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**ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION**

Volume 87

Held: September 19, 1988, at the St. Thomas Aquinas Church Hall,
Halifax, Nova Scotia

Before: Chief Justice T.A. Hickman, Chairman
Assoc. Chief Justice L.A. Poitras and
The Honourable G. T. Evans, Q.C., Commissioners

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David
Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:
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Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre

Mr. Donald C. Murray: Counsel for Mr. William Urquhart

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for
Donald MacNeil estate

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the
Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P.
and Counsel for the Correctional Services of Canada

Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and
MacAlpine

Mr. Charles Broderick: Counsel for Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel
for Staff Sgt. Wheaton and Insp. Scott

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for
the Union of Nova Scotia Indians

Mr. E. Anthony Ross: Counsel for Oscar N. Seale

Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black
United Front

Court Reporting: Margaret E. Graham, OCR, RPR

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MR. RUBY - SUBMISSION and DISCUSSION
SEPTEMBER 19, 1988 - 9:30 A.M.

1 MR. CHAIRMAN

2 Good Morning. Yes, Mr. Ruby?

3 MR. RUBY

4 Good morning, Mr. Chairman, I'd like to deal now with the
5 [questions?] you heard from last week.

6 MR. CHAIRMAN

7 Yes.

8 MR. RUBY

9 ...that I wanted to raise on behalf of Mr. Marshall. There
10 were a number of matters which I might ask Your Lordships to
11 consider as an application by Mr. Marshall to call further
12 evidence. There are three such items. First of all, in connection
13 with the Marshall case itself.

14 First, there is a lawyer by the name of Peter Ashman, who is
15 the Director of an organization called "Justice," which is the
16 London, England branch of the International Commission of
17 Jurists, an organization with which I think you'll probably all be
18 familiar. And Mr. Ashman and the Justice group have made a
19 practice, unlike anyone else that I can find in the English-speaking
20 world, of investigating miscarriages of justice in the criminal
21 system. And they have investigated a large number of such cases
22 and, incidentally, one, the equivalent of acquittals through the
23 English legal system by persuading the Home Secretary in a large
24 number of cases that miscarriages of justice have occurred and
25

MR. RUBY - SUBMISSION and DISCUSSION

1 that innocent people have, in fact, been convicted of crimes. Now
2 what he has as a result of this is what we do not have here. We
3 have looked very, very carefully at one particular miscarriage of
4 justice. We've put it under a microscope, as it were. And we have
5 not had an opportunity to look more broadly into the question of
6 miscarriages of justice generally and how they occur, what makes
7 them arise. Now what are the features of miscarriage of justice in
8 the criminal justice system in Canada?

9 And my submission on this point is that it would be useful
10 for us to have his work as an overview, so we have a context into
11 which we can put this particular feature. For example, assuming
12 that one of the factors we associate with miscarriage of justice
13 here is sloppy and incompetent police work. Is that a common
14 feature or an unusual feature? Is miscarriage of justice more
15 likely to arise from other causes than that? And it would be my
16 submission that, since we don't have the time or resources to do
17 that kind of broad independent investigation here, we should
18 draw in someone who has already done it and learn what lessons
19 we can. So that's the first point.

20 I pause when I say that. Mr. Spicer has long known of my
21 wish in this regard and I believe he has actually gone to England
22 and interviewed Mr. Ashman, but I don't know if anything further
23 has come of it.

MR. CHAIRMAN

25 Ms. Edwardh supplied us with his book which gave the

MR. RUBY - SUBMISSION and DISCUSSION

1 details up to that point, at least, of all his investigations and
2 results.

3 MR. RUBY

4 There is a selection. There were two volumes and I...

5 MR. CHAIRMAN

6 Yeah, we have them.

7 MR. RUBY

8 I think that is helpful, but that's not something that's come
9 onto the record, and I think it should. That's my point. Also, we
10 haven't the benefit of his analysis of the kinds of questions that
11 I'm asking now, which is, you know, you can do it from the book
12 but we haven't been able to ask him what are the kinds of factors
13 which cause miscarriages of justice in the criminal justice system.
14 And I think that's something we ought to know and be able to ask
15 this man.

