney General

Your File Reference

Subject Donald Marshall, Jr.

Date May 31, 1983

The following Memorandum covers three basic areas:

1. References contained in the Decision of the Appeal Division dated May 10, 1983 to the role of the Sydney City Police Department in investigating the death of Sandy Seale.

2. Summaries of Inconsistencies of key witnesses at the 1971 trial and at the 1972 appeal hearing plus a summary of the evidence of James W. MacNeil who gave fresh evidence before the Appeal Division in December of 1982.

3. The question of compensation for Donald Marshall, Jr.

MEH:if

Martin

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1. References Contained in the Decision of the Appeal Division Dated May 10, 1983 To the Role of the Sydney City Police Department In Investigating the Death of Sandy Seale

At page 22 of the Decision, the Court refers to the evidence of Maynard Chant at the original trial who stated that he had been questioned by Sergeant MacIntyre and another police officer for several hours and told them an untrue story because he was scared.

At page 32, the Court refers to the attack by Mr. Marshall's Defence Counsel upon the evidence of Maynard Chant and John Pratico showing that neither of them had reported seeing Donald Marshall, Jr. commit the crime when they were first in contact with the police.

Finally at pages 65-66 of the Decision, the Court refers to the concealment of material facts by Donald Marshall from his lawyers and the police which, if known, might well have permitted the truth of the matter to be uncovered by the police.

Aside from the above, their Lordships refrained from commenting upon or drawing any conclusions as to the role of the Sydney City Police Department in investigating this crime.

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2. Summaries of Inconsistencies in Stories of Key Witnesses At the 1971 Trial and At the 1972 Appeal Hearing Plus A Summary of the Evidence of James W. MacNeil Who Gave Fresh Evidence Before the Appeal Division in December of 1982

MAYNARD VINCENT CHANT -

In 1971, Maynard Chant was 15 years of age and resided in Louisbourg, N.S. Maynard Chant gave a statement to the Sydney City Police on May 30, 1971 in which he indicated that while standing on the tracks in Wentworth Park in Sydney on the evening of May 28, 1971, he saw four individuals conversing on Crescent Street, at which point one fellow hauled a knife from his pocket and stabbed Sandy Seale and Donald Marshall. After the stabbing, Maynard Chant stated that Marshall caught up to him, showed him his arm where he was stabbed and he returned with others to the place where Seale was lying. Maynard Chant stated that he took off his shirt and put it around Sandy Seale's waist and Donald Marshall then went to a house and asked the occupant to summons an ambulance. In his statement, Maynard Chant was not able to identify the two assailants. He described these two men - one about six foot two, light brown hair, dark pants, suit coat - over 200 pounds and the other fellow to be six feet tall - dark pants, dark hair, 165 pounds.

On June 4, 1971 a second statement was taken from Maynard Chant in which he recanted his first statement and stated that he saw Donald Marshall, Jr. stab Sandy Seale. This statement was given at the

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Louisbourg Town Hall allegedly in the presence of the police, Maynard Chant's mother, his Probation Officer, and Wayne MacGee, the present Sheriff of Cape Breton County.

In testifying before the Appeal Division in 1982, Maynard Chant stated that he did not in fact see anyone stab Mr. Seale and did not really know what was happening until he met Donald Marshall, Jr. on Bying Avenue near the park. When approached by the police and observed to have blood on his shirt, he went to the police station and gave the written statement of May 30, 1971 referred to above. Before the Appeal Division, Maynard Chant indicated that the reason for the change between statements of May 30th and June 4th, 1971 was attributed to his being scared and being pressured.

Maynard Chant's story as related in the June 4, 1971 statement, was related at the preliminary inquiry held on July 5, 1971. However, at the trial in November, 1971, Maynard Chant had to be cross-examined under Section 9 of the Canada Evidence Act as a hostile witness. Only by resort to this section was the Crown able to get the June 4th story before the jury.

With respect to Maynard Chant's evidence, the Appeal Division stated at page 49 of its Decision:

> "Mr. Chant has by now changed his story so many times that, in our opinion, no weight can be placed upon his evidence either at the trial or now. To the extent that his testimony cannot be

relied upon to support the position taken by the Appellant, however, it can no longer be of much assistance to the Crown should a new trial on the original charge ever take place."

JOHN L. PRATICO -

In 1971, John Pratico was a 16 year old student who lived near Wentworth Park in Sydney.

At the November, 1971 trial of Donald Marshall, Jr., John Pratico testified he had seen Donald Marshall, Jr. and Sandy Seale up by Saint Joseph's Hall and had walked down towards Wentworth Park with them. He then left their company but observed Marshall and Seale apparently arguing. John Pratico testified that Marshall plunged something into Seale's stomach, at which point Pratico ran up Bentinck Street.

On cross-examination, evidence was adduced that John Pratico had been drinking heavily on the evening of May 28th and that on an occasion outside the court room during the trial, he had indicated that Donald Marshall did not do the stabbing.

John Pratico was not called before the Appeal Division in 1982 to give evidence. Evidence was adduced before the Appeal Division by way of an Affidavit ir which Mr. Pratico indicated that he had not in fact been a witness to the actual killing even though he had said so at trial. Also adduced was an Affidavit from a psychiatrist indicating that Mr. Pratico had been a patient prior to the time of the murder and continues under psychiatric treatment to the present day.

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PATRICIA ANNE HARRISS -

The third witness who placed Donald Marshall, Jr. at the scene of the crime at his 1971 trial was Patricia Harriss, then a 14 year old girl. She testified at the trial that she had seen Donald Marshall, Jr. with one other person in the vicinity of Crescent Street on the evening in question. According to Miss Harriss' evidence, she and a friend met Donald Marshall, Jr. when they left a dance to go for a cigarette down by the bandshell in Wentworth Park.

Before the Appeal Division, Miss Harriss testified that she had actually seen two people with Donald Marshall on Crescent Street rather than only one as she had said during cross-examination at the trial. Neither of these men whom she saw was the deceased, Sandy Seale. The Appeal Division had before it a copy of a statement given to the police on June 17, 1971, at approximately 8:15 p.m. in which she indicated that she saw Donald Marshall with two other men on the night in question.

DONALD MARSHALL, JR. -

At his trial in 1971, Donald Marshall, Jr. testified that while in the Park, he and Sandy Seale were approached by two men. After a brief conversation, the older of these two took out a knife from his pocket and drove it into Sandy Seale's stomach. After this, Donald Marshall, Jr. ran for help and the first person he came into contact with was Maynard Chant.

In giving evidence before the Appeal Division in 1982, Donald Marshall included many additional facts which the Appeal Division concluded Mr. Marshall must have wilfully held back from the Court at

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the time of his trial. Before the Appeal Division, Donald Marshall testified that he and Sandy Seale encountered two men, one approximately 55 and the other approximately 30 years of age in Wentworth Park on the evening in question. After a brief conversation, the two men walked away from Seale and Marshall but subsequently returned. As Donald Marshall went to assist the younger of the two who he believed was drunk and staggering, he observed the older man stab Sandy Seale and then take a swipe at Marshall himself. Before the Appeal Division, Donald Marshall denied that he and Sandy Seale were attempting a robbery of the two older men. However, in a statement dated March 9, 1982 given to the Royal Canadian Mounted Police at Dorchester Penitentiary, Donald Marshall had stated that Sandy Seale and he had agreed to "roll" someone on the evening in question and proceeded to Wentworth Park to look for someone to roll.

In its Decision, the Appeal Division stated:

> "In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.
>
> By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief."

.../6

sympathize but not apologize.

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JAMES W. MacNEIL -

On December 1st and 2nd, 1982, the Appeal Division heard fresh evidence. Of the four witnesses who gave fresh evidence, the Court termed that of James W. MacNeil, the most significant. Mr. MacNeil testified that on the evening of May 28, 1971, he and Roy Ebsary were proceeding through Wentworth Park when they were approached by Sandy Seale and Donald Marshall who attempted to rob them. Accordin to Mr. MacNeil, Sandy Seale asked Roy Ebsary for money and told him to "did man dig". Roy Ebsary replied "I got something for you", took a knife and stabbed Sandy Seale. Following the stabbing, MacNeil and Ebsary returned to Ebsary's home where he observed Roy Ebsary wiping blood off a knife.

James MacNeil testified that following the conviction of Donald Marshall, Jr., he communicated his story to the Sydney City Police and in November of 1971, he took a polygraph test administered by a member of the R.C.M.P. The results of this polygraph examination were inconclusive.

3. Compensation

This Department has not received a request from Donald Marshall or his Counsel for the payment of compensation.

Should a request for compensation be received, it would have to be considered in the light of the comments of the Appeal Division at page 65 of its Decision wherein the Court stated:

> "Any miscarriage of justice is, however, more apparent than real.
>
> In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.
>
> By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief."

and further at page 66:

> "Even at the time of taking the fresh evidence, though he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the Court ordered him to do so. There can be no doubt that Donald Marshall's untruthfulness throughout this whole affair contributed in large measure to his conviction."

Marshall an Indian therefore Federal responsibility.

Marshall case demands inquiry

AG

Parker Barss Donham

It would be hard to imagine a more graceless response than that offered by the province of Nova Scotia to the recent acquittal of Donald Marshall Jr., the 29-year-old Micmac Indian who spent more than a third of his life in prison for a murder authorities now concede he did not commit.

Instead of a prompt offer to pay Marshall's legal bills and to compensate him for 11 years of wrongful imprisonment, we have been treated to unseemly bickering as to which level of government ought to bear responsibility.

In place of a forthright, public investigation of the role played by police and the criminal justice system in the conviction of an innocent teenager, we have only Attorney General Harry How's musings that Marshall was partly the author of his own misfortune.

But the most abhorrent aspect of this official flight from responsibility is the fact that How has been encouraged in his shilly-shallying by the Supreme Court of Nova Scotia.

The court's acquittal of Marshall can best be described as grudging. In a hearing last December, the court heard evidence that both the eyewitnesses whose testimony convicted Marshall had since recanted. Only one of these witnesses actually testified at the December hearing. The other was acknowledged by the Crown to be completely unreliable. He had been treated, before Marshall's trial, for a mental illness that made him prone to fantasizing. Defense lawyers at the time knew nothing of his illness.

The court heard a new witness testify that he and a companion had encountered Marshall and Seale on the night of the murder, and that his companion — not Marshall — had stabbed Seale after Marshall and Seale attempted to rob the pair.

Both the Crown and the defense urged the court to quash Marshall's original conviction and substitute an acquittal.

In the face of all this evidence, the court acknowledged, with seemingly great reluctance, that it would now be "impossible for a jury to avoid having a reasonable doubt as to whether (Marshall) had been proved to have killed Seale."

But the court did not stop there. For reasons of their own, the justices added a series of gratuitous comments that amount to a defense of the legal system's handling of the Marshall case.

"Any injustice," the ruling declared, "is . . . more apparent perjury for which he could still be charged. By lying, he helped secure his own conviction." Had he been more forthcoming, the court concluded, "the truth of the matter might have been uncovered by the police."

These assertions do not square with the facts of the matter, nor do they serve the cause of justice.

What apparently rankles the justices is that Marshall did not own up to the fact that he and Seale were in the process of trying to commit a robbery when Seale was stabbed. In effect, the court is proposing that a 17-year-old Indian boy, in the process of being railroaded for a murder he did not commit by a white society for which he felt nothing but hostility, should have sought to improve his position by admitting to another crime.

Even if the judges are correct in this belief, it is hardly surprising that Marshall did not share their generous view of the system.

To assert that Marshall would have been acquitted had he told the truth about his attempted robbery ignores the fact that the Crown had two eyewitnesses who claimed to have seen him murder Seale — witnesses who now say they were pressured by police into lying.

As for the likelihood that police might have uncovered the truth, the court ought to have remembered that the evidence it found most convincing — that of the new eyewitness — was new only to them. The witness had told the police his story in 1971.

To imply, as the court does, that the 17-year-old Marshall's incomplete rendering of the facts at his original trial was so perfidious as to lift the weight of responsibility from the system that imprisoned him is absurd.

Nevertheless, the effect of the court's comments is to mitigate any claim for damages, to offer Attorney General How an easy out, a way off the hook. How should remember that the public, too, has a sense of justice. It will not let him off the hook so easily.

If How fails to investigate, fully and publicly, the events that led to Marshall's wrongful conviction, he will demean our system of justice. If he fails to compensate Marshall, generously and openheartedly, he will perpetuate the injustice that now lies on the province's collective conscience.

In this matter, justice has been perverted long enough.

(Parker Barss Donham welcomes

The Hants County Music Festival came to a close with

Two new cups which were

A blaze had or

AG26

ACTION REQUEST

Nova Scotia

TO 99 DATE Jan 1

LOCATION

FROM GHe.

RE

☐ APPROVAL	☐ DRAFT REPLY	☐ REPLY PLEASE
☐ SIGNATURE	☐ TRANSLATION	☐ SEE ME PLEASE
☑ COMMENTS	☐ NOTE & FILE	☐ CALL ME PLEASE
☐ INFORMATION	☐ NOTE & FWD	☐ BF - YOUR REQUEST
☐ ATTEND TO	☐ NOTE & RETURN	☐

MESSAGE COMMENTS

Whether you think Donham is in Contempt of Court in his comments on the Court.

FORM 182A
10133/86R/38A

May (?) HANTS JOURNAL March 23, 1983

Nova Scotia

Attorney General

Memorandum

From Gordon S. Gale, Q.C.
Director (Criminal)

Our File Reference 09-84-02520/

To Gordon F. Coles, Q.C.
Deputy Attorney General

Your File Reference

Subject

Date June 9, 1983

I spoke to Chief Justice MacKeigan concerning the Marshall article by Parker Barss Donham in the Hants Journal of May 25th. I advised the Chief Justice that we had reviewed it and at best it could be considered to be boarderline and accordingly, we were not instituting any contempt proceedings. At his request I have sent him a copy of the article.

Chief Justice MacKeigan referred to a broadcast on CBC by Donham which occurred approximately two weeks ago on the Information Morning Program. I heard part of that broadcast and it appeared to be the same as the article. The Chief Justice suggested that the Attorney General might write to the CBC to request a transcript of that broadcast in the hope that so doing might have some salutary effect.

GSG:jd

GG

To GG:

Check with our Communications liaison Man and see if he can obtain a transcript. My recollection is that the station only keeps copy of on file for a week or so to comply with CRTC regs, and if one has to obtain a copy by way of a formal request, a complaint may need to be first filed with the CRTC. GH

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JUNE 1, 1983

MORNING SIDE - CBC

BARBARA FRUM

INTRODUCTION - . . . who was acquitted of murder in Nova Scotia. That may sound ordinary but what sets this case apart is that Donald Marshall spent 11 years of his life in jail for the murder before he was acquitted. In the meantime, no Government has stepped forward to accept responsibility for compensating him. In a moment I will talk about this with Attorney General of Nova Scotia, Harry How, but first let's hear a comment on the situation from Cape Breton Journalist, Parker Dunham.

