

1 MR. MacDONALD:

2 Thank you, My Lords.

3 Today, My Lords, is the 90th day of hearings for this
4 Commission. Counting this morning and at least according to my
5 count, 113 witnesses have given evidence to you, some on more
6 than one occasion, with one exception. We consider you have all
7 the evidence available to you to assist you in discharging your
8 mandate. As you know there is one topic we have not yet been
9 able to canvass because of rulings in the court and that is still
10 before the court.

11 At the outset, I would like to state that all parties and
12 their counsel have cooperated fully with Commission Counsel as we
13 gathered information and presented evidence to this Commission.
14 Had it not been for that assistance, the hearings would have been
15 much longer than the 90 days. And on behalf of Commission
16 Counsel, I would like to thank all of those parties and their
17 counsel for this assistance.

18 Also, My Lords, I would like to thank you for your patience
19 and for allowing counsel fairly free reign to question witnesses
20 and present evidence in the way that best suited the needs of
21 their clients. You were quick to rule on the various questions
22 put to you by counsel throughout the hearings and that also
23 avoided delays and confusion while we awaited decisions.

24 At this stage, it would be useful if I were to state again
25 our understanding of the mandate which was given to you by the

1 Government of Nova Scotia. Simply put, you were asked to deal
2 with two questions, first: Why was Donald Marshall, Jr.,
3 wrongfully convicted of the murder of Sandy Seale and second:
4 What, if anything, should be done to prevent a reoccurrence of
5 such a tragedy? Your Lordships instructed your counsel to gather
6 and present all evidence considered relevant by us to assist Your
7 Lordships in answering those two extremely difficult questions.

8 At this stage, My Lords, various oral submissions are to be
9 presented in an attempt to interpret the evidence and to put
10 forward recommendations which may be of assistance to you.
11 Commission Counsel will make the first submission. Following
12 that there will be submissions on behalf of various parties who
13 were granted standing and who wish to be heard. After counsel
14 for those parties are heard, a presentation will be made on
15 behalf of the Canadian Bar Association.

16 And finally and if necessary, Commission Counsel will
17 address you again but only with respect to any points that we
18 have not already covered in our primary submission and which may
19 be raised by others and which we consider require some comment.

20 The role of Commission Counsel is one which is foreign to
21 and not completely understood by most practicing lawyers. It is
22 likely the public and the media have the same difficulty and for
23 their benefit, I thought it might be useful to take a few minutes
24 at this time to explain our understanding of that role.

25 Commission Counsel are retained by the Commissioners and

1 asked to locate, assemble, and present in public hearings all the
2 relevant evidence concerning the topic under review. Commission
3 Counsel do not advocate any point of view but are expected to
4 present all relevant evidence. We enjoy the luxury of being able
5 to ask any question of any witness because there is no answer
6 which could be considered harmful to our position.

7 COMMISSIONER EVANS:

8 We seem to have some local interference in the back room there
9 and I was wondering if somebody could -- I don't want another
10 group in competition with you.

11 MR. MacDONALD:

12 Thank you, My Lord.

13 COMMISSIONER EVANS:

14 Peace has been restored; if not, harmony.

15 MR. MacDONALD:

16 In order to make certain that all relevant evidence is
17 presented, it sometimes is necessary for Commission Counsel to
18 cross-examine witnesses. While this may give the appearance of
19 bias toward a particular point of view, that approach must be
20 adopted, when required, to assure that Commission Counsel
21 discharge their responsibility. In theory if Commission Counsel
22 discharged their responsibility fully, there would be no need for
23 other counsel to ask any questions. One must only recall the
24 extent of cross-examination which took place in this case to
25 realise that at least in the eyes of other counsel, we obviously

1 did not perform our role as completely as we hoped we would.

2 At this stage, though, we are the only counsel who
3 reasonably can be expected to present to Your Lordships an
4 assessment of all the evidence and to suggest the various
5 findings of fact which may be supported by such evidence. We
6 have attempted to be impartial in assessing the evidence.
7 Although necessarily, we have had to make decisions which may
8 appear to place us in a position of being advocates for
9 particular points of view.

10 Other counsel who will address you represent clients and
11 their traditional and expected role is to direct your attention
12 to the evidence which supports their clients' position and to
13 suggest ways in which you can interpret evidence in favour of
14 their client, even though the evidence on the surface may appear
15 to be adverse to their clients' interests.