16 MR. CHAIRMAN

17 And how do they relate to the Province of Nova Scotia as
18 opposed to Canada?

19 MR. RUBY

20 In that the systems are different. It is background. This is
21 not direct material. It is context to what we have done.

22 The second item concerns the issue of compensation. The
23 Commission has received a paper from Professor Archie Kaiser of
24 Dalhousie Law School on the subject of compensation. And I've
25 had an opportunity of reading it and it's a very interesting paper,

MR. RUBY - SUBMISSION and DISCUSSION

1 but it is, like most documented papers, written in abstract, in
2 general. And I would like to have the opportunity of having
3 Professor Kaiser here so that I can ask him questions that would
4 allow me to relate that general information to Mr. MacDonald's
5 compensation issue... Marshall's compen... We know about Mr.
6 MacDonald's compensation. Mr. Marshall's compensation. And
7 that relating should be done by somebody who has the kind of
8 breadth of understanding of the field that Professor Kaiser does.
9 So that's the second area.

10 The third witness I propose is Mr. Alan Story of the *Toronto*
11 *Star* and you recall that at some point I put into evidence, and it's
12 found at Volume 38 of the red volumes, page 129, an article he
13 wrote. The context was that we have tried with, one might think,
14 great difficulty to explore the issue of racism in the trial of Donald
15 Marshall and it's proved to be, I think, a difficult exploration.
16 We've not had great success one way or the other though we'll
17 deal with that in argument, in concretely pointing out racism in
18 that particular trial. And that's partly because of the passage of
19 time and partly because of the difficulty of getting people to
20 discuss the issue who were involved in the trial. But the one piece
21 of evidence which he has is that he talked to jurors.

MR. CHAIRMAN

22
23 What date was that argument, Mr. Ruby?

MR. RUBY

24
25 June 9, 1986. And one of the jurors, you'll recall, I'll just

MR. RUBY - SUBMISSION and DISCUSSION

1 read the short passage from the article:

2
3 Finally, Rosenblum had to overcome the racial
4 prejudice of at least one juror. Interviewed by
5 the *Star* after Marshall's innocence was proved,
6 the juror denied any discrimination was at work
7 in the case, but then he added 'With one redskin
8 and one Negro involved, it was like two dogs in a
9 field. You knew one of them was going to kill
10 the other. I would expect more from a white
11 person,' he said. 'We are more civilized.'

12
13 It may well be improper for us to attempt to call the juror
14 or to find out which juror it was, and I'm not suggesting that we
15 should do that. But we should have in the record from Mr. Story
16 actual evidence that, in fact, occurred because it is the only
17 concrete evidence of the racism which I will submit in the end
18 pervasively permeated this trial. And I want to have an
19 evidentiary base for that submission. Mr. Story has now been
20 transferred to Toronto, but I'm sure he's available and will make
21 himself available to the Commission.

22
23 The fourth area that I want to raise flows from the portion
24 of the transcript which I have placed on your desk this morning.
25 I do not see Staff Sergeant Wheaton's name on the MacLean
witness list and it's my submission that he ought to be called.
You'll recall during the hearings the issue of the fire at Mr.
MacLean's restaurant in Port Hawkesbury was raised by Staff
Sergeant Wheaton, and you'll see that passage at page 7953 of the
transcript before you. At that point, the questioning continued

MR. RUBY - SUBMISSION and DISCUSSION

1 after the information had been brought out and then at page
2 7958, it becomes my turn to cross-examine and I indicate "I'm
3 waiting actually to deal with this issue," at Line 23 on page 7958.

4
5 I can appreciate at the moment we're dealing
6 solely with the Marshall case, as counsel outlined
7 in his opening, but I would also like to take the
8 position and I do take the position...

9 And so forth down to Line 7.

10 ...the documents are thoroughly capable of
11 raising the inference that's one's cases that affect
12 public officials, such as Chief MacIntyre, get
13 inside the Attorney General's (Department.)
14 Positions are taken from, among others, political
15 reasons and that's something I want to explore.
16 it's certainly within terms of reference.