"The Provincal Government has reacted to Marshall's acquittal in remarkable fashion. No offer to pay his staggering legal bill, no offer of compensation just a sleazy attempt to pass the buck. Attorney General How says Marshall's an Indian and therefore Ottawa's responsibility. So far no move to find out how and why the Sydney Police came to railroad an innocent 17 year old boy, just Harry How's fatuous musing that Marshall was partly the ~~offer~~ author of his own misfortune. Incredibly, How has been encouraged in this shilly shallowing by the Supreme Court of Nova Scotia. The Court's acquittal of Marshall can best be described as grudging. In a hearing last December, the Supreme

Court heard evidence that both the eye witnesses, whose testimony had convicted Marshall, had recanted. Only one of those witnesses actually testified at the new hearing. The other was said to be completely /unreliable. He had been treated before Marshall's trial for a mental illness that made him prone to fantasizing. Defence lawyers at the time knew nothing of this illness. A new witness told the Court that he and a companion had encountered Marshall and Sandy Seale on the night of the Seale boy's murder. The witness said that it was his companion and not Marshall who stabbed Seale after Marshall and Seale attempted to rob the pair. Both the Crown attorney and Marshall's lawyer urged the Court to void Marshall's conviction. The Court did so but with seemingly great reluctance. It said no jury could find Marshall guilty beyond a reasonable doubt in light of the new evidence. But the Court didn't stop there, the Justices added a series of gratuitous comments that amount to a defence of the legal system's handling of the case. Any injustice the ruling declared is more apparent than real. In attempting to defend himself against the charge of murder, Mr. Marshall committed perjury for which he could still be charged. By lying he helped secure his own conviction. Had he been more forthcoming the Court concluded, the truth of the matter might have been uncovered by the police. The judges were wrangled

because Marshall didn't confess that he and Seale were in the midst of a robbery when Seale was stabbed. In effect the Court says a 17 year old Indian boy being railroaded for a crime he did not commit by a white society for which he felt nothing but hostility, should have tried to improve his position by admitting to another crime. It is hardly surprising that Marshall did not share their generous view of the system. The Court says Marshall might have been acquitted had he told the truth about the robbery but the Crown still had two eye witnesses who claimed to have seen him commit the murder. Witnesses who now say that they were pressured by the police into lying. The Court says the police might have uncovered the truth had they known about the robbery but the evidence that the Court found most convincing, that of the new eye witness, was new only to them. The witness had told police his story back in 1971. The Court has offered Harry How an easy way out. It implies that the 17 year old Marshall's imcomplete rendering of the facts at his original trial was so perfidious as to lift the weight of responsibility from the system that imprisoned him. This view doesn't square with the facts nor does it serve the cause of justice. Marshall should be compensated fairly and open heartedly without further delay. The events leading to his wrongful conviction should be investigated fully and publicly, also without delay. Attorney

General How should remember that the public too has a sense of justice, it will not let him off the hook so easily.

MS. FRUM: That was Cape Breton. . . . . some of his comments. We now have in our Halifax Studio Nova Scotia Attorney General.

Q. Mr. How, before we talk about some of the things I'm curious about, uh do you have any comment what Mr. Dunham said?

A. Well Mr. Dunham does a lot of editorializing in his eh in his comments and as a matter of fact I just picked up a copy of the paper in which I saw his column about three or four days ago. What he, he's critical of the Courts, he's critical of me of course but what he does not say is that this man was tried not only once but there was an . . . appeal back in 1972 and then he was given the opportunity to appear before a Court a third time on this. And in the latter case, there were five of our eminent jurists who reviewed every scrap of evidence that was presented to them. And as Mr. Dunham in that respect has correctly stated the Crown did urge upon the Court his acquittal. But the Court did examine all this material and and drew certain conclusions and I think that I am more impressed with the conclusions of five eminent jurists than I am with the conclusions of Mr. Parker Dunham. I am not saying that Mr. Dunham doesn't in some

points have have something credible to say but I say to him and to you that we have to believe in,I hope we have,we believe in the system of justice we have. I know it can err but generally it errs where it's/not more likely to err and I think in most cases only errs where it's not fully informed.

Q. Yes Sir, but do you agree that there was an obvious miscarriage of justice in this case?

A. Well I don't know as yet. I have read the decision of the Court. I don't know whether the injustice was in part or wholly created by the way in which Marshall himself explained his conduct on the night in question.

Q. But the man was acquitted. If he's guilty, shouldn't

A. Well I think. Let's put it this way. Yes he's acquitted fine but that doesn't say when you acquit someone, we're not saying in effect that your innocent.

Q. We're saying that

A. We're saying that the Court could not find sufficient evidence to find him guilty.

Q. Meaning that he spent 11 years in jail for a crime that the Court didn't find him guilty of.

A. Yes, yes that's true.

Q. That sounds like a miscarriage of justice.

A. Well it depends. I mean I can cause my own, I can cause a miscarriage of justice against myself can't I? By the way my demeanor, my words my

Q. Your saying he deserves the 11 years in jail?

A. No no no I'm not saying that. I am simply saying to you and to others and to the world at large that this man had three sessions before our Courts and it was only in the last one that they found on the faces of evidence which was changed that the that the original verdict ought not to stand.

Q. I gather you'll, you don't intend to pay Mr. Marshall any compensation?

A. You don't need to gather that at all. That's not what you can gather if you want to be logical and fair to me. What you can do is to say that we will examine, we will examine what the Court had to say and what our Crown Prosecutor reports to us and that report has already been received and we will certainly and if there's an application made for restitution or some kind of, I'm sorry, consti uh, compensation, then certainly we will take a look at it, an honest look at it, and sincere look at it because I'm not I think my record here in Nova Scotia will indicate to all who know me that I acted as defence counsel all my life and I'm certainly as concerned that justice be done and fairness be done to people as you are or Mr. Dunham.

Q. Yes Mr. How. Given that will you go along with Mr. Aronson, Mr. Marshall's lawyer and Donald Marshall himeself, who have asked for a public inquiry into this case so they can have an explanation as to the process which which lead to the conviction in the first place.

A. Well you have to remember that the that the police force of Sydney were obviously dealing with people who changed their stories not only at the time my dear but since then have changed their stories.If you can, you can understand the that the difficulty that placed them in,the difficult position it placed them in. I don't know what they did, I wasn't there but I can see when when people now come back 11 years later and say we we told a story then which we now recant, then you can understand that they were, that for one reason of another they had great difficulty with this case. I'm not saying they did everything properly but I'm not suggesting for a moment that they did things improperly either.

Q. Yes well how will you deal with these allegations concerning the police force interfering with the witnesses.

A. Sure we will certainly examine that suggestion that that has been made. That didn't come out of the Court, that has been said by others outside of this Court process but but we will certainly look at that and that's my

Q. When Mr. How?

A. We are looking at it now.

Q. I see.

A. We are in the process of analysing all the materials I just mentioned much earlier we have just gotten a report from our Crown Prosecutor who dealt with this case before the Appeal Division over the last few weeks.

Q. There is some concerns too and some questions that have arisen out of this case as to the judicial system in Nova Scotia. Is this going

A. I don't know who's suggesting that there's anything in inordinately wrong with the justice system in Nova Scotia or indeed wrong at all. I don't know who's suggesting, what are they suggesting?

Q. They are referring directly to this case and what they feel is to be a, what has been a miscarriage of justice.

A. Yes dear well you can say it has been a miscarriage of justice. What has happened here is that a Court originally found him guilty and a second Court 11 years later found that there was not sufficient evidence on the basis that two of the witnesses who testified against him at that time now say that he didn't, they didn't see him stab this man as they said 11 years ago. Now the at the same time they said they were very critical of the evidence of Mr. Marshall himself and even

in the way he he testified before them at this hearing when as they put it he had little or nothing to lose by not telling the truth at this time. They accused him of of committing perjury, they accused him of being evasive and they accused him of not being frank with his lawyers and the Court at the time of the trial because if he had been, they say and they have been through this whole thing these five judges, they say if he had done that the truth might well have discovered at that time.

Q. Is there not a difference between a liar and a killer Mr. How?

A. Oh yes and then don't forget my dear that that Mr. Mr. Marshall went to that place with a companion for the expressed purpose of as he put it in his evidence getting some money and the Court said what you mean or what you saying is now that you didn't say at the trial is that you went there to rob somebody. He wouldn't quite admit that but the Court drew the conclusion that when he did say I went there to make some money and asked this companion to help me make the money, how were you going to make it, the Court rightly and I think fairly drew the conclusion they were going to rob somebody.

Q. Can you give us any idea Sir when you intend to make a decision about compensation to Mr. Marshall?

A. I don't know precisely when I'm going to make a decision. I'm not going to make any decision until until an application is made for that purpose.

Q. Thank you for talking to us.

A. OK

Q. I've been speaking to the Attorney General of Nova Scotia, Harry How.

AG 27

DEPARTMENT
OF
ATTORNEY GENERAL
NOVA SCOTIA

P. O. BOX 7
HALIFAX, NOVA SCOTIA
B3J 2L6

Our File No. 09-840257-01

June 9, 1983

The Honourable Chief Justice MacKeigan
Chief Justice - Appeal Division
Supreme Court of Nova Scotia
Halifax, Nova Scotia

Dear Chief Justice MacKeigan:

As requested, in our telephone conversation of June 9th, I am enclosing a photocopy of the article by Mr. Donham which I am advised appeared in the Hants Journal of May 25th.

The article has been reviewed to determine if contempt proceedings should be initiated. If action were to be taken it would fall under that category of contempt termed scandalizing the Court. However, after reviewing a number of cases in this area and in particular the cases of Ouellet, Alexander, Murphy and Edmonton Sun Publishing it is our opinion that the remarks of Mr. Donham in his article are at most boarderline and not of the degree in the aforementioned cases. It is not our intention to launch contempt proceedings unless you and the members of the panel in Marshall have different views.

Yours very truly,

Gordon S. Gale
Director (Criminal)

GSG:jd

SUPREME COURT OF NOVA SCOTIA
CHIEF JUSTICE OF NOVA SCOTIA

July 7, 1983.

Mr. Gordon S. Gale, Q.C.,
Director (Criminal),
Department of the Attorney General,
P.O. Box 7,
Halifax, N.S. B3J 2L6.

Dear Mr. Gale:

Re: SCC00580 Donald Marshall, Jr., v. The Queen

Thank you for your letter of June 9 with copy of the article from the Hants Journal.

We appreciate your having investigated this matter. We agree that it is the duty of the Attorney General to determine whether or not contempt proceedings should be initiated in any case of this sort. In any event, we do not disagree with your conclusion as to this particular article.

I enclose a copy of a rough transcript of a broadcast by Mr. Dunham which was taken by Gail Salsbury. Miss Salsbury would be able to tell you when and where the broadcast took place.

Although I would guess that you may well come to the same conclusion, it occurs to me that it might be worthwhile for you to ask the CBC to supply you with a copy of the actual transcript of this broadcast.

Yours faithfully,

Ian MacKeigan.

IM/RC

Enclosure

This ... not a transcript, ju notes taken while listening to the tape.

COMMENTARY OF PARKER BARSS-DUNHAM RE MARSHALL APPEAL

The provincial government has reacted to Marshall's acquittal in remarkable fashion. No offer to pay his bill, pay...staggering... Attorney-General says that Marshall is an Indian, and therefore Ottawa is responsible. The innocent, 17-year old boy has been railroaded. Harry How's fatuous musings about him being partly author of his misfortune. Encouraged in this shilly-shallying by the Supreme Court of Nova Scotia. The court's acquittal of Marshall can best be described as grudging.

... witness re-..... The other was said to be fairly unreliable. ... before trial made him frame this ... Defence lawyers knew nothing of the illness.

Marshall and Seale on the night of Seale's murder. The witness said it was his companion and not Marshall who stabbed Seale, after Marshall attempted to rob the pair. Both the crown attorney and Marshall's lawyer urged the court to void Marshall's conviction. The court did so, but with seemingly great reluctance. The court said no jury could find him guilty beyond reasonable doubt in light of the new evidence, but the court did not stop there. The justices added a seris of gratuitous comments that amounts to a defence of the justice system's handling of the case: Any injustice is more apparent than real. In attempting to defend himself against the charge of murder, Marshall committed perjury. By lying, he helped secure his own conviction. Had he been more forthcoming, the truth of the matter might have been uncovered by police. The judges were rankled because Marshall did not confess that he and Seale were in the middle of a robbery when Seale was stabbed. In effect, the court said that a 17-year old Indian boy who was being railroaded for a crime he did not commit...for a white Society...hostility...admitted to (should have?) another crime. It is hardly surprising that Marshall did not share their generous view of the system. The court says Marshall might have been acquitted if he had confessed to the robbery.

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Could say police might have discovered the truth of the robbery. The eye witness told police the story back in '71. The court has offered Harry How an easy way out. Implies Marshall's imcomplete rendering so perfidious as to.. (lift?)..the responsibility of the system. This view doesn't square with the facts. Marshall should be compensated, and fairly, without delay. Investigated fully and publicly and also without delay. Attorney General How should remember that the public too has a sense of justice.

FC 79

HOUSE OF ASSEMBLY
NOVA SCOTIA

OFFICE OF THE LEADER
NEW DEMOCRATIC PARTY

P.O. BOX 1617
HALIFAX, NOVA SCOTIA
B3J 2Y3

June 29, 1983

OPEN LETTER

Honourable Harry How
Attorney General
Province of Nova Scotia
Halifax, Nova Scotia

Dear Mr. Attorney General;

I am again writing to express my deep concern about Donald Marshall's situation. On May 10th, 1983 he was acquitted of the murder of Sandy Seale for which he spent eleven years in prison. He had been convicted of that murder on the basis of testimony by three witnesses who have since admitted they lied on the stand during Mr. Marshall's original trial in 1971.

These witnesses claim that they did so because they had been intimidated by the police. It was the unanimous decision of the five Justices of the Nova Scotia Supreme Court of Appeal Division that the verdict of guilt at the original trial was "unreasonable" and "not supported by the evidence".

As a result of this miscarriage of justice, Donald Marshall has spent 11 of his 29 years behind bars. In order to obtain his acquittal, Mr. Marshall had to hire legal counsel and owes some $79,000 in legal fees and costs. The only assistance which he has received to date to help pay this debt has been the maximum contribution of $3,000 under the Legal Aid program.

This raises two issues. First, both he and the public deserve an explanation of the process which led to this conviction. Second, Mr. Marshall deserves compensation for the eleven years which he wrongly spent in prison and assistance in defraying the legal expenses which he was forced to incur in order to secure his acquittal.

.../2

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I am writing, therefore, to urge most strongly that you establish a public inquiry to look into the facts surrounding the wrongful conviction and subsequent imprisonment of Donald Marshall, as well as to recommend compensation to him and his legal counsel.

Thank you for your attention to this matter.

I am,

Yours sincerely,

Alexa McDonough

Alexa McDonough, MLA
Halifax Chebucto
Leader, Nova Scotia NDP/is

AUG 5 1983
C. Fair Election
FC 85

ATTORNEY GENERAL
NOVA SCOTIA

Our File No.

09-82-0236-09

July 15, 1983

Mrs. Alexa McDonough, M.L.A.
Leader of the New Democratic Party
Province of Nova Scotia
Halifax, Nova Scotia

Dear Mrs. McDonough:

I have yours, of June 29th, with respect to Mr. Donald Marshall. I draw your attention of the opinions of the five eminent judges of the Appeal Divison of our Supreme Court in the attached extracts. I am sure you would agree that the views of the Court would have to be given great weight in connection with any consideration of compensation to Mr. Marshall.

I must take issue with you in your interpretation of the decision of that Court that the verdict of guilt on the original trial was "unreasonable" and "not supported by the evidence". I suggest to you that what the Court found was that in view of the complete change of testimony by several witnesses from that given by them in the original trial, it would be unreasonable to expect a re-trial to come forth with a verdict of guilty. The Appeal Divison, I submit, did not say at any point that the verdict in the original trial was not supported by the evidence.

I reiterate what I have said both inside and outside the Legislature that if Mr. Marshall or anyone upon his instructions and on his behalf makes a request for compensation with respect to his incarceration, then such a request will receive my earnest consideration and appropriate recommendation to the Government of the Province.

Thank you for writing.

Yours sincerely,

Harry W. How, Q. C.

Enclosure

Later in the evidence Mr. Marshall was asked about a statement which he had made to the R.C.M.P. officer who was investigating his conviction while he was still in Dorchester on March 9, 1982. Part of this statement reads as follows:

> "I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone. I had done this before myself a few times. I don't know if Sandy ever rolled anyone before. We agreed to roll someone and we started to look for someone to roll."