16 Simply put, the role of Commission Counsel at this time is
17 to present our assessment of all the evidence. In many
18 instances, it would not be possible to comment on the evidence
19 without at the same time referring to conclusions which we
20 consider are supported by the evidence. Even if this were
21 possible, however, we do not consider it would be proper for
22 Commission Counsel to proceed in that way. If we are to continue
23 to perform the traditional role of Commission Counsel, it is
24 likely we will be involved further with Your Lordships as you
25 prepare your report. With very few exceptions, the tradition in

1 Canada is for Commission Counsel to be available to provide
2 whatever advise and assistance the Commissioners require after
3 the conclusion of the public hearings. It would not be fair if
4 we were to keep our views secret concerning the conclusions which
5 we consider are supported by the evidence and take the
6 opportunity at a later date, in private, to urge those views upon
7 you. Accordingly wherever we consider the evidence supports
8 particular findings of facts or conclusions, we will identify
9 those and refer to the evidence which we consider supports our
10 recommendations. On those occasions where we do not hold a firm
11 view, we will identify the various alternative findings of fact
12 or conclusions which could be supported but express no further
13 comment.

14 We emphasize, however, that in presenting our submissions,
15 we are acting as your counsel and not as advocates for any
16 particular point of view, even our own. Accordingly in my
17 submission today, I will not refer to nor comment on the
18 submissions of other counsel on points that we will cover, or
19 make any attempt to convince you that their arguments must be
20 wrong and ours must be correct.

21 As Your Lordships know, our formal written submission was
22 filed with the Secretary of this Commission on October 20th,
23 1988, and copies of that submission have been circulated.

24 I heard the Chief Justice's admonition at the beginning and
25 it's not my intention to read the contents of our submission. I

1 will, however, highlight some of the major portions of the
2 submission and explain in some detail why we are urging Your
3 Lordships to make certain findings and conclusions.

4 I would note for the record that in our written submission,
5 we have highlighted all those conclusions which we support. To
6 the extent possible in delivering an oral submission, I will
7 attempt to include most, if not all of those conclusions in my
8 remarks.

9 The system of administration of justice which prevails in
10 Nova Scotia and many other jurisdictions is comprised of many
11 parts. Whatever the number of parts be, however, hopefully the
12 pursuit of justice is the foundation upon which the system is
13 constructed.

14 Justice may be defined as being fair to all people and
15 treating people right. Conversely, a miscarriage of justice may
16 be defined as not being fair and not treating a person right. By
17 any measure or by any definition in our view, there was a
18 horrible miscarriage of justice committed by our system in its
19 treatment of Donald Marshall, Jr. To this point in time, all
20 parts of the system with which he came in to contact have failed
21 him. Some of that failure can be attributed to carelessness,
22 some to incompetence, some to deliberate acts, and some because
23 people just didn't appear to care. In our view, the evidence
24 does not support any finding that would attribute responsibility
25 to Donald Marshall, Jr., for his wrongful conviction for murder.

1 Once it was determined that Mr. Marshall had been wrongfully
2 convicted of murder, he was let out of gaol reluctantly,
3 acquitted of the murder which everyone knew he did not commit but
4 at the same time told that it was largely his own fault that he
5 spent eleven years in gaol. Very grudgingly, he was given
6 compensation and told to pay his own costs for proving that the
7 system had wrongfully convicted him. Those responses by the
8 various parts of our system of administration of justice should
9 be strongly criticized.

10 The way Marshall was treated is in stark contrast to the
11 treatment afforded other individuals who come into contact with
12 the administration of justice. Some key people in our system
13 appeared to go out of their way to be unfair to Marshall, yet
14 they asserted the same degree of effort to protect others whose
15 actions appeared to have warranted further investigation or the
16 laying of charges. Such unequal treatment of individuals in
17 Nova Scotia is unfair; hence, it is unjust and you must condemn
18 it.

19 Based on our assessment of the evidence, which I intend to
20 refer to in some detail, we have come to three fundamental
21 conclusions. First, Donald Marshall, Jr., was not responsible
22 for his wrongful conviction and was not the author of his own
23 misfortune. Second, virtually all the institutions involved in
24 the administration of justice in this Province and their
25 representatives which touched Donald Marshall, Jr.'s life failed

1 him. And third, all individuals have not been treated fairly by
2 the justice system in Nova Scotia.