17 And the argument goes on. Mr. Chairman deals with a point in
18 part in that Line 25 to the bottom of 7960. Mr. Chairman points
19 out the undesirability of having an innocent person's name
20 become public.

21 I'm very keenly aware of that. I take it, then,
22 the decision of this issue is deferred until some
23 later time when further investigation has taken
24 place.

25 Mr. CHAIRMAN:

No, no, no. We seem to be getting side-tracked
now. I've ruled on that and

MR. MACDONALD:

The decision has been made, in my view, My

MR. RUBY - SUBMISSION and DISCUSSION

1 Lord. It's to permit this question to be answered
2 and it's been answered.

3 MR. CHAIRMAN:

4 It's been answered.

5 MR. MACDONALD:

6 There's no decision other than that, as I see it.

7 And then Mr. Pugsley rises in relation to another matter. And we
8 come back to that at page 7963. Line 11:

9 ...I want to get clear direction from Your
10 Lordship on it on how far I can go... For
11 example, I would like to ask this witness what
12 he knows of the decision-making process inside
13 the Attorney General's office in the case that he's
14 involved in, the MacLean case where there's
15 arson. And I think it's relevant because it may
16 well show the pattern of political decision-
17 making inside that office. Now I'm willing to
18 defer that, but if you're telling me that I can't
19 ask it...

20 I think what I meant to say was " I want to argue that
21 further.

22 MR. CHAIRMAN:

23 No, what I'm saying to you is that you can ask
24 him with respect to what he knows of the
25 decision-making process, but the contents of the
file is totally different. If he says that he knows
that the particular file goes to the Attorney
General's Department in the normal decision-
making is not followed, and if he knows that of
his own, you know, knowledge, we accept that.

MR. RUBY - SUBMISSION and DISCUSSION

MR. RUBY:

1 For example, I won't talk to the witness. But
2 let's say he says this, like the MacIntyre case...
3 issue, where there was a case where there was a
4 prima facie case of guilt as far as he was
5 concerned and yet charges never emerged, I
6 would like to know about that. He may have to
7 tell me something about the facts in order to
8 make that meaningful. Now as I say, I want to
9 defer this to a second stage

(Which we've now arrived at I can say parenthetically.)

But it is, in my submission, relevant.

MR. CHAIRMAN:

10 I think you'd better defer it to a second stage,
11 because I would not be prepared to rule on that
12 at this time, Mr....

MR. RUBY:

13 I take it we'll have the witness back to deal with
14 that at some point later.

MR. CHAIRMAN:

15 Well, no, I'm not... I'm not saying we're going to
16 have this witness back.

MR. RUBY:

17 Make a ruling.

18 And then there's a comment from the Chair and turns to the
19 7965 at Line 21:

MR. CHAIRMAN:

20 Yes, well, let's proceed with the cross-
21
22
23
24
25

MR. RUBY - SUBMISSION and DISCUSSION

examination of this witness now and...

1

2

MR. RUBY:

3

And I take it I will confine myself at this time to the issues affecting the Marshall case directly and leave the argument that I've made to another day?

4

5

6

MR. CHAIRMAN:

7

Right.

8

9

And that day now having arrived, it's my respectful submission that on the face of the evidence we now have, there was a cover-up of the case involving arson at Port Hawkesbury involving Mr. MacLean. And, therefore, it's important for me to...

10

11

12

13

MR. CHAIRMAN

14

15

16

17

18

Don't use that word, Mr.... because the evidence doesn't sustain you on that sofar as... You'll recall, I don't know if you were here for the subsequent cross-examination of Staff Sergeant Wheaton. My recollection is that he somewhat, on more sober reflection, he reached a different conclusion.

19

MR. RUBY

20

I respect that you may have reached a conclusion...

21

MR. CHAIRMAN

22

No, he.

23

MR. RUBY

24

But others changed slightly.

25

MR. CHAIRMAN

MR. RUBY - SUBMISSION and DISCUSSION

1 No, he did. He did.

2 MR. RUBY

3 In the sense that the time of the snowstorm may have
4 varied. But I don't believe, respectfully, that there's any variance
5 in Staff...