Later in the same statement the appellant said:

> "I then walked down Crescent Street to Sandy and the two guys. We talked about everything, women, booze, about them being priests, and hinted around about money. The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy. Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying I got something for you and then stabbing Sandy."

There was also evidence before us to the effect that counsel for Marshall at the time of his trial had no knowledge of the prior inconsistent statements given to the police by Chant, Pratico and Harriss.

That then is the totality of the evidence before this Court from which it must be determined whether the conviction of Donald Marshall, Jr., is unreasonable or cannot be supported by the evidence, or whether an injustice has been done.

Although Mr. Marshall now puts forward Mr. MacNeil as his chief witness, their evidence in the main is in conflict. The only material particular on which they agree is that Ebsary stabbed Seale.

Mr. MacNeil's version of the incident has already been set out herein and we would but repeat the following extract from his evidence where he describes the meeting of Ebsary and himself with Marshall and Seale and the subsequent events:

> "Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were -- we were approached by this coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind the back like that, eh, and I remember I kinda like panicked because I -- in a situation like that, you get 'stensa fied' or something like that but I remember the coloured fellow asking Roy Ebsary for money. He said, like, 'Dig, man, dig,' and he said 'I got something for you,' and then he -- I just heard the coloured fellow screaming and everything was so you know, like 'tensafied' and every darn thing and I seen him running and flopping...."

Mr. Marshall on the other hand testified before us that he passed four people in the park, two of whom he knows now were Ebsary and MacNeil; that later when Seale and himself were in the park someone called to them from Crescent Street asking for a cigarette and a light, that at about the same time Patricia Harriss and Terry Gushue asked for a light; that Seale responded to the first request and that he went to Miss Harriss and Gushue with whom he talked for approximately five minutes; that he then went to where Seale was talking to

two men whom he knows now were Ebsary and MacNeil; that they introduced themselves; that Ebsary and MacNeil inquired about bootleggers in the area; that Ebsary invited them to his house for a drink; that they declined; that Ebsary and MacNeil then left; that when Ebsary and MacNeil had nearly reached the intersection of Crescent and Bentinck Streets they were called back: that he doesn't know why they were called back; that MacNeil had his head down "looked like he was ready to pass out or he was too drunk or something...."; that MacNeil slipped off the curb and he grabbed him to keep him from falling; that at this time Ebsary stabbed Seale. Mr. Marshall categorically denies jumping Mr. MacNeil from behind and putting his arm behind his back. He is obviously not prepared to admit at this stage that he was engaged in a robbery.

How two people could describe the same incident in such a conflicting manner has caused us great concern and casts doubt on the credibility of both men. However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James MacNeil's story - namely, that Seale was <u>not</u> killed by Marshall but died at the hands of Roy Ebsary in the course of a struggle during the attempted robbery of Ebsary and MacNeil by Marshall and Seale. In our opinion, Marshall's evidence, old and new, if it stood alone, would hardly be capable of belief.

MacNeil's evidence although unfortunately not

adequately tested by rigorous cross-examination by Crown counsel, is clearly evidence that is capable of being believed. Even though the various members of this Court may have varying degrees of belief as to some aspects of that evidence, we have no doubt that in the light of all the evidence now before this Court no reasonable jury could, on that evidence, find Donald Marshall, Jr., guilty of the murder of Sandy Seale. That evidence, even if much is not believed makes it impossible for a jury to avoid having a reasonable doubt as to whether the appellant had been proved to have killed Seale.

Putting it another way, the new evidence "causes us to doubt the correctness of the judgment at the trial." - Reference Re Regina v. Truscott (1967) 1 C.R.N.S. 1 (S.C.C.)

We must accordingly conclude that the verdict of guilt is not now supported by the evidence and is unreasonable and must order the conviction quashed. In such a case a new trial should ordinarily be required under s.613(2)(b) of the Criminal Code. Here, however, no purpose would be served in so doing. The evidence now available, with the denials by Pratico and Chant that they saw anything, could not support a conviction of Marshall. Accordingly we must take the alternative course directed by s.613(2)(a) and direct that a judgment of acquittal be entered in favour of the appellant.

This course accords with the following submission of counsel for the Crown as set forth in his factum:

"It is respectfully submitted that the appeal should be allowed, that the conviction should be quashed, and a direction made that a verdict of acquittal be entered.

"It is also submitted that the basis of the above disposition should be that, in light of the evidence now available, the conviction of the Appellant cannot be supported by the evidence."

Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside. Any miscarriage of justice is, however, more apparent than real.

In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.

By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief.

By planning a robbery with the aid of Mr. Seale he triggered a series of events which unfortunately ended in the death of Mr. Seale.

By hiding the facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defence available to him, namely, that during a robbery Seale was stabbed by one of the intended victims. He now says that he knew approximately where the man lived who stabbed Seale and had a pretty good description of him. With this

information the truth of the matter might well have been uncovered by the police.

Even at the time of taking the fresh evidence, although he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the Court ordered him to do so. There can be no doubt but that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction.

We accordingly allow the appeal, quash the conviction and direct that a verdict of acquittal be entered.

C.J.N.S.

J.A.

J.A.

J.A.

J.A.

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1615A

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

Our File No.
09 84-0255-09

FROM: Martin E. Herschorn
Assistant Director (Criminal)

TO: The Honourable Harry W. How, Q.C
Attorney General

Re: Donald Marshall, Jr.

This Memorandum focuses on three issues which arise following the rendering of the Appeal Division's decision on May 10, 1983 in the matter of the reference respecting Donald Marshall, Jr. These issues are:

1. Whether criminal charges are warranted against Maynard Chant, John Pratico, Patricia Harriss or Donald Marshall, Jr.

2. Whether a public inquiry ought to examine the role of the Sydney City Police in investigating the death of Sandy Seale and the role of the Prosecuting Officer, Donald C. MacNeil, in prosecuting the charge of murder brought against Donald Marshall, Jr.

3. The question of compensation for Donald Marshall, Jr.

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1. Whether criminal charges are warranted against Maynard Chant, John Pratico, Patricia Harriss or Donald Marshall, Jr.

The relevant provisions of the Criminal Code are Section 120 and Section 124 which provides as follows:

Perjury - Section 120

"Everyone commits perjury who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false."

.../2

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Witness Giving Contradictory Evidence - Section 124(1)

> "Everyone who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and is liable to imprisonment for fourteen years, whether or not the prior or the later evidence or either is true, but no person shall be convicted under this section unless the court, judge or magistrate, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead."

The three key Crown witnesses at the 1971 trial of Donald Marshall, Jr. were Maynard Vincent Chant, then aged 15, John Louis Pratico, aged 16 and Patricia Harriss, 14 years of age.

MAYNARD CHANT - At Donald Marshall's trial in November of 1971, Maynard Chant gave evidence that he saw Marshall stab Sandy Seale. This evidence was consistent with a second statement taken from Chant by the Sydney City Police at the Louisburg Town Hall on June 4, 1971. On May 30, 1971, Maynard Chant gave an initial statement to the police in which he did not say that Donald Marshall stabbed Sandy Seale but related the events as had been told to him by Donald Marshall. At the November, 1971 trial, the testimony of Chant which implicated Marshall in the stabbing was only adduced after the Crown resorted to Section 9 of the Canada Evidence Act and had Maynard Chant declared a hostile witness.

In testifying before the Appeal Division in 1982, Maynard Chant stated that he did not in fact see anyone stab Sandy Seale and did not really know what was happening until he met Donald Marshall near the Park after the stabbing. Chant indicated that since the trial in 1971, he had become a born again Christian and was now telling the truth.

JOHN PRATICO - This witness testified at the November, 1971 trial of Donald Marshall that he had observed Marshall plunge something into Sandy Seale's stomach. On cross-examination, evidence was adduced that Pratico had been drinking heavily on the evening in question and that on an occasion outside the court room during the trial, he had indicated that Donald Marshall did not do the stabbing.

.../3

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John Pratico was not called before the Appeal Division in 1982 to give evidence. An Affidavit was tendered to the Court in which Pratico indicated that he had not in fact been a witness at the actual killing even though he had said so at trial. A second Affidavit before the Appeal Division from a psychiatrist indicated that Pratico had been a patient prior to the time of the murder and continues under psychiatric treatment to the present day.

PATRICIA HARRISS - In 1971, Patricia Harriss testified that she observed Marshall and one other in the vicinity of Crescent Street on the evening in question. In 1982, before the Appeal Division, Miss Harriss testified that she actually seen two people with Donald Marshall on Crescent Street rather than only one as she had stated during cross-examination at trial. Neither of these two men whom she saw was the deceased, Sandy Seale.

During the course of the police investigation in 1971, Miss Harriss had been taken to the police station at approximately 8:00 p.m. on June 17, 1971 and at approximately 8:15 p.m., gave a statement to the police indicating that she saw two other men with Donald Marshall on the night in question. That statement was discontinued and never signed. The questioning then continued until 1:20 a.m. on June 18th at which time Miss Harriss gave a statement indicating that she saw only one other person with Marshall at the crucial time and that person was Sandy Seale. Miss Harriss was not accompanied by an adult during this interrogation. As you will note, her subsequent trial testimony reiterated this latter version although at trial she did not same Sandy Seale as the one other person with Marshall.

To summarize, in 1971 the three above-noted witnesses ranged in age from 14 to 16 years. While each of these witnesses has admitted to lying at the trial in 1971, there is evidence which suggests that both Maynard Chant and Patricia Harriss gave versions of the events of May 28/29 which they believed the police wanted to hear. The existence of the inconsistent statements given to the police by Chant and Harriss was not made known to Defence Counsel. These would have been available to the Crown.

Frank Edwards, in a Memorandum to me dated May 16, 1983, a copy of which is attached, suggests at page 5:

> "In these circumstances, with respect to both Chant and Harriss, it is the opinion of the undersigned that neither had the criminal intent necessary to support a conviction for perjury. In other words, they probably did not have the 'intent to mislead' because they believed they were telling the court what the police were convinced was the correct version."

.../4

In such circumstances, it may not be in the overall interest of the administration of justice to charge either Patricia Harriss or Maynard Chant with perjury contrary to Section 120 of the Criminal Code or with giving contradictory evidence contrary to Section 124. In view of John Pratico's degree of mental illness, charges would not appear to be warranted against his situation either.

DONALD MARSHALL, JR. - At page 63 of the Appeal Division's decision, the court stated:

> "However, the fact remains that Marshall's new evidence, despite his evasions, prevarications and outright lies, supports the essence of James MacNeil's story - namely, that Seale was not killed by Marshall but died at the hands of Roy Ebsary in the course of a struggle during the attempted robbery of Ebsary and MacNeil by Marshall and Seale. In our opinion, Marshall's evidence, old and new, if it stood alone, would hardly be capable of belief."

At page 65 of the decision, the Court stated:

> "Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside. Any miscarriage of justice is, however, more apparent than real.
>
> In attempting to defend himself against the charge of murder, Mr. Marshall admittedly committed perjury for which he still could be charged.
>
> By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version which was so far-fetched as to be incapable of belief."

I refer you again to Frank Edwards' Memorandum of May 16, 1983, in which at pages 1 through 3, Mr. Edwards deals with the question of whether Marshall committed perjury in 1971 and in 1982. I concur with Mr. Edwards' assessment that in 1971, Marshall's omission of facts left the Court with an incorrect impression of a casual meeting between he, Seale, Ebsary and MacNeil and not an attempted robbery by Seale and Marshall of MacNeil and

.../5

Ebsary on May 28, 1971, and thus constituted perjury.

Mr. Marshall repeated the same type of perjury in his evidence before the Appeal Division in 1982. However, in considering the question of laying criminal charges against Marshall, an obvious factor which must be considered is the 11 years of imprisonment served by Marshall following his conviction in 1971. This factor is also relevant to the question of whether a charge of attempted robbery should now be laid against Donald Marshall. The ultimate question to be resolved is whether the administration of justice would be brought into disrepute by the Crown failing to initiate criminal charges against Donald Marshall. In this regard, you will note Frank Edwards' view as expressed at page 3 of his Memorandum of May 16th that Mr. Marshall not be charged with either perjury or attempted robbery.

2. Whether a public inquiry ought to examine the role of the Sydney City Police in investigating the death of Sandy Seale and the role of the Prosecuting Officer, Donald C. MacNeil, in prosecuting the charge of murder brought against Donald Marshall, Jr.

In considering whether a public inquiry ought to be held, the following factors are relevant for consideration:

1. The basic difficulty of conducting an effective inquiry into a matter which occurred over 12 years ago. Compounding this is the fact that Donald C. MacNeil is now deceased. Whether a full inquiry into this situation is possible, absent Mr. MacNeil testimony is open to some question.

2. The Appeal Division in its decision of May 10, 1983, made no direct reference nor did it criticize the role of the Sydney City Police Department in this affair.

3. To assist us in assessing this issue, the Royal Canadian Mounted Police were requested to comment upon the manner in which this investigation was conducted by the Sydney City Police. I enclose a report dated June 24, 1983 addressed to Gordon Gale from Superintendent

D.F. Christen which contains some very candid and critical comments on the manner in which this case was handled both by the police and the Crown Prosecutor.

4. Whether it is desirable to "clear the air" in view of the questions raised by certain members of the public and the media as to the role of the police in this matter.

3. The question of compensation for Donald Marshall, Jr.

This Department has not received a request from Donald Marshall or his Counsel for the payment of compensation.

Should a request for compensation be received, it would have to be considered in the light of the comments of the Appeal Division at page 65 of its decision wherein the Court stated:

> "Any miscarriage of justice is, however, more apparent than real.
>
> In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.
>
> By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief."

and further at page 66:

> "Even at the time of taking the fresh evidence, though he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the Court ordered him to do so. There can be no doubt that Donald Marshall's untruthfullness throughout this whole affair contributed in large measure to his conviction."

MEH:if
Encls.
c.c. Gordon F. Coles, Q.C.
Gordon S. Gale, Q.C.
July 7, 1983

M.E.H.

AG 64

July 8/83

Gordon Dale, Martin Hewson & I met today regarding Marshall.

Decided not to press any charges against Marshall or the other witnesses & will hold action re the Sydney Police force until we know the outcome of the civil action Marshall has brought against them.

Re the question of compensation will leave it to see if he applies. Or someone on his behalf applies to us. H

FC 107

MEMO RE: DONALD MARSHALL, JR.

Since the charging of Roy Newman Ebsary with the murder of Sandy Seale, Donald has had to attend Court in Sydney on three separate occasions. The first occasion was on August 4, 1983 when he gave evidence at the Preliminary Hearing. He also appeared on September 15 for Mr. Ebsary's first trial and again on November 4 for the second one. At no time has the Crown made any arrangements for Donald's transportation to and from Sydney. To the best of my knowledge, he has not been paid any conduct money whatsoever. It is almost as if the Crown did not want him to appear. This attitude prevailed throughout the three hearings and culminated on November 4 when there was in my opinion a definite attempt to assassin Mr. Marshall's character or at least paint him in such a bad light that sympathy could be drawn to the accused. At the Preliminary Hearing, Frank Edwards asked Donald about his testimony in the reference hearing pointing out that he and Seale were there to rob Ebsary and MacNeil. This same evidence was brought out at the first trial through cross-examination by the defence on Donald's statement given to Staff Sergeant Wheaten and Corporal Carrol in March of 1982. At Ebsary's second trial, the Crown close to the conclusion of its case asked that the jury be excluded and the Crown be allowed to cross-examine Donald on his March, 1982 statement. The defence objected to this indicating that there were no inconsistencies in Donald's testimony but Mr. Justice Rogers ruled that the Crown would be allowed to cross-examine on the statement.

Mr. Edwards dealt with three small portions of the three page statement. In all these references the thrust was that Marshall and Seale were there to rob, that they had called back Ebsary and MacNeil with the purpose of robbing them and that Donald had done this several times in the past although Seale had not. This evidence went to the jury.