3 The primary reason for constituting this Commission was a
4 desire expressed in various ways by the people of Nova Scotia to
5 attempt to learn why Donald Marshall, Jr., was wrongfully
6 convicted for the murder of Sandy Seale. Everyone now knows and
7 they knew at the time this Inquiry was commissioned that various
8 persons who gave evidence at trial of Donald Marshall recanted
9 that evidence and admitted to committing perjury.

10 Further, it is and it was known at the time this Inquiry was
11 commissioned that Sandy Seale was killed by Roy Ebsary and not by
12 Donald Marshall, Jr. You are asked to determine among other
13 things why perjury was committed and why no one was able to
14 detect the perjury as Donald Marshall was brought to trial and
15 convicted.

16 To assist you in answering those questions, I propose to
17 review in some detail the evidence surrounding the obtaining of
18 evidence from those persons who now recant the story told by
19 them at trial and to review the performance of those persons who
20 should have been able to expose the perjured evidence.

21 In reaching your conclusion, in our opinion, it will be
22 essential that you make findings of credibility respecting
23 various witnesses, while counsel always seek to avoid urging that
24 a finding of credibility be made, and though judges are loathe to
25 make such a finding, if it is possible to reach a decision

1 without commenting on credibility. In this case, we do not
2 believe it will be possible to answer the questions which will be
3 put to you unless you do elect to accept the evidence of some
4 witnesses, reject the evidence of others. In many cases, the
5 evidence is diametrically opposed; and in our view, it would not
6 be possible to reconcile the differences by referring, for
7 example, to the passage of time or to loss of memory by the
8 witnesses.

9 We are cognizant also of the comments frequently made by
10 Appeal Court judges who criticize Trial Division judges for
11 saying they do not believe a witness without giving express
12 reasons for reaching that conclusion.

13 If you do consider it necessary, therefore, to make a
14 finding that a particular witness is not to be believed, either
15 in total or with respect to a particular point, we urge you to
16 set out your reasons for reaching such a conclusion.

17 On several occasions, we will suggest to you that the
18 evidence of John MacIntyre on particular points should not be
19 accepted. In those situations, we will review the evident
20 conflicts in the evidence and explain why we consider the
21 evidence of various witnesses should be preferred to that of
22 MacIntyre.

23 To avoid repetition, however, it would be useful at this
24 stage to refer generally to those items which have been
25 considered important in other cases when assessing credibility of

1 witnesses.

2 On page 15 of our formal submission, we have set out a
3 quotation taken from the text, Wigmore on Evidence. While this
4 extract deals with the topic other than credibility, the
5 references made are equally applicable to this topic. There can
6 be no doubt that the deportment of a witness during the giving of
7 evidence is of great assistance to anyone attempting to assess
8 the veracity of a witness.

9 The words of Justice Ryland which are contained on page 16
10 of the quotation, spoken almost 130 years ago, are as appropriate
11 today as they were then. He said:

12 There are many things, aside from
13 the literal import of the words
14 uttered by the witness while
15 testifying, on which the value of
16 his evidence depends. These it is
impossible to transfer to paper.
Taken in the aggregate, they
constitute a vast moral power in
eliciting the truth...

17 And similarly, the words of Chief Justice Appleton, also almost
18 120 years ago, are appropriate.

19 . . . the promptness and
20 unpremeditatedness of his answers
or the reverse, their distinctness
21 and particularity or the want of
these essentials, their
22 incorrectness in generals or
particulars, their directness or
evasiveness, are soon detected.
23 . . . The appearance and manner, the
voice, the gestures, the readiness
24 and promptness of the answers, the
evasions, the reluctance, the
25 silence, the contumacious silence,
the contradictions, the

1 explanations, the intelligence or
2 the want of intelligence of a
3 witness,...

4 and similar type of considerations. When I recall the evidence
5 of Mr. MacIntyre, I see a person who attempted to evade answering
6 questions, who was particularly reluctant to deal with many
7 matters, who was contradictory, and certainly less than prompt
8 when answering questions, who continually fidgeted with the
9 papers in front of him, who could not sit still for more than a
10 few seconds, who was very uncomfortable generally to be in a
11 position where he had to give explanations for his actions for
12 many years ago.