6 MR. CHAIRMAN

7 I think he also said that the information had come to him
8 from someone else.

9
10 MR. RUBY

11 That's true. He said that here.

12 MR. CHAIRMAN

13 That's right.

14 MR. RUBY

15 He said he was assisting in the investigation. But the fact
16 remains that the evidence we have now with respect to this
17 incident indicates that there was a valid charge to be laid. It was
18 the opinion of the investigator, according to what he has said at
19 page 7953. "...it was the feeling of the investigators that it was a
20 set fire." No charges were ever laid once the documents went to
21 the Attorney General's Department. So my respectful submission
22 is that is something we should look at. Now I have not seen those
23 documents. I've not seen the evidence. I've not seen how it was
24 dealt with in the Attorney General's Department. But on the face
25 of it, it is directly related to what we are talking about. He does

MR. RUBY - SUBMISSION and DISCUSSION

1 not expand the field substantially, because we're already looking
2 at Mr. MacLean in the way in which his cases got handled in the
3 Attorney General's Department. And I would like to ask that this
4 be called and I be allowed to ask questions about this man. Now
5 if there are any questions, I don't want to expand further on the
6 argument that I made in the previous day. But it having been
7 deferred until today, my submission is what we know is that
8 investigators felt a charge of arson was warranted and without
9 going into the merits of that, because we don't have any
10 information of substance on it yet, when it got to the Attorney
11 General's Department, the charge was not proceeded with. And
12 it's unexplained. And that's what I would like to see explained.
13 Thank you, My Lords. You've been very patient.

MR. CHAIRMAN

14
15 Yes, Mr. Orsborn?

MR. ORSBORN

16
17 My Lord, I'll respond to the first three matters that Mr.
18 Ruby raised and Mr. MacDonald will respond to the last one that
19 was raised.

20 Mr. Ruby did advise us some time ago about his request to
21 call this additional evidence and we have met with him on
22 occasion to discuss that and, in general, our answer to him on the
23 three items that he raised was that we would not be prepared to
24 call them of our own volition, hence, the application to yourselves.
25 To some extent, we may be grappling with a situation of, while the

MR. RUBY - SUBMISSION and DISCUSSION

1 evidence may be nice and, indeed, in some respects, not
2 irrelevant, that we have had to grapple with the question of
3 drawing a balance between calling all evidence which in any way
4 impinges on our Inquiry and, on the other hand, the need to bring
5 this inquiry, at some time in the reasonable future, to an end.

6 With respect to the evidence of Mr. Ashman, Mr. Spicer,
7 while he was on other business in Europe, took advantage of the
8 opportunity to meet with Mr. Ashman and had a useful discussion
9 with him. We have been provided with a useful copy of his latest
10 paper on the matter and that will be available to the Commission.
11 Given that the benefits of his work will be available to yourselves
12 for your consideration, given that they are in very, they are in
13 general terms and not related specifically to the Marshall case or
14 to Nova Scotia, we felt that it was not that necessary to bring Mr.
15 Ashman across the Atlantic to testify before the Commission.

16 With respect to the calling of Mr. Kaiser, Professor Kaiser,
17 again the, his paper on compensation, as Mr. Ruby indicates, has
18 been made available to the Commission. The direct evidence on
19 compensation is all in, is all before the Commission and insofar as
20 there may be principles in Mr. Kaiser's paper that can be related
21 and adapted to the evidence that you have already heard, it is our
22 view that that is something that the Commission, the
23 Commissioners can do without the necessity, again, of calling Mr.
24 Kaiser as an additional witness.

25 With respect to the evidence of Mr. Alan Story, while the

MR. RUBY - SUBMISSION and DISCUSSION

1 evidence from the juror himself or herself would be directly
2 relevant to the Marshall matter, we share Mr. Ruby's concern
3 about the possible impropriety of obviously calling a juror, given
4 the provisions of the Criminal Code. Because of that, we have an
5 equivalent concern about calling Mr. Story to comment on his
6 discussions with the juror. It would seem to us that if the juror,
7 or indeed Mr. Story, would be in contravention of the Code by
8 speaking of the deliberations of the jury, it would not be
9 appropriate for this Commission in any way to be seen to be
10 aiding or abetting that kind of conversation by calling Mr. Story to
11 comment on it. We do have the reference to the discussion in the
12 Globe and Mail... or in Toronto Star, I'm sorry, for whatever weight
13 the Commission does ascribe, wishes to ascribe to that. And it was
14 out of that concern, predominantly, that we chose to advise Mr.
15 Ruby that we would not be in agreement to calling Mr. Story.