The Crown in Ebsary's first trial called five witnesses and they were Donald Marshall, Dr. Naqui, James MacNeil, Leo Mroz and Donna Ebsary. The Crown did not attempt to introduce Mr. Ebsary's confession given to Staff Sergeant Wheaten and Corporal Carrol. The obvious inferences that the case was being down played certainly not all the witnesses that could shed some light on the occurences of that evening were called.

On the November 4th trial, the Crown intended to call three additional witnesses they being Staff Sergeant Wheaten, Corporal Carrol and Chief John MacIntyre. This is the first time that Chief MacIntyre will have given evidence in any of the proceedings against Donald Marshall except for the original Preliminary Hearing in 1971. MacIntyre's testimony concerns the introduction of a statement given to him by Roy Ebsary in 1971. It is interesting to note that throughout the proceedings John MacIntyre and Oscar Seale had been very close and infact John MacIntyre once urged Seale to lay a complaint against Edwards with the Bar Society for not prosecuting Donald for the offences of perjury and attempted robbery. Seale however does not know that MacIntyre interviewed Ebsary in 1971. He has been led to

FC 107

believe throughout that Ebsary was never considered. Hopefully this is the straw that will break Seale's back and allow him to stop viewing Donald as his son's murderer.

The Crown in both trials has not called Corporal Evers the hairs and fibers expert to relate the cuts on Donald's jacket and the hairs and fibers found on Ebsary's knife nor has there been any attempt to try and relate the knife to Roy Ebsary. This evidence is available through the office of the Prothonotary where all the exhibits have been stored since the reference hearing.

Staff Sergeant Wheaten was a witness who would give very fairable evidence on behalf of Donald has never been called as a witness in either trial. He was listed on the indictment for trial however through an agreement with defence counsel, his evidence was not required on the voir dire to introduce the tape recorded conversation between Wheaten, Carrol and Ebsary wherein Ebsary admitted to stabbing Seale and saying that he had made a resolve to himself that the next person who tried to roll him would be stopped dead in their tracks.

Wheaten is an experienced and very competent police officer who apparently has written a report to the R.C.M.P. which has been forwarded to the Attorney General with his recommendations regarding the laying of charges and seven to eight major procedural irregularities in the questioning of witnesses and the taking of statements. It appears that his recommendation was to the effect that there be a police inquiry into the investigations surrounding the trial of Donald Marshall.

FC 107

At no time during any of the proceedings in which Edwards has been involved has he interviewed Donald. This morning was the longest conversation that Edwards had with Marshall and it took place in his office where Donald was asked to point out on a plan drawing of Wentworth Park where the stabbing had occurred. There was no discussion whatsoever concerning the events themselves nor was Donald advised that he would be cross-examined by the Crown on a Section 92 Canada Evidence Act application. Once Donald left the room, I was advised by Edwards that he would take this approach. Edwards stated to me that he feared that Donald would "bolt if he knew that the Crown intended to make this application." I advised Donald of this prior to his testifying.

Edwards in conversation at the noon break in his office would not indicate what his recommendation had been to the Attorney General regarding the laying of charges against witnesses who had perjuried themselves or the police commission investigation into the conduct surrounding the initial trial. He also denied that he had been under any direction whatsoever from the Attorney General regarding how to prosecute this case. Edwards justified his use of Section 92 by saying that it was more favourable to Donald that he bring it out then have the defence make the application. This whole application would not have been necessary had he spoken with Donald concerning his testimony prior to going into Court.

Chief John MacIntyre is to retire in May of 1984 he apparently has quite a few business interests and owns part of a car dealership together with a city block full of warehouses.

Apparently the men on his force do not like him as his system of promotion is not based on merit but on favors done to him. He apparently used to have inmates released from the County jail to do work on his various properties. He is also known by his men as being a racist and particularly so towards indians and blacks. Throughout the 12 years he has maintained a relationship with Oscar Seale and has fed Seale with misinformations about his son's murderer. He has attempted to have a complaint laid against Frank Edwards by Seale with the Barrister's Society and has in fact had him lay a complaint with the Attorney General regarding the conduct of the Crown in not vigerously opposing the reference hearing. The original investigation into Seale's murder was to be conducted by another investigator however MacIntyre and Urquhart took the case away from this investigator and did all the interviewing of witnesses themselves. There is a rumor that John MacIntyre was the one who drove Pratico to the Nova Scotia Hospital just prior to the trial and then picked him up shortly before the trial and returned him to Sydney where he was housed with Manard Chant another Crown witness.

The Crown has cross examined Donald under Section 92 and with consent of the defence, the statement itself was not left with the jury as an exhibit.

120 Beech St., #101
Ottawa,
K1S 3K2

July 17, 1983

FC 88

Felix A. Cacchione
5194 Blowers St.,
Halifax, N.S.
B3J 1G9

Dear Felix

I enclose an undated letter from a Mr. Morley in Vancouver for your information. This morning I called the New Zealand High Commission to obtain a copy of the Royal Commission Inquiry as it may be of some value. If the N.Z. H.C. doesn't have it, it may be a while getting it, but I'll let you know the result.

Hope you are getting busy and that the practice is warming up. Work here is quite busy and there will be a doubling of our staff by the end of the fall (from 4 to 8 people). The isolation of our departments from each other is a well-known fact – everyone is working for power – empire building.

John and Viv are doing well in their new home, although John is starting to look for other employment potential within government.

I'll give you a call at the end of July as I'll be coming home to help with the move. Kindest regards to you and Barbara.

FC 88

704-2075 Comox St:
Vancouver.
B.C. V6G 1S2.

Mr Stephen Aronson.
Lawyer.
Halifax. N.S.

Dear Mr Aronson,

Having followed your case on behalf of Mr Marshall, with interest, I find his remark reported in todays Globe & Mail = 'This man is more than my lawyer,he's my friend' worthy of the respect he should have for you. However, this remark was followed by a question = 'How do you feel about Mr Aronson's unpaid $79.000 legal bill' Marshalls reply was ' Thats his problem'.

Obviously - at least I trust so - you will be going after your own compensation as well as that for Mr Marshall, and I thought that you may like to follow up on precedents created in the following case some 24 months ago in New Zealand -

Initial case = The Crewe Murders.
Three trials. Accused = Arthur Allan Thomas.
Sentenced to approx: 30 years.
(Thomas was a farm laborer with frugal education).

After sentencing, lawyers, private forensic personnel, the sub-editor of the Auckland Star and other interested parties, made very frequent demands to the Justice department , police depts: saying that all the evidence had been rigged by the police and the forensic interests 'proved' that the police had erred in toto.

Thomas was finally pardoned after about 14 years. It did not take long for the government to arrange a very substantial compensation package, that took into account the lawyers fees etc etc - I think

FC 88

Page two: Mr Aronson.

this precedent created the basis for compensation of dimensions not heretofore considered in commonwealth criminal law - recall that Thomas was an 'artesan laborer'.

I feel sure that this aspect should be of interest to you provided you have not seen it - should you wish to follow it further, I suggest you may contact the following -

Auckland Law Society.
Auckland.
New Zealand.

The Government Printer.
Wellington.
New Zealand.
(Royal Commission Arthur Allan Thomas).

I really look forward to learning how you come out of this -

With best wishes,

Cordially,

Lvor Mosley.

FC 83

July 14, 1983

Mr. Lvor Mosley
704-2075 Comox Street
Vancouver, British Columbia
V6G 1S2

Dear Sir:

I am writing to you as a result of a letter which you directed to Mr. Stephen Aronson regarding compensation for Donald Marshall, Junior. Mr. Aronson is no longer representing Mr. Marshall and I have assumed the conduct of Mr. Marshall's case.

In your letter to Mr. Aronson you refer to the Crewe case where compensation was paid to the person or persons who were wrongly convicted of murder.

Would it be possible to obtain from you the exact citation for that case or in the alternative an indication of where you found this case?

As you are no doubt aware, very little has been written or reported regarding compensation for persons wrongly convicted of criminal offences and any leads in this area are greatly appreciated.

Thanking you in advance for your cooperation. I remain.

Yours truly,

Felix A. Cacchione

FAC/oh

Ivor Mosley
Ste. 704 - 2075 Comox St.
Vancouver, B. C.
V6G 1S2

FC 87

Felix A Cacchione Esq.
5194 Blowers Street,
HALIFAX
N S. B3J 1J4.

July 19 1983.

Dear Mr Cacchione,

It is pleasing to hear that you have at last received the data concerning the Crewe case.

This case was of double murder caliber and, obviously involved the deaths of Mr & Mrs Harvey Crewe who were farmers in a small place called Pukekohe in New Zealand. The murders took place about 1967. Arthur Allan Thomas was tried and convicted. Subsequently another trial was held and was again incarcerated.

After much innocence pleading, support from the vice-editor of the Auckland Star and a forensic/ballistic professional - and, I believe about twelve or fourteen years later, Arthur Allan Thomas was pardoned. He received well over one million dollars from the New Zealand state coffers - others who were peripherally connected also received some minor form of costs etc. The police were severely taken to task over very serious errors of the case. The release happened in 1979, compensation in 1980.

I realise that you require the court transcripts for your pleadings, and, suggest that you contact the secretary of the Auckland Law Society - this matter was in the jurisdicti of the Auckland Supreme Court - asking for speedy access to records - frankly, I feel that you would do well to have some eyeball to eyeball contact with the very exceptional lawyer who handled this case throughout. Not only was he successful as far as the outcome, but his in-fighting tactic and assessments were played well - he did his stuff with the privy council London too.

Although my dates are not accurate, I am of the opinion tha the case has some serious relevancy for you and your client

Should you obtain a copy of the transcripts I would very much like to read them.

Good luck, cordially,

Ivor Mosley.

SA 16

1983

S.N. No. 02790

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

DONALD MARSHALL, JUNIOR

PLAINTIFF

- and -

(T.S.)

THE CITY OF SYDNEY, a body corporate; and John L. MacIntyre and William Urquhart;

DEFENDANT

O R D E R

IT IS HEREBY ORDERED that the Originating Notice (Action) dated 19th January, A.D., 1983, be renewed for the period of six months from JULY 22, 1983 by order of HIS HONOUR MURRAY J. RYAN, LOCAL JUDGE OF THE SUPREME COURT OF NOVA SCOTIA.

DATED AT Sydney, Nova Scotia, this 22nd day of July, 1983.

PROTHONOTARY

SUPREME COURT OF N.S. JUL 22 1983 CAPE BRETON

IN THE SUPREME COURT
TRIAL DIVISION
I hereby certify that the foregoing is a true copy of the original order on file herein.
Dated the 22nd day of July 1983
at Sydney, Nova Scotia
Prothonotary

Nova Scotia

Attorney General

AG 142

Memorandum

From Martin E. Herschorn
Assistant Director (Criminal)

Our File Reference 09-84-02570

To Harry W. How, Q.C.
Attorney General

Your File Reference

Subject Donald Marshall, Jr.

Date August 4, 1983

At the time of our last discussions concerning Mr. Marshall, and in particular in discussing the question of whether an inquiry ought to be called into the role of the Sydney City Police Department and the Crown Prosecutor, the late Donald C. MacNeil in the matter, questions were raised as to the status of a civil action initiated by Mr. Marshall against the City of Sydney, Chief MacIntyre, and Inspector Urquhart.

I enclose for your information a copy of the Originating Notice (Action) in this proceeding which was recently renewed for a further period of six months. Reference to the Statement of Claim indicates that the allegations contained therein against Chief MacIntyre and Inspector Urquhart bear directly upon matters that a public inquiry would examine. You will recall our concern that a public inquiry ought not to serve as a forum for the assembling of evidence for any civil suit initiated by Mr. Marshall.

In my absence on vacation for the past three weeks, I am uncertain whether you have made any public comment concerning this matter. Perhaps we could discuss the situation at your convenience.

MEH/ltm
Encl.

Martin

cc: Gordon F. Coles, Q.C.

RENEWED FOR THE PERIOD O[F] SIX MONTHS JULY 22, 1983
BY ORDER OF HIS HONOUR M[U]RAY J. RYAN, LOCAL JUDGE OF THE
SUPREME COURT OF NOVA SCOTIA.
DATED AT SYDNEY, N.S. THIS 22ND DAY OF JULY, 1983.

PROTHONOTARY

AG 242

9.04A

ORIGINATING NOTICE (ACTION)

19 83 S.N. No. C 2796

IN THE SUPREME COURT OF NOVA SCOTIA,
TRIAL DIVISION

Between DONALD MARSHALL, JUNIOR; PLAINTIFF

-and-

THE CITY OF SYDNEY, a body corporate; and John L. MacIntyre and William Urquhart; DEFENDANT

TO THE DEFENDANT:

TAKE NOTICE that this proceeding has been brought by the Plaintiff against you, the Defendant, in respect of the claim set out in the statement of claim annexed to this notice.

AND TAKE NOTICE that the Plaintiff may enter judgment against you on the claim, without further notice to you, unless within TEN days after the service of this originating notice upon you, excluding the day of service, you or your solicitor cause your defence to be delivered by mail or personal delivery to,

(a) the office of the Prothonotary, , at

The Court House, Sydney, , Nova Scotia, and

(b) to the address given below for service of documents on the Plaintiff;

provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the statement of claim and the sum of $ (or such sum as may be allowed on taxation) for costs to the Plaintiff or his solicitor within six days from the service of this notice on you, then this proceeding will be stayed.

ISSUED the day of January A.D. 19 83.

Solicitor for the Plaintiff - Stephen J. Aronson, Esq.
whose address for service is: 277 Pleasant St., #305
Dartmouth, N.S. B2Y 4B7

TO: City of Sydney
c/o Michael G. Whalley, Esq.
Post Office Box 730
Sydney, N.S. B1P 6H7

AND TO: John L. MacIntyre and William Urquhart
c/o Sydney City Police

AG 242

1983 S.H. No.

IN THE SUPREME COURT OF NOVA SCOTIA,
TRIAL DIVISION

BETWEEN:

DONALD MARSHALL, JUNIOR;

Plaintiff

- and -

THE CITY OF SYDNEY, a body corporate, and John L. MacIntyre and William Urquhart;

Defendants

STATEMENT OF CLAIM

1. The Plaintiff, Donald Marshall, Junior, resides in Halifax, in the County of Halifax and Province of Nova Scotia.

2. The Defendant, City of Sydney, is a body corporate, incorporated by an Act to Incorporate City of Sydney, S.N.S. 1903, c. 174, as amended, and is located in the County of Cape Breton, in the Province of Nova Scotia.

3. The Defendants, John F. MacIntyre and William Urquhart are employees of the Defendant City, and reside in the City of Sydney.

4. On or about the month of June, 1971, the Plaintiff was investigated and subsequently charged with the murder of one Sanford Seale, by the Sydney City Police Department.

5. The Defendants, John MacIntyre and William Urquhart, were employed by the Defendant City as police officers and at all material times hereto were involved in the above-mentioned investigation of the Plaintiff.

6. As a result of the investigation and prosecution by the Defendants, the Plaintiff suffered damages, caused solely by the negligence of the Defendants, MacIntyre and Urquhart, for which the Defendant, City of Sydney, is vicariously liable, particulars of which are as follows:

(a) The Defendants were negligent in that they

failed to fully investigate the facts surrounding the events of the evening of May 28, 1971, and in particular the version of events related to them by the Plaintiff.

(b) The Defendants gave false and misleading information to Maynard Chant, a witness for the Crown at the trial of the Plaintiff in November, 1971, to the effect that the former had been seen in the vicinity of the murder by the Crown witness, John Pratico.

(c) The Defendants exerted pressure on Mr. Chant to state falsely that he had witnessed the Plaintiff stab the deceased.

(d) The Defendants coerced John Pratico, a witness for the Crown at the trial of the Plaintiff in November, 1971, through threat of imprisonment to state falsely that he had witnessed the Plaintiff stab the deceased.