13 Beyond this general impression, however, there were
14 instances where Mr. MacIntyre gave evidence and answered
15 questions in a seemingly straightforward manner, yet he would
16 quickly abandon the evidence or the answers when confronted with
17 other evidence or documents which appeared to contradict him.

18 Let me refer to two particularly vivid examples of this type
19 of conduct. The first involved the preparation of the affidavit
20 which was taken from Mr. MacIntyre and which was filed in the
21 Appeal Court of Nova Scotia in an application to have evidence
22 heard on the Reference. And I'm going to read to you some of the
23 evidence that was given by Mr. MacIntyre on this point. The
24 first is taken from volume 33 of the evidence commencing at page
25 6105 and that was after Mr. MacIntyre was being questioned about
a particular statement contained in the affidavit. This was in

1 response to a question from the Chairman who asked Mr. MacIntyre:

2 Q. Who prepared the affidavit?

3 and his answer was

4 A. Mr. -- I would say -- I don't know. The
5 day I was there it was Mr. Edwards and
6 Mr. Wheaton were there and it's from
7 them I got the affidavits.

8 At that point, I took over the examination again. I said:

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

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

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

19 A. I did not.

20 Q. Did you discuss it with him?

21 A. No. No.

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

24 A. That's right.

25 And over on page 6106:

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

Again the Chairman had intervened at this stage.

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

A. That's right.

1 Q. Before the affidavits were prepared?

2 And Mr. MacIntyre responded with a question:

3 A. Before this was written down?

4 And he said:

5 A. No.

6 And this was the question:

7 Q. Well, were would he have gotten the
8 information?

9 A. They made them up.

10 Now it was only after Mr. MacIntyre was then shown the contents
11 of Frank Edwards notes which detailed the visits to the office,
12 the taking of the instructions, the review of the draft
13 affidavit, the changing of the affidavit. In response to Mr.
14 MacIntyre's request that he then acknowledged on page 6112 that
15 he had the opportunity to look the affidavit over before he swore
16 to it.

17 And the other example I'll refer to briefly of this tactic
18 of Mr. MacIntyre of saying one thing and then backing off. It
19 had to do with John Pratico and the taking of the second
20 statement. And I'm referring to page 6115.

21 Q. Had you seen him...

22 That's Pratico.

23 ...since you had taken the statement on May
24 30th until he was brought to your office on
25 June the 4th which was a Friday?

A. No. No.

And again it was only after Mr. MacIntyre was shown the statement

1 of Pratico that referred to "a place that I showed you", that
2 MacIntyre said: "Oh, yes, then I must have been there with him".
3 In stark contrast with the initial evidence: "No, I never saw him
4 from the time he gave his first statement until he gave his
5 second."

6 In our formal submission, My Lords, there is reference to
7 specific conflicts in the evidence between Mr. MacIntyre and
8 others and we have directed you to the page references in the
9 transcripts where that conflicting evidence can be found. I am
10 not going to deal with all of those. I do suggest, however, that
11 ultimately you must.

12 In our submission we have referred to two particular
13 conflicts which we ask you to review and resolve in particular.
14 The first relates to the evidence of Detective M. R. MacDonald.
15 His evidence and that of Mr. MacIntyre are diametrically opposed
16 on a relatively minor point which should not have caused any
17 concern. A finding of credibility on this point is not
18 particularly important to the major issues which confront you,
19 but it does afford a very clear opportunity to test the general
20 evidence of Mr. MacIntyre and to demonstrate his refusal to
21 concede even the most minor point. It's intended to suggest that
22 he had not performed as one would have expected. We subscribe to
23 the theory that a witness who is not truthful on minor points
24 certainly would be prepared to give untrue evidence when dealing
25 with points of major importance. And that is another reason that

1 | we want to take the time to refer to issues which may appear to
2 | be of little importance in the overall scheme of this Inquiry.