16 And, as I said, with respect to the calling of Staff Wheaton,
17 Mr. MacDonald will respond to that question.

MR. MACDONALD

19 My Lords, I am taken somewhat by surprise. I wasn't
20 aware that this particular issue was being raised this morning. I
21 was aware of the other three and had I been aware, I would have
22 had extracts from the transcript to refer you to as well. The
23 Chairman referred to subsequent evidence given by Mr. Wheaton
24 on cross-examination.

MR. RUBY

MR. RUBY - SUBMISSION and DISCUSSION

1 If you want to defer that discussion until you've had a
2 chance to do so, I'm quite content.

MR. MACDONALD

3
4 I'm prepared to talk about it, My Lord, but I can certainly
5 get these additional transcript references for you, if you wish. But
6 it's my clear recollection that on cross-examination by Mr.
7 Saunders, Staff Wheaton acknowledged that at no time... first of
8 all, what we should recall is what Wheaton said. My recollection
9 is Staff Wheaton said that Mr. MacLean had copies of a report that
10 had been filed by the R.C.M.P. with the Attorney General and that
11 that was a violation or that was an aberration from the normal
12 procedure. Further, he said that the investigator considered that
13 arson charges should be laid, and they weren't laid. And he did
14 confirm that, in this respect, he was, in all cases, relying on what
15 he was told by Constable Gaudet.

16 Now on cross-examination... Or he also said that Mr.
17 MacLean allegedly was seen at the restaurant at five o'clock in the
18 morning in a blinding snowstorm. Now on cross-examination, I
19 believe by Mr. Saunders, he said that five o'clock in the morning,
20 could, in fact, be noon or getting up to noon. That that would be
21 very early in the morning.

22 He also said that he had no knowledge of any report actually
23 having been received by the Attorney General's office. I take it, I
24 think it was until some time in December of 1980. And he also
25 went on to say that Constable Gaudet did tell him that he believed

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1 Mr. MacLean had copies of earlier reports and that Mr. MacLean,
2 in fact, had been, being investigated for arson.

3 Now those are very serious charges and, by request, both
4 the R.C.M.P. and the Attorney General's gave me full access to the
5 files involving that particular case, which I have reviewed. I've
6 also examined and questioned Constable Gaudet on the matter.

7 What we are about here, My Lords, is to look at cases where,
8 in our opinion, there is some suggestion that other than the
9 normal procedure was followed by the Attorney General's
10 Department or the Royal Canadian Mounted Police. That's what
11 we're dealing with now.

12 9:52 a.m.

13 We have not tried to find every possible case where there
14 may have been a departure from what is maybe considered
15 normal. We consider that if we can demonstrate to you or if the
16 evidence demonstrates to you that on a couple of occasions there
17 has been a procedure followed that is not normal that that would
18 be sufficient to enable Your Lordships to make recommendations
19 of change, if you consider change is required.

20 In this particular case, in the MacLean fire case, having
21 reviewed all of the materials, I am satisfied that there is nothing
22 in the files of the RCMP or the Attorney General which would
23 demonstrate that any report was received by the Attorney
24 General's office prior to December of 1980.

25 I'm also satisfied, My Lord, that the procedure followed in

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1 this case was absolutely the normal. That, in fact, once the RCMP
2 report was received, it was reviewed and it was reviewed by a
3 local Crown Prosecutor who reviewed all of the evidence, took all
4 the information he considered necessary and advised the RCMP
5 that in his opinion there was no evidence to support the laying of
6 a charge against Mr. MacLean, and that decision was concurred in
7 by the RCMP. So this is not a situation where at the very top of
8 the Attorney General's Department, without involvement of local
9 Crowns, any decision was made. This was the normal procedure
10 being followed. In fact, they took it outside of the county in which
11 Mr. MacLean resides and went to a Crown Prosecutor in another
12 county in an attempt to make certain they got an independent and
13 an objective opinion on the matter.