(e) The Defendants pressured Patricia Harriss, a witness for the Crown at the trial of the Plaintiff in November, 1971, by means of lengthy and persistent interrogation on the eve of June 17, 1971, to contradict her initial statement and falsely testify to a version of events as suggested to her by the said Defendants.

(f) Such other negligence as may appear.

7. By the actions referred to in Paragraph 6 herein, the Defendants were negligent in their duties and were instrumental in the fabrication of false and misleading evidence which proved detrimental to the Plaintiff and the Plaintiff's Defence.

8. As a result of the testimony of the Crown witnesses, in particular, that of the aforementioned Chant, Pratico and Harriss, the Plaintiff was convicted of the murder of Sanford Seale on November 5, 1971, and sentenced to a term of life imprisonment.

9. That the tortious actions committed by the Defendants were not made known to the Plaintiff until the Spring of 1982

upon the completion of an investigation conducted by the R.C.M. Police under the direction of S/Sgt. Wheaton.

10. The Plaintiff therefore claims as relief:

(i) damages for false imprisonment, abuse of process, defamation, negligence and malicious prosecution perpetrated upon the Plaintiff by the actions of the Defendants;

(ii) costs of this action;

(iii) such further and other relief as the Court might deem appropriate.

PLACE OF TRIAL: Sydney, Nova Scotia

DATED at Dartmouth, in the County of Halifax and Province of Nova Scotia, this .. day of January, A.D. 1983.

STEPHEN J. ARONSON
Aronson, MacDonald
277 Pleasant St., Suite 305
Dartmouth, N.S. B2Y 4B7

TO: City of Sydney
c/o Michael G. Whalley, Esq.
Post Office Box 730
Sydney, N.S. B1P 6H7

AND TO: John L. MacIntyre and
William Urquhart
c/o Sydney City Police
Sydney, Nova Scotia

1983 S.H. No.

IN THE SUPREME COURT OF NOVA SCOTIA,
TRIAL DIVISION

BETWEEN:

DONALD MARSHALL, JUNIOR;

Plaintiff

- and -

THE CITY OF SYDNEY, a body corporate; and John L. MacIntyre and William Urquhart;

Defendants

STATEMENT OF CLAIM

Stephen J. Aronson, Esq.
Aronson, MacDonald
Barristers and Solicitors
277 Pleasant St., Suite 305
Dartmouth, N.S. B2Y 4B7

FE 75

CROWN PROSECUTOR'S OFFICE
CAPE BRETON COUNTY
SYDNEY, N.S.

77 Kings Road
Sydney, Nova Scotia
B1S 1A2
August 8, 1983

Mr. Justice Lorne Clarke
44 Longworth Avenue
Truro, Nova Scotia
B2N 3E8

Dear Mr. Justice Clarke:

RE: Roy Newman EBSARY

Enclosed herewith, please find a Summary For The Trial Judge in the above matter.

Mr. Ebsary was originally charged with second degree murder but was committed for trial on the reduced charge of manslaughter at his Preliminary Inquiry held August 4, 1983. The Crown is now considering whether or not to proceed with the reduced charge or to prefer a murder indictment. A final decision will be made prior to the pre-trials scheduled for August 23 and 24.

By way of a copy of this letter, I am suggesting to Mr. Wintermans that he arrange a specific time for a pre-trial with Miss Bezanson.

Because the Preliminary just concluded on August 4 and I now begin two weeks holidays, I have not prepared a brief of law. Of course, the same will be forthcoming at a reasonable time before September 6.

I trust this is satisfactory for the time being.

Very truly yours,

F.C. Edwards
CROWN PROSECUTOR

FCE:ami
Enc.

c.c. Miss Dorothy Bezanson, Prothonotary, Sydney, N.S.
Mr. Luke Wintermans, N.S. Legal Aid, Sydney, N.S.

CROWN PROSECUTOR'S OFFICE
CAPE BRETON COUNTY
SYDNEY, N.S.

77 Kings Road
Sydney, Nova Scotia
B1S 1A2
August 8, 1983

Mr. Martin E. Herschorn
Asst. Director (Criminal)
Dept. of Attorney General
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. Herschorn:

RE: Roy Newman EBSARY

As discussed, the preliminary inquiry of the above named was held on August 4, 1983, before His Honour Judge Charles O'Connell. After hearing five witnesses called by the Crown (Donald Marshall Jr., James MacNeil, Donna Ebsary, Cst. Leo Mroz and Dr. Naqvi), His Honour committed the accused to stand trial on the reduced charge of manslaughter.

In support of his decision (copy of his remarks attached), His Honour cited R V Faid, a recent decision of the Supreme Court of Canada. After referring to the judgement of Dixon, J., His Honour found that he was satisfied that there was no evidence of intent (under S. 212) and therefore he committed on the reduced charge.

This finding of no intent is not supported by the evidence. James MacNeil says Seale said "Dig man dig", that Ebsary said "I've got something for you", that Ebsary made a lunging motion at Seale; that Seale instantaneously screamed and ran away. There is no question but that that evidence is the type envisioned by S. 212(a)(ii).

..... 2

PE 131

The problem, as I see it, is that Judge O'Connell may have made the right decision for the wrong reason. In my opinion, there was evidence of provocation and His Honour did find in fact that Seale and Marshall were attempting a robbery. There was also some evidence of drunkeness. That evidence would make the eventual result of a murder trial almost a certainty; that is, a finding of guilty of manslaughter.

For that reason, although I believe the Judge's finding of no intent was unreasonable and not supported by the evidence, I hesitate to recommend that we prefer an indictment for second degree murder. On the other hand, by proceeding with a manslaughter charge, there is, in my opinion, an increased risk that Ebsary will be acquitted. Unlike a murder charge, the manslaughter charge leaves the jury with no "fall-back" or compromise verdict.

I leave the matter in your hands for consideration. I shall be on vacation until August 22nd at which time we can discuss the matter further. In the meantime, I remain

Very truly yours,

F. Edwards per ami

F.C. Edwards
CROWN PROSECUTOR

FCE:ami
Enc.

REMARKS OF THE JUDGE ON ROY NEWMAN LEARY

The Accused stands charged in Sydney on the 28th of May 1971 he did unlawfully commit second degree murder on the person of Sanford Seale contrary to Section 218(1) of the Criminal Code of Canada. The evidence against the Accused is that when a robbery was in process he stabbed Sanford Seale with his death ensuing as a result of the stabbling. Now the question I have to determine is is there sufficient evidence to commit the Accused for trial. I just want to review the authorities in brief. I think there is no disagreement, I think we are all in agreement the leading case on committment for trial is the United States of America versus Sheppard, and I want to refer to an article written by Mr. Maurice Fish, Committal for Trial, and it is in the 39 Revu, a French publication du Bareau, a Bar Review in Quebec 1979, 607 at page 8 and the author goes on to say test for committal to trial is identical to the test upon a motion for non suit or directed verdict to trial. There remains pockets of resistance to this motion but the question must be taken as settled by the cases of Moribideau, Paul and of course Sheppard. The common test of sufficient evidence is throughout these judgements equated with prima facie case. Prima facie case and either of it's

two accepted sentences never means less than sufficient evidence and the phrase "sufficient evidence" used in relation to criminal law invariably means evidence upon which a Jury might through the absence of contradiction or explanation reasonably and properly convict. That is the law. In Canada talking about....another authority is found in the text known as "Criminal Procedure in Canada" at page 306, not that it matters who the article is by but I believe it is by Greenspan and Mark Rosenburg, and there again they are referring to the United States of America versus Sheppard, and it has been pointed out that the test propounded in the United States of America versus Sheppard is not the equivalent of any or some evidence. The test, and they agree with Professor Fish, the test is identical to that for a motion for non suit or a directed verdict to trial and requires evidence capable of satisfying a properly instructed, reasonable Jury that the Accused guilt was beyond a reasonable doubt. This test is often interpreted of course as meaning that the Justice, now this is at the preliminary inquiry level, at the level we are at, is not to weigh the evidence, it is not the function of a Justice or Judge on trial where application is made for non suit to determine whether

a witness is creditable however where the evidence is circumstantial the Justice necessarily weighs the evidence as he must consider whether a jury could properly infer guilt from the individual facts. Now in this particular case I will just refer briefly to a recent decision of the Supreme Court of Canada Regina vs Faid, 2 CC, Canadian Criminal Cases, 3rd Edition Part A, June 21st, 1983. And I am going to just quite briefly from the judgement of Mr. Justice Dixon and this is a case he is talking about murder, and he is talking about manslaughter. "Where a killing has resulted from the excessive use of force in self defence the Accused loses the justification provided under Section 34, there is no partial justification open under the Section. Once the Jury reaches the conclusion that excessive force has been used, the defence of self defence has failed. It does not follow automatically however that the verdict must be murder. The Accused has become responsible for a killing, that's what we have here. The next sentence hasn't any bearing as far as Mr. Ebsary is concerned. He has no justification on the basis of self defence but unless it is shown that the killing was accompanied by the intent required under, in this case, Section 212(a) of the Code, it remains a

RE 31

killing without intent; in other words manslaughter. Now I am satisfied upon reviewing the evidence that there is no evidence of intent, but there is evidence of a killing, and on the evidence before me I am discharging the Accused on the charge of murder against Section 218(1) of the Criminal Code but I am committing the Accused for trial on the included offence of manslaughter.

AG 133

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM Our File No.

FROM: Martin E. Herschorn
Assistant Director (Criminal)

TO: The Honourable Harry W. How, Q.C
Attorney General

Re: Roy Newman EBSARY

I enclose Frank Edwards' letter to me of August 8, 1983, reporting on the preliminary inquiry held on August 4, 1983 into a charge of second degree murder against Roy Newman Ebsary.

I concur with Frank's overall assessment that His Honour Judge O'Connell may have made the right decision i.e. to commit the accused for trial for the offence of manslaughter, but for the wrong reason, i.e. citing the absence of any evidence of intent as opposed to making reference to the evidence of provocation.

Prior to confirming that the matter ought to proceed to trial on the reduced charge of manslaughter, I would appreciate your views.

M.E.H.

MEH:if
Encl.
c.c. Gordon F. Coles, Q.C.
Gordon S. Gale, Q.C.

To MEH:

I do not share Edwards concerns that "by proceeding with a manslaughter charge ... on evidence such that Ebsary will be acquitted": if the Crown's case only supports a manslaughter charge, so be it. If Ebsary is successful in his defence of "self defence" or the Crown fails to prove its case to the satisfaction of a jury, Ebsary should be acquitted. On my view we should proceed on the basis of the committal.

Aug 11/ FWH

1415A

DEPARTMENT OF ATTORNEY GENERAL

AG 133
09-82-0311-09

MEMORANDUM

Our File No.

FROM: Martin E. Herschorn
Assistant Director (Criminal)

TO: The Honourable Harry W. How, Q.C.
Attorney General

Re: Roy Newman EBSARY

I enclose Frank Edwards' letter to me of August 8, 1983, reporting on the preliminary inquiry held on August 4, 1983 into a charge of second degree murder against Roy Newman Ebsary.

I concur with Frank's overall assessment that His Honour Judge O'Connell may have made the right decision i.e. to commit the accused for trial for the offence of manslaughter, but for the wrong reason, i.e. citing the absence of any evidence of intent as opposed to making reference to the evidence of provocation.

Prior to confirming that the matter ought to proceed to trial on the reduced charge of manslaughter, I would appreciate your views.

M.E.H.

MEH:if
Encl.
c.c. Gordon F. Coles, Q.C.
Gordon S. Gale, Q.C.

Aug. 16 - discussed with AG - not prepared to prefer indictment for 2nd degree murder - feels manslaughter is proper charge.

1615A

DEPARTMENT OF ATTORNEY GENERAL

AG 133

MEMORANDUM

Our File No.
~~09-83-0638-09~~

FROM: Martin E. Herschorn
Assistant Director (Criminal)

TO: The Honourable Harry W. How, Q.C.
~~Attorney-General~~

RECEIVED
AUG 11 1983
ATTORNEY GENERAL

Re: Roy Newman EBSARY

I enclose Frank Edwards' letter to me of August 8, 1983, reporting on the preliminary inquiry held on August 4, 1983 into a charge of second degree murder against Roy Newman Ebsary.

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MEH:if
Encl.
c.c. Gordon F. Coles, Q.C.
Gordon S. Gale, Q.C.

Martin

Aug 21

I have already discussed the with Martin & G.G. & we agreed the trial should proceed on manslaughter file H

A-130

09-82-0311-08

August 17, 1983

Mr. Frank C. Edwards
Prosecuting Officer
77 Kings Road
Sydney, Nova Scotia
B1S 1A2

Re: Roy Newman EBSARY

Dear Mr. Edwards:

Further to your letter of August 8, 1983, I wish to advise that the Department has assessed this matter and is of the view that the trial of Roy Newman Ebsary should proceed on the reduced charge of manslaughter.

Yours very truly,

Martin E. Herschorn
Assistant Director (Criminal)

MEH:if

1615A

DEPARTMENT OF ATTORNEY GENERAL

IG 232

MEMORANDUM

Our File No.
09-84-0257-01

FROM: Martin E. Herschorn
Assistant Director (Criminal)

TO: Gordon F. Coles, Q.C.
Deputy

Re: Civil Proceeding Instituted by Donald Marshall, Jr. Against the City of Sydney, John L. MacIntyre and William Urquhart

In early August, when we last discussed the above-noted matter, you suggested that Jim Fanning, our Articled Clerk, prepare a Memorandum on the liability of a municipality for the wrongful acts of its police officers.

I now enclose for your information a copy of Jim's Memorandum.

M.E.H.

MEH:if
Encl.
August 31, 1983

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

Our File No.
09-83-0638-09

AG 30

FROM: Jim Fanning
Articled Clerk

TO: Martin E. Herschorn
Assistant Director (Criminal)

Re: The Liability of a Municipality for the Wrongful Acts of its Police Officers

Municipal police forces operate under a variety of statutes, which contain significantly different provisions, respecting their status and accountability.

In Nova Scotia, such forces are established and governed pursuant to the Police Act, S.N.S., 1974, c.9. The ultimate authority for appointing members of the force rests with the municipal council. The Powers of the Board of Police Commissioner are determined by the council through the by-law establishing the Board. Section 20(2) of the Act provides:

> "20(2) Notwithstanding the right of a municipality to direct its own police operation, the function of any board shall primarily relate to the administration and policy required to maintain an efficient and adequate police force."

Subsection 16(2) provides that each municipal officer,

> "16(2) shall have all the power and authority of a provincial constable".

.../2

AG 20

Subsection 11(6) provides that:

> "11(6) Each provincial constable shall have the power and authority to enforce and to act under every enactment of the province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality to a police officer, peace officer, constable, inspector or any term of similar meaning or import shall be construed to include a reference to a provincial constable."

This provision suggests that the common law office of constable, as modified by the provisions of the Police Act, remain the basic status of the police in Nova Scotia. This view is reinforced by the fact that there is no general provision respecting the status of provincial constables, apart from subsection 11(6).

Subsection 15(5) of the Act provides:

> "15(5) Except when inconsistent with the provisions of this Act, the actual day to day direction of the police force with respect to the enforcement of law and the maintenance of discipline within the force shall rest with the chief officer or person acting for him."

No where in the Act, however, is there a provision requiring the police chief or the members of the force to obey the lawful direction of the council or board. It is possible, therefore, that the provision in the Act giving the police chief the day to day direction of the force, may imply a degree of autonomy, vis-à-vis his governing authority.

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The first reported case relating to actions for damages against municipal corporations for the wrongful acts of municipal police officers was Wishart v. City of Brandon (1887), 4 Man. R. 453 (Q.B.).