3 | Detective M. R. MacDonald was the detective on duty the
4 | night Sandy Seal was stabbed. He testified and Mr. MacIntyre
5 | confirmed this, that MacDonald was in contact with MacIntyre on
6 | that night. And he was told to carry out an investigation,
7 | obtain any evidence you can, obtain the names of people, go as
8 | far as you can that night. Mr. MacIntyre was aware of the
9 | practice of people in his Department and Mr. MacDonald in
10 | particular of keeping notes of what they did as they carried out
11 | investigations. Mr. MacIntyre made a particular point of being
12 | at the Sydney Police Station on the Saturday night, the following
13 | night around midnight to discuss the events of the previous night
14 | with those patrolmen who had been on duty. Yet he says -- Mr.
15 | MacIntyre says that at no time did he ever speak with M. R.
16 | MacDonald to find out what MacDonald did on that night or to
17 | review the notes which were taken by MacDonald and which have
18 | been filed as Exhibit 38 of this Inquiry.

19 | Now we know that Mr. MacDonald did carry out some
20 | investigative work on that night, although, one can hardly
21 | commend him for the quality of what he did. One of the things he
22 | did though was to interview Junior Marshall and to take notes of
23 | what Marshall told him, including a fairly detailed description
24 | of the persons who were involved in the stabbing at Wentworth
25 | Park. MacDonald testified that he worked the entire day on

1 Saturday, met with Mr. MacIntyre, reviewed his activity of the
2 night before, and in particular, reviewed the notes that he had
3 made. Mr. MacIntyre says MacDonald didn't do that, that he must
4 be mistaken. The transcript reference for all of those comments
5 I just made, My Lord, are found in our submission commencing at
6 page 23.

7 Which of those stories is the most probable? Which of those
8 witnesses is the most believable? Is it reasonable to conclude
9 that MacIntyre would make it a point to be at the police station
10 at midnight on May 29th to interview the patrolmen who were
11 involved the previous night, but would not have made any effort
12 at all to discuss the activity of the detectives he assigned to
13 carry out the investigation that night? Is it reasonable to
14 conclude that MacDonald would deliberately invent his evidence
15 about having spent the entire Saturday with MacIntyre being
16 involved in the investigation? And if he was, isn't it
17 reasonable to conclude that Mr. MacIntyre would have asked him:
18 "What did you do? Where are your notes?". In our opinion, Mr.
19 MacIntyre's evidence on this point is totally unreasonable and it
20 should not be accepted.

21 Another very vivid conflict of evidence exists concerning
22 the relationship between MacIntyre and Robert Patterson.
23 Patterson's name appears in the statements taken by MacIntyre on
24 May 30, from Donald Marshall, Jr., and from John Pratico.
25 Marshall says he spoken with -- he and Seale spoke with

1 Patterson, who called them by name. Pratico says Patterson told
2 him important information concerning the two persons Pratico
3 allegedly saw running from the scene of the incident. There is
4 no documentary evidence to show whether Patterson was ever spoken
5 to by the police. Now when Mr. MacIntyre was asked if he spoke
6 to Patterson, he said no. He even said he did not know
7 Patterson, that he did not know where he lived. He went on to
8 say, however, there wouldn't have been any need to interview
9 Patterson because he could not have any relevant information.
10 Now how can you say that on May 30th when you have Pratico
11 saying: "Patterson told me that the two guys I saw running from
12 the scene were members of a bike gang from Toronto". How could
13 you possibly say that man couldn't have any relevant
14 information. Patterson's name came up again in the statements
15 taken from Patricia Harriss and Terry Gushue. Once again when
16 questioned Mr. MacIntyre said he made no effort in questioning
17 those witnesses to find out where Patterson lived. That was the
18 story concerning Robert Patterson after John MacIntyre left the
19 witness stand. That didn't seem particularly convincing and at
20 that time we intensified our effort to locate Mr. Patterson and
21 were able to find him in Toronto.

22 In addition we were able to secure the police records from
23 Mr. Patterson and those were filed as Exhibit 120. And what
24 those reveal is that Robert Patterson was arrested twice in 1971
25 by John MacIntyre; once in March, 1971, a couple of months before

1 the stabbing. And yet, Mr. MacIntyre said: "I didn't even know
2 him. I didn't know where he lived." Now unfortunately Mr.
3 MacIntyre has not had the opportunity to explain his previous
4 evidence where he denied even knowing Patterson. Given the fact
5 that he repeated that, however, on several occasions: "...that I
6 didn't know where he lived"... "I didn't know him". We can only
7 assume that had he been confronted he would have to continue to
8 say he did not know Patterson, he didn't know where he lived, and
9 he didn't interview him.