14 I have spoken to Constable Gaudet. Constable...and for this
15 purpose, my major purpose in speaking to Constable Gaudet was
16 to determine whether he would agree with the evidence of what
17 Staff Wheaton said he had been told by Gaudet. And I was
18 advised that he was certainly not prepared to disagree with what
19 Staff Wheaton had said and for that reason he wasn't called. The
20 only purpose I would see in calling Constable Gaudet would
21 perhaps be as a collateral attack on the credibility of Staff
22 Wheaton. So we elected not to call Constable Gaudet.

23 We've seen no evidence to suggest that anything other than
24 the proper procedure, as we understand it, was followed in the
25 MacLean case, that following complete investigation there was no

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1 suggestion of any impropriety or, in fact, any evidence to support
2 the allegation that Mr. MacLean was involved in any arson. And
3 in those circumstances we saw no need to bring that evidence
4 before Your Lordships.

MR. RUBY

5
6 In response, My Lord. First with regard to Mr. Story. It is
7 not clear that Mr. Story engaged in any impropriety at all from
8 the comment that I've read. But in any event, I should point out
9 to you that that question in a criminal context, at least, will never
10 be tried because of the six months statute of limitations on the
11 summary conviction offence in the Criminal Code of reviewing
12 deliberations of a juror. So there is no possible criminal exposure
13 to anyone at this point in time. I want to make it clear also that I
14 don't rule out questioning the juror at this point. I simply say
15 that the first step, at least, is to get the evidence before us in the
16 form in which we can get it from Mr. Story.

17 Second, with regard to the MacLean arson, my submission is
18 that on its face we're left with a peculiarity in that the
19 investigator felt there was a charge. Once again, we have someone
20 who has a high political position and the Attorney General's
21 Department decided not to proceed.

MR. CHAIRMAN

22
23 No, no, the...no, the local Crown Prosecutor in another county.

MR. RUBY

24
25 Local prosecutor aside, he's part of the Attorney General's

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1 Department.

2 MR. CHAIRMAN

3 I realize that's true, but there's a difference from the context
4 that we've been looking at in last week's evidence and the
5 evidence coming this week.

6 MR. RUBY

7 Sure. No two cases are ever exactly alike. But in this case,
8 given that that's the procedure that was followed, the only way of
9 knowing whether or not there was an impropriety in the handling
10 of that case requires an assessment of the strength of the
11 evidence. If there's a case that's a very strong case, that
12 somebody decides not to proceed with in the face of the evidence
13 that's available, then one would say, yes, there may well be
14 impropriety. If on the other hand it's a weak case, you'd say, no,
15 there was not an impropriety. So that we are unable to assess
16 that question without knowing what the documents are, what the
17 evidence was in that case, and being able to compare that with the
18 decision that was made by the Attorney General's Department.
19 My friend has seen the documents. I have not. And so I am left
20 in a position where must suggest to you that I think it's
21 important to look at this case and see whether or not there is any
22 impropriety because what we have now before us, we are not
23 having heard from the investigator or the person who has looked
24 at the evidence and said, "There's not enough evidence." There's
25 no reason to think that that's the case, that's so. We just don't

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1 know. And so it does fit respectfully within the general
2 parameter of the kind of problem we're looking at, even though
3 the procedure may have been a different one. And the mere fact
4 that a difference in procedure of going to a local Crown rather
5 than to the Attorney General's office in Halifax should not make
6 the crucial difference. Thank you.

MR. MacDONALD

8 Just so it's clear, My Lord, I'm not suggesting here that the
9 local Crown made any decision. The local Crown was asked for his
10 opinion by the RCMP and he gave it. The RCMP decided not to lay
11 a charge. That was a clear case of exercise of discretion that we've
12 heard of all last week, and the normal procedure being followed.
13 You go to a Crown, you get his advice, and then you decide what to
14 do. There is no evidence of any kind of any pressure being
15 exerted on the RCMP. The decision was made by the RCMP
16 according to the documentary evidence.