In that case, the plaintiff sued the defendant corporation for assault and false imprisonment by a member of the city's police force. The arrest was made pursuant to a by-law which the parties later agreed was unlawful. The issue in the case was whether the city could be held vicariously liable for the wrongful act of one of its police officers. In order for the city to be found liable, the court had to find that the police officer was the "servant or agent" of the City in the sense in which those terms are used in the law relating to vicarious liability. The court held the City not liable for the acts of the police officers. Taylor, J., at p.455 stated:

> "No case can be found in England or in Ontario in which such an action as the present has been brought against a municipal corporation."

Noting that the question raised in that case had frequently come before the courts of the United States and there the weight of authority goes toward non-liability of the corporation, the Judge stated, at p.457:

> "The reason for holding the corporation not liable is, that though a constable may be appointed by the corporation, yet in discharging his duty he is acting not in the interest of the corporation, but of the public at large."

To support that proposition, Taylor, J. cited Hafford v. City of New Bedford (1860), 82 Mass. (16 Gray) where Chief Justice Bigelow at p.302 stated:

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> "Where a municipal corporation elects or appoints an officer, in obedience to an act of legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a 'servant or agent' for whose negligence or want of skill in the performance of his duties a town or city can be held liable."

In response to the argument of the plaintiff, that there was a difference [distinction] between "officers who are not under the control of the municipality" and "officers that are entirely controlled by the municipality", Taylor, J. at p.458 stated:

> "It is not the absence of control over such a force which relieves a corporation from liability, nor does the having such control render it liable".

The essential reason for the non-liability of the corporation, according to Taylor, J., was that the duties constables performed do not "relate to the exercise of corporate powers" and are not "for the benefit of the corporation in its local or special interest" but for the general public welfare.

In Kelly v. Burton (1895), 26 O.R. 608 (Ch. D.), the plaintiff sued the City of Toronto for damages for a wrongful arrest made by two of its police officers. There was evidence that the Mayor (a member of the Board of Police Commissioners) had stated that he had given instructions to the officers concerned to "stop all buses", and that on these instructions the

.../5

AG 30

plaintiff was arrested. There was also some evidence that the Mayor had asked the executive of the city council to protect the police by defending the action. In dismissing the plaintiff's claim, the court, at p.623 stated:

> "The plaintiffs must rest their claim upon ratification by the city of the alleged illegal act of the police officers, for these latter are not officers or agents of the corporation, but are independently appointed by the board of police commissioners, as an agency of good government, for the benefit of the municipality. The officers ... were acting under the direction of the mayor, but there is nothing to show any adoption of the act of the officers by the city council, so as to fix the corporation with the consequences of that act."

In Mcleave v. City of Moncton (1902), S.C.R. 106 (S.C.C.), the Supreme Court of Canada held that the defendant city was not liable for an illegal search and seizure committed by one of its police officers. The court, at p.108, relied on the american decision of Buttrick v. City of Lowell and quoted verbatim the short judgment of Bigelow, C.J. where he said:

> "Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws and other similar powers and duties with which

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police officers and constables are entrusted and derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as agents or servants of the city."

And again he says:

"If the plaintiff could maintain his position that the police officers are so far agents or servants of the city that the maxim 'respondeat superior' would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action, because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city."

The court, at p.109, also cited with approval the following passage from Dillon on Municipal Corporations (4th ed.):

"When it is sought to render a municipal corporation liable for an act of servants or agents, a cardinal inquiry is, whether they are servants or agents of the corporation ... If ... they are elected or appointed by the corporation in obedience to a statute, to perform a public service,

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> not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties, they are not regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon them and the doctrine of respondent superior is not applicable."

The Chief Justice went on to say, at 109:

> "I quite agree upon the question of fact with the court below that the [police man] held his appointment from the corporation for the purpose of administering the general law of the land, and that the wrong complained of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely."

In Mcleave, control over the police force did not seem to be a determining factor in the decision. Despite this however, the fact the court cited the passage from Dillon raises the possibility that this was one of the issues considered by the court in rendering its decision even though as the Wishart case shows, such a decision could be reached without consideration of this issue.

The decision in Mcleave was adopted by the Manitoba courts in Bowles et al. v. City of Winnipeg et al.,[1919] 1 W.W.R. 198 (Man. K.B.). In that case, the husband and father of the plaintif were killed in an accident involving an ambulance that had been operated by the Board of Commissioners of Police for the City of Winnipeg. Mathers, C.J.K.B., speaking for the majority, stated at p.203:

> "It was conceded that according to well-settled principles of law none of the defendants [the city, the police board, and the individual members of the board] can be held liable for anything done by the police... A municipality is entrusted with certain powers of government for the benefit of the inhabitants in their local or corporate limits as distinct from the interest of the public at large. It is also given certain powers to be used for the benefit of the community at large as a conscientious method of exercising some of the functions of government. In the former case civil responsibility attaches to the municipality, its servants and agents, just as in the case of any other corporate body. In the latter case the officers elected or appointed by the municipality are not regarded as servants or agents of the municipality appointing them, but as public officers acting in the public interest for whose conduct civil responsibility does not attach to the municipality."

At p.204, he added:

> "According to both systems [Canadian and American courts] it is well settled that police officers fall within the latter class and that neither the municipality nor the commissioners of police, where the administration is committed to such a body is liable for the acts of its police: Dillon, para, 1656; Wishart v. City of Brandon, 4 Man. R. 453; Mcleave v. City of Moncton, [1902] 32 S.C.R. 106."

The Chief Justice goes on to say as p.204,

> "It is clear that no liability can be fastened upon the city unless it can be held responsible for the acts or conduct of Fegg (the policeman] and it cannot be held responsible for his acts or conduct unless he were an officer, servant or agent of the city."

.../9

The Judge then went on to cite well known principles used in determining whether or not a person was an agent or servan The court in doing so found that the defendant policeman was not an agent or servant of the city. At p.205, Mathers, C.J.K.B., stated:

> "The fact is that Togg was not employed by the city, neither was he bound to obey any orders emanating from the city, nor had it any power to discharge him. It appropriated the money required to pay his wages, but it did not fix the rate. Tested by any of the recognized rules for determining whether or not the relationship of prinicipal and agent or master and servant subsisted between the city and Togg, the answer must be, he was not the agent or servant of the city."

He adds, at p.205:

> "As stated by Chancellor Boyd, speaking with reference to similar legislation to ours in Kelly v. Barton 26 O.N. 608 (Ch. D.) at p.623:
>
> 'police officers... are not officers or agents of the Corporation but are independently appointed by the board of police commissioners.'"

It is interesting to note that despite its findings that the municipality was not liable in this case, the court did recognize that in some situations a municipality could be found liable. At p.204, for example, the court stated:

> "It will not be denied, I think, that an employee who ordinarily bears the character of a police constable may be authorized to perform duties of a

.../10

> local or corporate character having no relation to his public police duties, that might just as appropriately be performed by a person who was not a police constable; and, if in the performance of that duty, damage was occasioned to another by the employee's negligence, the municipality could not escape liability because of the mere fact that the offender happened to be a police officer."

The court also held that the Board of Police Commissioners were not liable. Mathers, C.J.K.B., was of the view that if the police chief was the servant of the board and issued his orders within the scope of his authority, then the board would be liable. But since he was not an agent of the board, they were not liable.

In Tisher v. Oldham, [1930] 2 K.B. 364, the question to be decided was whether the defendant corporation could be held liable for the action of the police in causing the wrongful arrest of the plaintiff and wrongfully keeping him in custody.

McCardie, J., in dismissing the action, cited with approval the Supreme Court of Canada decision in Mcleave where at p.372, he states:

> "The like view has been taken by the Supreme Court of Canada in Mcleave v. City of Moncton, where it was held that a police officer is not the agent of the municipal corporation which appoints him to the position and if he is negligent in performing his duty as guardian of the public peace, the corporation is not responsible."

McCardie, J., concluded his judgment with the following observation:

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> "If the local authorities are to be liable in such a case as this for the acts of the police with respect to felons and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change."

In Hebert v. City of Thetford Mines, [1932] S.C.R. 424, (S.C. the decision in City of Montreal v. Plante (1923), 34 Que. K.B. 137, was referred to with approval by Rinfret, J. The headnote in that case reads as follows, at p.425:

> "Held that a constable binds the municipal corporation which has appointed him when he acts as municipal officer for the purpose of enforcing the observance of the local ordinances; but he does not bind the corporation when he acts as guardian of the peace to enforce observance of the laws concerning public order.
>
> Held, also, that the mandatary of several principals binds only the one for whom he acts at the time when the act causing injury is committed. It is not the regular and customary employment of the mandatary that must be taken into consideration, but the quality in virtue of which he really acts at the time of the event giving rise to the action brought against him."

The status of municipal police officers was also considered by the Supreme Court of Nova Scotia in R. v. Labour Relations Board, (1951), 4 D.L.R. 227 (N.S.S.C.). The court in that case had to decide whether policemen were employees for the purposes of the Nova Scotia Trade Union Act. In holding they were not, MacDonald, J., at p.235 stated:

"It will be noted how different is the position, and the language of the statutes providing for their appointment, powers, and tenure, from that of ordinary employees and of contracts relating to them. They may in some senses be employees subject to a degree of control by the town as such and with an enforceable right to remuneration (because of a statutory duty to remunerate); but there are many respects in which constables differ from ordinary employees. Can they, then, be said to be *employees employed to do work* in the sense of the *Trade Union Act*, or are they *public officers appointed* (under statutory authority) *to perform public duties* remote from those of an employee as ordinarily understood?

My view is that the relationship between the town and its police officers is not essentially that of employer-employees according to the general law; that such duties as the officers render to the town and such incidents of their work as are within the control of the town, and such features of their engagement and tenure as may savor of employment, do not alter the fact that *in essence* they are officers of the law and not servants of the town; that *in substance* they are not "*employed to do* skilled or unskilled manual, clerical or technical *work*", but to perform the duties and exercise the powers assigned by the law, and that whatever work they do of a manual, clerical or technical nature is merely incidental and does not alter the substance of their position.

In this view one should hold that the police officers here in question are not "employees" within the definition in the *Trade Union Act*..."

In relation to the liability of the City of Dartmouth for the wrongful acts of such police officers, MacDonald, J., stated at p.235:

"Under the common law the basic position of constables is that they are holders of offices of trust under the Crown whose primary purpose is to exercise the rights and discharge the duties conferred or imposed upon the holders of that office by the common or statutory law: see generally 25 Hals., 2nd ed., pp. 320 *ff.*; *Fisher* v. *Oldham Corpn.*, [1930] 2 K.B. 364; *Lewis* v. *Cattle*, [1938] 2 All E.R. 368; *R.* v. *Heighton* (1922), 69 D.L.R. 386, 55 N.S.R. 512. From this position are derived many consequential rules of law. Such a rule is the well-established one that they are not servants or agents of the appointing municipality, for whose wrongful acts that municipality is liable at law; being rather officers appointed (and sworn) *to perform public duties* of an executive character in the general administration of justice: *McCleave* v. *Moncton* (1902), 6 Can. C.C. 219, 32 S.C.R. 106; *Bruton* v. *Regina City Policemen's Ass'n*, [1945] 3 D.L.R. 437 at pp. 447-9; McQuillin on Municipal Corporations, vol. 16, pp. 514-33; vol. 18, p. 354)."

This statement of MacDonald, J., was quoted with approval by Lacourciere, J., in Re St. Catharines Police Association Local No. 374 v. Board of Commissioners, [1953] 8 W.W.R. 230 at p.426.

In Schulze et al. v. The Queen, [1974] 17 C.C.C. (2d) 241 (F.C.T.D.), the court was called upon to decide whether municipal police officers can be considered in law, the agents, servants or employees of Her Majesty In Right of Canada. The plaintiffs' daughter had been kidnapped and murdered. The plaintiffs charged that the defendant police officers were negligent in not making prudent and deligent efforts to save their daughter. The plaintiffs conceded that the police officers were not employed by the Crown [Federal] in any master-servant relationship, but rather they were agents by virtue of the legal mandate to enforce the criminal law. In deciding that issue, the court also passed on the issue of the liability of a municipality for the acts of its police officers.

Walsh, J., at p.245 stated:

> "In... Roy v. City of Thetford Mines et al., the judgment... of Hebert v. City of Thetford Mines is referred to with approval. In rendering judgment, Fauteaux, J., as he then was, stated at p.402 (translation)
>
> > 'The responsibility of the Corporation is not engaged by the fault and damaging action which the municipal policeman commits when acting in the execution and the limits of these other functions which the state, by the dispositions of law, i.e., the Criminal Code, attributes to him in his quality as peace officer to ensure the observation of this law. Thus, as agent or mandatary of different principles ... the municipal police officer only engages the principal ... for whom he is doing business or for the benefit of whom he is acting at the time that the damaging act is caused.'"

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Walsh, J., then goes on to say, at p.245:

> "It is to be noted that none of these cases [Roy v. City of Thetford Mines; Montreal v. Plante; Hebert] deals directly with the responsibility of the Crown, whether in right of Canada or of the province, for acts of police officers in enforcing provisions of the Criminal Code, but merely with the non-responsibility of the municipality which employs them under these circumstances unless it can be considered to have approved or condoned their actions ..."

Walsh, J., considered the case of Allain et al v. A.G. Que, [1971 S.C. 407 in which Chief Justice Challies dismissed an action against the Quebec Attorney General for alleged false arrest by constables of the City of Montreal. He refused to sustain the argument that because the constables were acting as peace officers they were agents of the Attorney General. Walsh, J. at p. 248 states:

> "It can be concluded therefore that the associate Chief Justice Challies would recognize the existence of a situation where no superior authority would be responsible for the tortious acts of the Constable in enforcing the criminal law."

In conclusion, the learned justices states, at p.251:

> "Certainly, in deciding that the municipal corporation was not liable for the acts of its police constables save for the enforcement of municipal by-laws or in the event that they had ratified and approved these acts, the higher Courts in the cases of *Plante*, *Hebert* and *Roy*, *supra*, did go very far in implying that they were acting as agents for several principals or mandators at the same time and that each of these principals or mandators would be responsible for their tortious acts to the extent that they were acting as their agents. I do not believe that the higher Courts can be said to have definitively considered and dealt with the question of whether a municipal police officer when enforcing the criminal law thereby automatically must be considered as acting at the time as an agent of the Crown in right of Canada, and I have reached the conclusion that the police officers in question were not acting as agents of the Crown in right of Canada so as to engage its responsibility within the meaning of s. 3(1) of the *Crown Liability Act*. The question must therefore be answered in the negative. As the question has never been raised before there will be no costs on the motion."

The cases up to and including 1978 establish, in relation to the liability of municipalities for the wrongful acts of police officers, that none of the three levels of government nor a municipal police Board or Commission, are liable at common law for the torts that police officers commit while exercising their public duties as peace officers, unless in some way they can be said to have adopted, or approved of, the conduct in question, either by prior authorization or subsequent ratification. The basis of this liability seems to be the status of a Constable as a "peace officer" when performing his public duties with respect to the enforcement of the law and the preservation of the peace. When performing such duties, the Constable acts not as a servant or agent of the municipality, board or government that appoints him but as a public peace officer whose duties are owed to the public at large. What this seems to imply is that unless statutorily liable pursuant to the Police Act, municipalities are not liable for the tortious acts of their police officers.