10 William Urquhart testified after we were able to locate Mr.
11 Patterson. Mr. Urquhart said Patterson was well known to the
12 Sydney Police and that he believed Patterson would be well known
13 to MacIntyre. The evidence we heard from various policemen,
14 R.C.M.P., other people, was that John MacIntyre was a good
15 policeman, and that he has his finger on the pulse of Sydney. He
16 knew who was involved in criminal activity. He would know where
17 people lived who were involved in crime, particularly someone
18 that he arrested twice in the same year that the stabbing
19 occurred. In our opinion, the evidence of Mr. MacIntyre that he
20 did not know Patterson nor did he know where he lived, is not
21 credible.

22 It must be conceded at this point that Donald Marshall, Jr.,
23 was convicted of murder because of the evidence given by two
24 eyewitnesses, John Pratico and Maynard Chant. In addition, the
25 evidence given by Patricia Harriss was of crucial importance in

1 | the securing of the conviction. All three of these witnesses now
2 | say that the evidence given by them at trial was not true. Your
3 | Lordships must determine why these witnesses committed perjury
4 | before you can answer the question: Why was Donald Marshall,
5 | Jr., wrongfully convicted? There are many possible reasons
6 | which could be advanced and during the next several days I'm
7 | certain you will hear various theories in an attempt to assist
8 | you in answering that most fundamental question: Why -- Why did
9 | these three witnesses lie? In our opinion, the false evidence
10 | of these three witnesses was secured through the efforts of John
11 | MacIntyre, assisted by William Urquhart.

12 | We consider that MacIntyre concluded early in the morning of
13 | May 29th, 1971, before Sandy Seale died that Seale had been
14 | stabbed by Junior Marshall. With this conclusion planted firmly
15 | in his mind, MacIntyre carried out what can only be described as
16 | a perfunctory investigation which culminated on Friday, June 4,
17 | 1971, when the statements were obtained from the two
18 | eyewitnesses. We are prepared to accept that Mr. MacIntyre
19 | probably believed that Marshall had committed the stabbing,
20 | although, we cannot understand why he reached such a conclusion
21 | based on the evidence of his past dealings with Mr. Marshall. We
22 | cannot accept the proposition, however, that merely because a
23 | policemen believed that an incident happened in a particular way,
24 | that he has the right to suggest, badger, and coerce witnesses to
25 | obtain evidence which supports his conclusion.

1 John MacIntyre was Sergeant of Detectives in 1971 and was in
2 charge of the investigation of the murder of Sandy Seale. He
3 later became Chief of Police and he retired from that position
4 with honour. All the evidence we have heard is that he was a
5 competent policeman. How do we explain his incompetence in this
6 case. We are urging you to conclude that in this one instance
7 his performance as a policeman was flawed to the extent that it
8 constituted culpable conduct on his part. I realize the
9 seriousness of this statement and consider it essential,
10 therefore, that I take the time to review the evidence in some
11 detail in order that Your Lordships, the public, and Mr.
12 MacIntyre may understand why Commission Counsel have reached the
13 conclusions which are set out in our written submissions and
14 which will be repeated today.

15 Let me, first of all, deal with the suggestion that Mr.
16 MacIntyre concluded virtually immediately that MacIntyre had
17 stabbed -- I'm sorry, that Marshall had stabbed Sandy Seale.
18 Filed as Exhibit 40 are the notes of Constable Wood of the
19 R.C.M.P. The relevant parts of that exhibit, My Lord, are
20 reproduced on page 27. This is what is reported by Constable
21 Wood on the morning of May 29th, 1971.

22 Stabbing in Wentworth park, early
23 a.m., this date, two youths, Seale
24 and Marshall. Conversation with
25 Edward MacNeil & Det. MacIntyre
feeling at this time, Marshall was
responsible. An incident happened
as a result of an argument between
Seale and Marshall...