MR. CHAIRMAN

18 Any other counsel wish to be heard?

MR. PINK

20 My Lord, I'd like to just speak briefly on all the matters
21 raised by Mr. Ruby, but I'd like to start with the last one. I can't
22 object strongly enough to the language that my friend uses to
23 characterize this in his representation. It's...I think it's
24 inappropriate for counsel to use some of the language that he did
25 to describe something of which he knows very little about. I

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1 know that he has made requests of Commission counsel to have
2 this matter dealt with and he's been advised of their position
3 earlier on. Mr. MacDonald is correct. The matter was dealt with
4 away from the central office of the Attorney General's Department
5 and the only fact, I might add, is that the local Crown in reviewing
6 the file reminded the RCMP that it was their ultimate choice
7 whether or not a charge should be laid. So again, it was kept
8 within the confines of what we've called normalcy.

9 In terms of the other applications, My Lord, I support the
10 position enunciated by Commission counsel, and especially on the
11 Story application. I think it would be inappropriate, even though
12 there may be some statutory limitation period, for this
13 Commission to support or condone the speaking with the witness,
14 directly or indirectly, a juror, directly or indirectly about
15 something which the Code deals with.

16 In terms of Mr. Kaiser, we've not seen the report or the
17 opinion that's been referred to but would agree also that if Your
18 Lordships have the benefit of reviewing it and are able to
19 compare it with the evidence that's before us that that should be
20 sufficient.

21 MR. CHAIRMAN

22 Mr. Ruby.

23 MR. RUBY

24 My Lord, I just wanted to add just very briefly, in response
25 to my friends' comments. My friend criticizes my choice of

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1 language, but what he does and what Mr. MacDonald also did was
2 to keep throwing out little tidbits from the files that they've seen
3 which they say lead to the conclusion that nothing was wrong
4 here.

5 MR. CHAIRMAN

6 Right.

7 MR. RUBY

8 They've never shown the files to us. It does seem just a bit
9 unfair.

10 MR. CHAIRMAN

11 Well, we have to...we have to rely, and we do rely on the
12 high degree of professionalism and the integrity of Commission
13 counsel. That's part of their duty to review files to see if there's
14 any relevancy to this inquiry. And I...and without ruling on the
15 application I have no difficulty in accepting the position put by
16 Commission counsel.

17 It does trouble me a great deal that accusations that are
18 made involving people who are not before us seem to create a
19 great deal of headlines without any substantiation for them, and I
20 have never met the gentlemen you'er referring to, Mr. MacLean,
21 but I do recall reading in the press, when this evidence was
22 suddenly volunteered by Mr. Orsborn, Mr...or Staff Sergeant
23 Wheaton after he had completed his evidence-in-chief, and then
24 the next day certainly recanted to a large extent, seeing two
25 quotes in the press that I thought would be significant attributed

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1 to Mr. MacLean, that he had thirty-odd calls as a result of the
2 accusations made just before we rose that day from the press, and
3 following the change in the...the refinement, he only had two.
4 And that, you know, troubles me a great deal that people who are
5 not before us seem to be the subject, their guilt or innocence
6 seems to be the subject matter of public debate arising out of
7 these hearings, and it was the same all of last week, and I make it
8 clear again today. We are looking only at the procedure and the
9 practise followed. The rest is outside of our mandate. And it is
10 quite wrong for anyone to attribute guilt or innocence to the...any
11 person arising out of the evidence that we hear in what we
12 interpret to be a discharge of our mandate, with respect only to
13 the recommendations.

14 Such being the case we will, as a Commission, consider
15 these...the representations that have been made and either deal
16 with them this afternoon or more likely tomorrow morning, at the
17 commencement of tomorrow morning's hearings. Now are you
18 ready to proceed.

MR. ORSBORN

20 Yes, My Lord. The first witness will be Mr. Paul Cormier.

MR. CHAIRMAN

22 I've heard some good news that counsel are prepared to
23 assiduously devote themselves to their duties and ask only
24 relevant questions and as a result thereof the schedule has been
25 changed, or conclusion has been changed from Thursday to