This whole line of jurisprudence, however, was thrown in doubt by the recent decision of the Supreme Court of Canada in Chartier v. Attorney General of Quebec, [1979] 2 S.C.R. 474 (S.C.C.). In that case the appellant had been charged with manslaughter by the Quebec police force. The two officers had tampered with evidence (reprehensible manoevering and testifying ...) by not taking certain things into account in preparing a sketch of the assailant and by giving erroneous testimony at the coroner's inquest. The appellant had been detained for thirty-six hours. Several days later, the real assailant confessed and charges against the appellant were withdrawn. In awarding the appellant, the sum of $50,500 dollars in damages against the Attorney General of Quebec, the court focused on

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the authority of a police officer to arrest a person without warrant. Pigeon, J., in deciding the issue, stated at p.499:

> "Under s. 435 of the *Criminal Code* in force in 1965, a peace officer could arrest a person without a warrant if he had reasonable and probable grounds for believing that he had committed an indictable offence. Did the officers have such grounds when they placed Chartier under arrest as a suspect? I do not think so. They seem to have felt that they could pay attention only to what might serve to incriminate appellant and disregard, as being grounds of defence for him to raise at his trial, anything that might exonerate him. This approach was accepted by the trial judge, but in my opinion it is erroneous.
>
> For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing not reliable. Since the suspect was denying that he had been involved in the incident, and there was no reason to fear that he would run off, all the descriptions provided by the eyewitnesses should have been checked before he was incarcerated. If this had been done the only conclusion that could have been reached is the one René Forget arrived at during the line-up: this suspect could not be the true culprit. Even after this, appellant was not released but was kept in a cell all night, until three o'clock in the afternoon of the following day. Despite what is stated under his signature in the report on the September 2 line-up, Sgt. Wilmot, when testifying at the trial in the case at bar, dared say of the prisoner's situation at the end of the day on September 2: (Translation) "the witnesses identified him". Knowing how he testified at the Coroner's inquest, this is hardly surprising."

In criticizing the conduct of the police officers involved, Mr. Justice Pigeon went on to say at p. 500:

> "Turning now to the coroner's inquest, it must be said that the actions of the Quebec police force were nothing less than scandalous... For the purposes of the case at bar it is not necessary to determine whether they did this knowingly with the intention of misleading the court before which they were testifying. It is sufficient to say that this was an unpardonable and unjustifiable error, which proved to be extremely prejudicial to appellant since it is

> obvious that, had it not been for the reprehensible manoeuvring and testifying of the officers, Chartier could never have been charged. Without this there was a complete lack of evidence against him; the only two witnesses called to identify him had said they were unable to do so owing to the grey hair they had observed on the assailant's head and could not see on Chartier:"

In holding that the Attorney General was liable for the acts of the police officers involved, Pigeon, J., concluded by stating, at p.500:

> "I must therefore conclude that the Quebec police force officers committed various acts of fault with regard to appellant in the performance of their duties, and that consequently the Attorney General, representing Her Majesty In Right of the Province of Quebec, is liable for those acts as their employer. Counsel for the respondent did not contend in this Court that the acts alleged against the Quebec Police Force officers should not be considered as done in the performance of their duties. I shall therefore refrain from considering the questionable theory, sometimes admitted in the case of municipal policemen, that they may not be considered to have been acting in the performance of their duties where their actions concern criminal offences rather than violations of municipal by-laws. Moreover, it seems obvious to me that since the entire administration of civil and criminal justice as a rule comes within provincial jurisdiction, there can be no question of making a distinction as to the liability of the provincial police officers on the basis of whether the case involves investigation and prosecution of offences under federal legislative jurisdiction as opposed to offences under provincial legislative jurisdiction."

The court in Chartier did not give any reasons for what appeared to be a departure from the principles of the earlier cases. One reason for this might be the fact that the Province did not contest its liability on such grounds.

More recently, in Johnson v. Adamson (1981), 32 O.R. (2d) 255 (Ont. H. Ct.) the court was called upon to decide the liability of the metropolitan Toronto Board of Commissioners for the injuries and death of the plaintiff during an altercation with police. Montgomery, J., in dismissing the action against the board of police commissioners, stated at p.256:

> " The board of commissioners of police is a creature of statute created under the *Police Act*. There is no allegation of any overt negligent act by either the board or the chief. There is no provision in the Act creating liability on a board of police commissioners for tortious acts by members of a police force appointed by the board. . . .
>
> The action must, therefore, be struck out so far as the board of commissioners of police is concerned.
>
> Liability is created on the chief of police for the torts of his officers under s. 24 of the Act. Section 24 states:
>
> > 24(1) The chief of police is liable in respect of torts committed by members of the police force under his direction and control in the performance or purported performance of their duties in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and shall in respect of any such torts be treated for all purposes as a joint tortfeasor.
> >
> > (2) Where a chief of police is liable in respect of a tort committed by him in the performance or purported performance of his duties, he is also liable and may be sued separately in his capacity as chief of police for the purposes of subsection 1.
>
> Neither the chief of police nor the board of commissioners of police is in such a relationship with members of the police force as to impose liability in law upon such chief or board for the tortious acts of police officers except as provided under s. 24.
>
> In support, I rely on *Reference re Constitutional Questions Act*, [1957] O.R. 28, 7 D.L.R. (2d) 222, 118 C.C.C. 35, *sub nom. Reference re Power of Municipal Council to Dismiss Chief Constable etc.* (C.A.), where Mr. Justice Laidlaw said, at p. 31:
>
> > I conclude that the relation of master and servant does not exist in law as between a municipality or a board and a member of a police force appointed under Part II of The Police Act. The true position of such a police officer is stated by Viscount Simonds in *Attorney-General for New South Wales v. Perpetual Trustee Co.* (I.D.), [1955] A.C. 457 at 489, as follows:
> >
> > ". . . there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract."
>
> Paragraphs 23, 35, 36, 39, 40, 41, 42 and those parts of paras. 47(b) and (d) that relate to "negligence in the control, maintenance and operation of a police force" of the statement of claim are struck out. "

.../19

The court dismissed the action in its entirety against the metropolitan Board of Commissioners of police and against the Chief of Police with the exception of any claim pursuant to Section 24 of the Police Act.

That decision, however, was reversed by the Ontario Court of Appeal in Johnson et al. v. Adamson et al. (1981), 34 O.R. (2d) 236 (Ont. C.A.). The plaintiffs argued that the cause of action [a new statement of claim] was based upon negligence of the Chief of Police and the Board and was not based on vicarious liability. It was the negligence of the above and not that of the police constables, or any of them, that gives rise to the cause of action. The plaintiffs argued that such officials could be sued in respect of their "operative functions" but not in connection with their "policy making functions". The negligence of the Chief of Police and the Board is primarily based on inadequate training of constables and inadequate supervision of subordinates by the Chief of Police, and failure to maintain a competent team of subordinates. After referring to the judgment of Montgomery, J., Arnup, J.A., stated, at p. 241:

.../20

"It is the respectful view of my brother Blair and myself that

Montgomery J. erred in striking out the statement of claim and dismissing the action as against the chief and the Board. The plaintiffs undoubtedly face formidable problems of proof of the facts alleged and a difficult question as to any causal connection between the negligence alleged and the death of the late Albert Johnson. The sole question raised at this stage is whether there are facts alleged in the statement of claim which raise in law a triable issue. The action is undoubtedly novel but that has never been a reason for saying that an action has no foundation in law

The plaintiff will rely, and relies on this appeal, on the line of cases of which the latest in the chain is *Anns v. Merton London Borough Council*, [1978] A.C. 728, a decision of the House of Lords in which the leading and also relatively recent case of *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004, is considered in detail. In the *Anns* case Lord Wilberforce, giving the judgment of himself and three other law lords, said this at pp. 751-52:

> Through the trilogy of cases in this House — *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed. . . .

Reference may also be made to what was said in the speech of Lord Wilberforce at pp. 754-55.

In our view, help is also to be obtained on this appeal from the judgment of Chief Justice McRuer in *Symerose et al. v. Chapman et al.*, [1949] O.R. 194, [1949] 2 D.L.R. 839, 64 C.R.T.C. 225. In that case the distinction was made between the liability of the T.T.C. [Toronto Transportation Commission] as the employer of the operator of a street car who was negligent and the commission's own negligence alleged against it in placing in charge of the operation of the street car an operator who was incompetent. Chief Justice McRuer held that the commission could be liable for its own negligence, and an allegation in respect of that negligence could properly be made, and particulars should be given on discovery by the T.T.C. with respect to that allegation.

In summary then, Blair J.A. and I are of the same view as that expressed by DuPont J. when the earlier motion was heard by him, namely, that there are allegations of fact, which must be assumed to be true, raising a triable issue against the Board and the chief of police and accordingly the action should not have been dismissed as against those two defendants at this stage. We would therefore allow the appeal, set aside the order of Mr. Justice Montgomery and in lieu thereof substitute an order dismissing the motion of the two defendants with costs to the plaintiffs in any event. The costs of the appeal should also be to the plaintiffs in any event of the cause."

Jessup, J.A., also agreed with Arnup, J.A., on much of his decision, and at p.242, stated:

> "I would allow the appeal in so far as to delete the provision of the order below that dismissed the action as against the Board of Commissioners of Police but not in so far as it dismissed the action as against Harold Adamson...
>
> The responsibility of the Commissioners of Police under S.17(1) of the Police Act, R.S.O. 1970, c.351 [now R.S.O. 1980, c.381] is 'the policing and maintenance of law and order in the municipality'. 'Policing' is virtually defined in S.55. The Police Act and the common law do not place on the Chief of Police the responsibilities of the commissioners or any responsibility that is pleaded against him. ... I would order that a new statement of claim be ordered... any reference to Adamson (Chief of Police) and that in the new statement of claim the only permissible... allegations against the commissioners of police are paras ..."

.../22

The question of vicarious liability for the wrongdoing by police is in a confused state. In many jurisdictions, however, this confusion has been cleared up by legislation. The Police Acts of Saskatchewan, Manitoba and Ontario for example, contain provisions relating to the liability of either the municipality, the police Board or the Chief of Police. These provisions operate to hold these persons liable despite their common law immunity. The Police Act of Ontario (Police Act, R.S.O. 1980, c.381) for example, provides:

> "24 (1) The Chief of Police is liable in respect of torts committed by members of the police force under his direction and control in the performance of their duties in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and shall in respect of any such torts be treated for all purposes as a joint tortfeasor.
>
> (2) Where a Chief of Police is liable in respect of a tort committed by him in the performance... of his duties, he is also liable and may be sued separably in his capacity as Chief of Police..."

The Police Act of Nova Scotia, S.N.S. 1974, c.9, like that of Alberta and Prince Edward Island, does not contain any such provisions relating to statutory liability. The liability of a municipality, police chief or the Board of Police Commissioners therefore must be founded on the principles established by common law. The primary ground for determining such common law liability seems to be the existence or non-existence of a master-servant (Agency) relationship. In my view, such determination must be made in conjunction with Sections 13-18 of the Police Act. A perusal of those Sections, however, indicate that a master-servant or agent-principal

relationship, does not exist between a municipality and its police force.

Despite this, the recent decisions in Chartier, Schulze and Adamson seem to undermine the common law immunity of a municipality for the wrongful acts of its police officers. However difficult it may be to predict the exact meaning and effect of Chartier, one thing is clear. The courts seem more willing to attach liability to a municipality for the wrongful acts of its servants, despite its common law immunity. The common law principles upon which liability is founded appear to be giving way to a desire by the courts to provide an injured party with a remedy. Clearly however, the facts of a particular case, [the bona fide conduct of the police, the conduct of the aggrieved person and the circumstances surrounding the event] appear to remain important in determining the common law liability of a municipality for the wrongful acts of its police force.

JIM FANNING

JM:if
August 30, 1983

FC 99

September 21, 1983

The Honourable Harry How
Attorney General
Province of Nova Scotia
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. How:

RE: DONALD MARSHALL, JR.

I have assumed the conduct of Mr. Marshall's file since the departure of his last solicitor, Mr. Stephen Aronson. Shortly after the release of the Nova Scotia Court of Appeal decision in Mr. Marshall's case, Mr. Aronson and Mr. Marshall both made a request for a public inquiry to be held into the circumstances surrounding Mr. Marshall's arrest, the police investigation and Mr. Marshall's subsequent conviction.

To date there has been no word from your Department regarding a public inquiry into these matters. I would greatly appreciate the opportunity of meeting with you to discuss the possibility of a public inquiry and its timing.

I look forward to hearing from you on this matter.

Yours very truly,

Felix A. Cacchione

FAC/oh

263

Nova Scotia

SEP 29 1983

Department of Attorney General

Office of the Minister

PO Box 7
Halifax, Nova Scotia
B3J 2L6

902 424-4044
902 424-4020

FC 100

File Number 09-83-0638-09

September 27, 1983

Mr. Felix A. Cacchione
Lambert & Cacchione
P. O. Box 547
HALIFAX, Nova Scotia
B3J 2R7

RE: Donald Marshall, Jr.

Dear Mr. Cacchione:

I have your letter, of September 21st, and am not personally aware of any formal request for a public inquiry into the Marshall case.

In any event, I am turning your letter over to my Deputy, Gordon Coles, Q. C., and have asked him to discuss the matter with you and advise me accordingly.

Yours sincerely,

Harry W. How, Q. C.

FC 101

September 29, 1983

The Honourable Harry How
Attorney General
Province of Nova Scotia
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. How:

Re: Donald Marshall, Jr.

Thank you for your letter dated September 27, 1983.

I should note for your information that the request made by Mr. Aronson and Mr. Marshall for a public inquiry was made at a press conference held shortly after the release of the Nova Scotia Supreme Court of Appeal Division decision in this matter.

I am including a copy of the statement which was read by Mr. Aronson at that press conference.

Because of the importance and sensitivity of this matter, I feel that negotiations should be carried on directly between yourself and myself and I would therefore ask that I be allowed to meet with you to discuss this matter.

Should you have any questions, please do not hesitate to contact me.

Yours very truly,

Felix A. Cacchione

FAC/oh
enc.

On May 28, 1971, Sandy Seale was murdered in Wentworth Park in Sydney. Donald Marshall, Jr. was arrested on June 4, 1971, charged with this murder for which he was convicted on November 5, 1971. From the date of his arrest until July 29, 1982, Marshall was a prisoner and let there be no mistake about his status - He was a convicted murderer. Today, the Appeal Division of the Nova Scotia Supreme Court, set aside his conviction and ordered that an acquittal be entered. Junior has always known he was innocent, but now his innocence is acknowledged by the Court and he is free of at least one albatross. It has been a lonely twelve (12) years for him, without question. Prison records indicate Junior consistently denied his guilt, ~~yet he persisted,~~ knowing full well that his parole would, in all likelihood, never be granted without an admission of guilt. After all, he could not be rehabilitated without facing his guilt, which was impossible. His courage and inner strength in these bizarre circumstances is the source of much of today's result.

In addition, there are, ~~however~~ many people who have helped, in the last year or so, to bring us here today. Junior would like particularly to express his gratitude to S/Sgt. Harry Wheaton and Cpl. Jim Carroll of the R.C.M.P. who, in a most professional and competent manner, re-investigated the Seal' murder. The Minister of Justice, then Jean Chretien, who acted out of concern for both

Junior and the system of justice, in a timely and co-operative manner, also deserves credit. The Chief Crown Prosecutor for Cape Breton County, Frank Edwards, acted throughout honourably and it is to be hoped that all Prosecutors might reach his standards of thoroughness and candour in dealing with defense counsel. The Carleton Centre staff, have helped, and continue to help, Junior in re-adjusting to life on the outside and thanks are owed, in particular to Jack Stewart, Terry Hatcher and Gerry Smith.

One man was however outstanding in his efforts and was always at Junior's side for many months after Junior was released from Dorchester. I speak of Charlie Gould, a social worker with the U.N.S.I. whose concern and understanding gave Junior guidance and faith. Finally, there is Junior's family and friends, particularly Roy Gould, who never gave up and supported Junior for the many years when he had no other help.

THE FUTURE:

It must also be remembered that today the case does not end. There are other issues that must be addressed, which Junior has no real power over. One issue which the Attorney-General must address is whether another person is to be charged in the Seale murder. There is no doubt that facts exist to charge another individual and Junior would

certainly like to see that charge laid.

There is also sufficient information on which charges of perjury could be laid against witnesses who testified at the 1971 trial of Donald Marshall, Jr. These charges must be considered having regard to all the circumstances. But even more than the perjury charges, there remains a dark cloud hanging heavily over the original police investigation in 1971 by the Sydney City Police Department and many questions remain unanswered.

It is our considered view that the Attorney-General initiate a public inquiry in Cape Breton, to consider how an innocent man can be charged and convicted of a murder. What went wrong in the original police investigation in 1971 and how to avoid such tragic results in the future are two questions of general importance. Ultimately however, such an inquiry is necessary to clear the air and allow the citizens of Sydney to once again place complete faith in their police force. We call on the public ~~will~~ to support the request for a public inquiry. Such an inquiry would also allow the police to tell their side of the story which [illegible] MacIntyne [illegible] was unable to do at the hearing in June. - indeed they have filed [illegible]

COMPENSATION

Finally, we would like to address briefly the matter of compensation. Although a civil action has been filed against the City of Sydney and two officers of the Sydney Police Department, the concern was to protect Junior's

interest in bringing those proceedings in a timely manner. No decision has been made at this time as to whether to actually proceed in the courts or to look to other avenues of seeking compensation. No decision has been made on an amount to be claimed as compensation. It is quite possible that other legal counsel will be retained to handle the whole issue of compensation and there is no desire to publicly discuss this issue at this time.

Many people have stressed compensation from the outset of the Marshall case in March of 1982 and have mentioned various figures. It is, in our view, more important to consider Junior's loss of freedom for twelve (12) years from the age of 17 to 29 and the tragic consequences which resulted from his imprisonment. If each of you were to consider being placed in jail for over a decade for a crime which you had not committed, then possibly you would understand and appreciate, in some small way, Junior's feelings and thoughts. Society cannot ever repay Junior for his loss, but certainly all efforts should be made to see that he is given fair compensation under the circumstances.

FC 102

October 17, 1983

T The Honourable Harry How
Attorney General
Province of Nova Scotia
B.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. How:

Re: Donald Marshall, Jr.

I am still awaiting your reply to my letter directed to you and dated September 29, 1983.

I would still like to meet with you directly to discuss the possibility of a public inquiry being held to the circumstances surrounding Mr. Marshall's arrest, trial and conviction and the police investigation into the murder of Sandy Seale.

It has come to my attention that the Crown intends to enter a stay of proceedings against Mr. Ebsary at his upcoming trial on November 1, 1983. Would you please confirm or deny this rumour.

I look forward to hearing from you at the earlist possible opportunity.

Yours truly,

Felix A. Cacchione

FAC/oh

FC 103

Nova Scotia

Department of Attorney General

Office of the Minister

PO Box 7
Halifax, Nova Scotia
B3J 2L6

902 424-4044
902 424-4020

File Number 09-83-0638-09

October 19, 1983

Mr. Felix A. Cacchione
Lambert & Cacchione
Barristers & Solicitors
1649 Hollis Street, Suite 903
P. O. Box 547
HALIFAX, Nova Scotia
B3J 2R7

Dear Mr. Cacchione:

I have your letter of October 17th and would advise that I had handed your letter of September 29th immediately to Mr. Gordon Coles, my Deputy, for attention. I am sorry that he has not had an opportunity to contact you or discuss the matters you raised.

Mr. Coles will be back later today and I will either see him or leave a meassage for him to contact you and arrange for a meeting at an early date. In the meantime I will not comment on the suggestions you raise in your letter of October 17th but will ask Mr. Coles to deal with those when you meet.

Yours very truly,

Harry W. How, Q.C.

FC 104

October 24, 1983

The Honourable Harry How
Attorney General
Province of Nova Scotia
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. How:

Re: Donald Marshall, Jr.
Your File 09-83-0638-09

This will acknowledge receipt of your letter dated October 19, 1983.

Perhaps you misunderstood my requests contained in my letters of September 29 and October 17. As indicated in those letters, I would like to meet with you directly to discuss Mr. Marshall's situation. Because of the gravity of the situation, I feel that dealing with the Attorney General himself is of the ultimate importance. I trust you will consider my request.

Yours truly,

Felix A. Cacchione

FAC/oh

Cur file : 09-84-02580/
Marshall, Donald

DEPARTMENT OF ATTORNEY GENERAL AG 223

MEMORANDUM

FROM: Gordon F. Coles, Q. C. TO: Honourable Harry W. How, Q. C.

Re: Mr. Felix A. Cacchione's request concerning Donald Marshall, Jr.

As you had advised Mr. Cacchione in your letter of October 19th, I did not have an opportunity to attend on setting up a meeting with him prior to this date as I thought it would be more helpful for me to meet when both Gordon Gale and Martin Herschorn were available.

I telephoned Mr. Cacchione on October 24th to advise that I was prepared to meet with him at his convenience in response to his request to meet with you. He reminded me that his request was to meet with the Attorney General, to which I replied that you had passed his request for such a meeting to me and asked that I attend on it. However, if he did not wish to meet with me, that was perfectly all right with me and I would so advise you. He wanted some indication as to what authority I might have or what action I might take as a result of such meeting and I replied that that was a matter he would have to wait and see as I would not be prepared to indicate to him what advice or recommendation I might have following such a meeting. He obviously was not satisfied that a meeting with me would serve his purposes adequately and has asked me to convey to you his request to meet with you in the matter.

On the question of whether you should initiate an inquiry into the manner in which the Sydney City Police investigated the death of Seale resulting in the charges against Marshall, I offer the following comments:

1. The incident happened in 1971, some twelve years ago. 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. The 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 would be almost impossible to thoroughly and fairly investigate the activities of the principals involved in the investigation and prosecution at this point in time.

2. 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

Oct 25
office type

...2

upheld the conviction. The subsequent events which led to a further review by the Appeal Division resulted in the Court commenting adversely on the evidence of Marshall and the credibility of other witnesses and made no adverse comment on the role of the police in their initial investigatic

3. This is not a situation where there may be an ongoing or present police practice which needs to be scrutinized publicly and corrected. Accordingly, 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.

I understand Mr. Cacchione has launched a civil suit on behalf of Marshall against the City of Sydney and members of the Sydney Police Force and one might speculate on his reasons for urging a public inquiry at this time. It seems to me that his client has received the benefit of an acquittal and is now pursuing his civil remedies by way of redress. Unless the civil suit identifies conduct on behalf of the police officers which would warrant possible disciplinary action, I would continue to be of the opinion that the public interest would not be served by any formal inquiry of the police investigation into this matter in 1971.

Oct. 25/83

Nova Scotia

09-84-0255-09

AG 231

Attorney General

Memorandum

From Reinhold M. Endres — Our File Reference

To Gordon F. Coles
Deputy Attorney General — Your File Reference

Subject Donald Marshall — Date November 21, 1983

The Prothonotary told me that they have on file an Originating Notice (Action) dated January 24, 1983, by Donald Marshall against the City of Sydney, MacIntyre and Urquhart.

Stephen Aronson was the Solicitor of record at the commencement of the Action, and on June 20, 1983, Felix Cacchione filed a Notice of Change of Solicitor.

On July 22, 1983, Judge Murray Ryan gave an Order renewing the Originating Notice, and that is where the matter stands.

There is no Defence on file.

RME/smo

FC 114

HOUSE OF ASSEMBLY
NOVA SCOTIA

OFFICE OF THE LEADER
NEW DEMOCRATIC PARTY

P O BOX 1617
HALIFAX, NOVA SCOTIA
B3J 2Y3

November 22, 1983.

The Honourable Ron Giffen
Attorney General
Province of Nova Scotia
Halifax, N.S.

Dear Mr. Attorney General;

I am writing to urge your support for the request to appoint a public inquiry into the police investigation which led to the wrongful imprisonment of Donald Marshall Jr. for eleven years for a crime he did not commit.

As you know, Donald Marshall Jr. has been acquitted of the crime for which he was jailed. Another man has since been found guilty of manslaughter. Both of these events were important, important because Donald Marshall Jr. is now recognized to be innocent. He has always known he was innocent. Now society does as well.

Unfortunately, there are still a number of serious questions about the case which have to be answered. How did it happen? Who will pay the legal bills Mr. Marshall incurred in proving his innocence? How will he be compensated for those eleven lost years? What can be done to ensure that this kind of miscarriage of justice does not happen again?

To date, the response of both your government and the federal government has been to disclaim any responsibility - the provincial government saying the responsibility lies with the federal government and the federal saying it lies with the provincial. Surely in the interests of common justice, appropriate steps can be taken to compensate Mr. Marshall.

.../2

FC 114

It is clear that at this time a public inquiry is required to answer these questions. I urge you to establish one as soon as possible.

Yours sincerely,

Alexa McDonough, MLA
Halifax Chebucto
Leader, Nova Scotia NDP

cc. Donald Marshall Jr.
Donald Marshall Sr.
Union of Nova Scotia Indians

277 AG2

09-84-0258-

November 23, 1983

First is a letter from Alexa McDonough concerning Donald Marshall. Would you get out the Donald Marshall file for me. In particular I want this letter as well as other letters I have received and a copy of the originating notice action and the draft press release which I think I had said on an earlier tape to put in my Cabinet file. I would just like to have all this material with me when I take the matter to Cabinet tomorrow.

278

09-84-0258

AG51

OFFICE OF THE LEADER
NEW DEMOCRATIC PARTY

P.O. BOX 1617
HALIFAX, NOVA SCOTIA
B3J 2Y3

ATTORNEY GENERAL

November 22, 1983.

The Honourable Ron Giffen
Attorney General
Province of Nova Scotia
Halifax, N.S.

Dear Mr. Attorney General;

I am writing to urge your support for the request to appoint a public inquiry into the police investigation which led to the wrongful imprisonment of Donald Marshall Jr. for eleven years for a crime he did not commit.

As you know, Donald Marshall Jr. has been acquitted of the crime for which he was jailed. Another man has since been found guilty of manslaughter. Both of these events were important, important because Donald Marshall Jr. is now recognized to be innocent. He has always known he was innocent. Now society does as well.

Unfortunately, there are still a number of serious questions about the case which have to be answered. How did it happen? Who will pay the legal bills Mr. Marshall incurred in proving his innocence? How will he be compensated for those eleven lost years? What can be done to ensure that this kind of miscarriage of justice does not happen again?

To date, the response of both your government and the federal government has been to disclaim any responsibility - the provincial government saying the responsibility lies with the federal government and the federal saying it lies with the provincial. Surely in the interests of common justice, appropriate steps can be taken to compensate Mr. Marshall.

.../2

AG 51

It is clear that at this time a public inquiry is required to answer these questions. I urge you to establish one as soon as possible.

Yours sincerely,

Alexa McDonough, MLA
Halifax Chebucto
Leader, Nova Scotia NDP

cc. Donald Marshall Jr.
Donald Marshall Sr.
Union of Nova Scotia Indians

AG 248

PRESS RELEASE

SINCE REFERENCE HAS BEEN MADE IN THE MEDIA TO AN INTENDED MEETING ON WEDNESDAY, NOVEMBER 23RD, BETWEEN THE SOLICITORS REPRESENTING DONALD MARSHALL, JR. AND THE ATTORNEY GENERAL, THE HONOURABLE RONALD C.GIFFIN, Q.C., THOUGHT HE SHOULD MAKE A STATEMENT ON THE MATTER. MR. GIFFIN STATED HE MET WITH THE SOLICITORS FOR MR. MARSHALL ON MONDAY AT THEIR REQUEST TO HEAR THEIR REPRESENTATIONS ON THE MATTER OF A PUBLIC INQUIRY INTO THE POLICE INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF SANFORD SEALE IN SYDNEY ON MAY 28, 1971; THE MATTER OF MR. MARSHALL'S LEGAL FEES AND THE FURTHER MATTER OF COMPENSATION FOR MR.MARSHALL AS A CONSEQUENCE OF HIS ACQUITTAL ON MAY 10, 1983 BY THE APPEAL DIVISION OF THE SUPREME COURT OF NOVA SCOTIA PURSUANT TO A REFERENCE UNDER THE PROVISIONS OF SECTION 617 OF THE CRIMINAL CODE.

THE ATTORNEY GENERAL STATED THAT IT IS THE FUNCTION OF THE COURTS TO DETERMINE WHETHER A PERSON HAS A RIGHT TO COMPENSATIO IN SUCH CIRCUMSTANCES AND IF SO, THE APPROPRIATE AMOUNT OF SUCH COMPENSATION. MR. GIFFIN STATED THAT MR.MARSHALL HAS COMMENCED SUCH CIVIL PROCEEDINGS AND, THEREFORE, HAVING REGARD TO THE RIGHTS OF ALL THE PARTIES IN SUCH PROCEEDINGS HE IS OF THE OPINION THAT IT WOULD BE PREMATURE FOR HIM TO CONSIDER SUCH REQUESTS PRIOR TO THE DETERMINATION BY A COURT OF THE VERY MATTERS IN RESPECT OF WHICH MR. MARSHALL SEEKS RELIEF.

NOVEMBER 22, 1983

Nov 23 '63

FC 113

Mike Harris - re conversation w Mark [illegible]

MacMurgan

① - recommends investigation into City Police

② will pay Swanson's bill if he can't [illegible]

FC 115

Nov. 24 '83

D. Marshall:

Sgt/Sgt Wheaton: A-G asked opinion re outline police procedures in 1971.
- improper police procedures:
- terrible injustice was done
- his duty has been fulfilled as a police officer
- P.I wouldn't clear air

Mac Fortune - meeting in Frank Edwards
- why different stmts
- no answer
- after lunch he blamed everything on Mac Veil.
- wonders → never sat in A-G + talk about it
- would like to talk to Jeffries

Glen Wannamaker - feisty 71 yr old - erratic personality
- no remorse for cold-blooded murder
- injustice of Marshall case

FE 64

COPY

CROWN PROSECUTOR'S OFFICE
CAPE BRETON COUNTY
SYDNEY, N.S

77 Kings Road
Sydney, Nova Scotia
B1S 1A2
November 29, 1983

Mr. Gordon S. Gale
Director (Criminal)
Dept. of Attorney General
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. Gale:

RE: Donald MARSHALL, Jr.

Enclosed herewith please find tape of CBC program "Sunday Morning", broadcast on CBC radio Sunday, November 27, 1983.

During the program, freelance journalist Parker Donham in part said the following:

> "The Supreme Court justices who handled that case in Nova Scotia maybe have more to answer for than anyone. Their decision was an entirely political decision - they went out of their way to give Nova Scotia an out; to make it possible for Nova Scotia to abdicate its responsibility, they took a kid who had been sent to the slammer for 11 years for something he didn't do, and basically they said it's really not the system's fault, it was that kid's fault because on that particular day he didn't confess to a crime (they now believe he committed)".

While I have not researched the law re contempt, my initial reaction is that Donham's comment comes close but does not cross the line between fair comment and contempt.

..... 2

FE 64

If you wish to discuss the matter further, please do not hesitate to get in touch.

Very truly yours,

F.C. Edwards
CROWN PROSECUTOR

FCE:ami
Enc.

285

AG 230

1615A

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

~~Our File No.~~
09-84-0258-01

FROM: Gordon S. Gale, Q.C.
Director (Criminal)

TO: Honourable Ronald C. Giffin, Q.
Attorney General

I received a call from Doug Rutherford, Assistant Deputy Attorney General of Canada, advising that he had been asked by McGuigan to call and pass on a message. The message is that his stance on Marshall doesn't seem to be washing in public and he may feel it necessary to launch a commission of inquiry into the enforcement of the criminal law by the police in Marshall's case if we don't make some resolution of the case. He may contact Cacchione, Marshall's lawyer, to ask if he feels such an inquiry would prejudice his case, McGuigan feels that an impending civil action where nothing has been done except to take out an originating notice, is not a sufficient bar to an inquiry in matters of this type. I gather he expects to hear from you by word or action.

GSG:jd
November 29, 1983

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ATTORNEY GENERAL