1 Having reviewed the evidence of Mr. MacIntyre and Mr. MacNeil on
2 this subject, we must conclude that if the statement recorded by
3 Wood was, in fact, made, it must have been Mr. MacIntyre who
4 made it. And MacIntyre testified that if MacNeil made it in his
5 presence he would have asked him: "Why? Why did you make up
6 your mind to that?". And MacNeil testified that in the presence
7 of John MacIntyre who was in charge of this investigation, a mere
8 constable wouldn't say anything. He certainly wouldn't say:
9 "This is who committed the crime". If that statement was made,
10 we put it to you that it must have been made by John MacIntyre.
11 The fact that Mr. MacIntyre believed Marshall to be the prime
12 suspect from the beginning of this investigation is further
13 corroborated by reference to the Telex which was sent from the
14 Sydney detachment of the R.C.M.P. to Halifax early in the morning
15 of May 30th, 1971. I have reproduced for you on page 28 of our
16 brief the relevant provisions of that Telex.

17 Now recall this, Mr. MacIntyre was at the Sydney police
18 station at or about midnight on Saturday, May 29th. This Telex
19 was sent from the R.C.M.P. in Sydney to Halifax at three o'clock
20 in the morning, the same time. Mr. MacIntyre had questioned
21 Donald Marshall on the Saturday and had taken the statement from
22 him. He had not taken a written statement, but he said what he
23 was told on that day corresponded with what is contained in the
24 written statement taken the following day. He did nothing else-
25 - Oh, I'm sorry. There was a visit to the park that day at which

1 time they did a walk around and they found a blooded kleenex.
2 That appears to be the extend of the investigation carried out
3 that day. Well, this is what the R.C.M.P. were told obviously by
4 someone from the Sydney Police Department.

5 Circumstances presently being
6 investigated by Sydney Police
7 Department. Investigation to date
8 reveals Marshall possibly the
9 person responsible, however,
10 Marshall states he and the deceased
11 were assaulted by an unknown male,
12 approximately 5'8" to 6' tall,
13 grey hair, approximately fifty
14 years who stated he did not like
15 Indians or Negroes and assaulted
16 both persons.

17 You compare that description with the description Marshall gave
18 to MacIntyre on the Sunday that is written down. You compare
19 that statement with what Marshall told MacIntyre in writing on
20 May 30th but orally on May 29th. That information could only
21 have come from John MacIntyre to the R.C.M.P. And what does it
22 say, "Investigation to date...". What investigation? A walk
23 around the park to pick up a kleenex with some blood on it, and a
24 talk with Donald Marshall.

25 Investigation to date reveals
Marshall (is) possibly the person
responsible.

Now there is one other piece of evidence which points for
the early conclusion by Mr. MacIntyre that Marshall was guilty.
And that concerns the cut that was on Marshall's arm. Let me
refer you to this evidence from Mr. MacIntyre on page 5942. This
is talking about Saturday.

1 Q. Why did you want him there?

2 A. Because I wanted to talk to him.

3 Q. Did you?

4 A. And I did. And I seen his injury that morning.

5 Q. What did you think of that?

6 A. On his arm. Well, I thought it was a very -- a very shallow injury.

7 Q. How could you tell that?

8 A. Well, he had it bandaged and he pulled it down and I seen it.

10 Q. But wouldn't it be stitched up?

11 A. It was.

12 Q. How can you tell how shallow or deep it was? Did you split it?

13 A. By just looking at it, sir, I thought it was.

15 From the beginning, Mr. MacIntyre thought that this cut on
16 Marshall's arm was a very shallow type of injury. How could you
17 possibly conclude that looking at something that had ten or a
18 number of stitches are in the arm? That's what he believed. And
19 later on you'll recall he said: "That bothered me, that that
20 wound was self-inflicted". And that the jacket -- The talk to
21 Doctor Virick. Remember what he told Frank Edwards after
22 Reference: "I'll go to my grave believing that the wound was
23 self-inflicted". He believed that on Saturday morning. He
24 believe that an argument had taken place between Seale and
25 Marshall and he believed that Marshall stabbed Seale. And he

1 | believed that on Saturday morning before Sandy Seale died. That
2 | is our submission.

3 | Let me then turn to the evidence of John Pratico. John
4 | Pratico was called to the Sydney police station on Sunday, May
5 | 30th, and a statement was taken from him. What is not clear from
6 | the evidence is: Why? We have not been able to satisfy
7 | ourselves and we don't think the evidence supports any particular
8 | conclusion why Pratico was brought there. But, for whatever
9 | reason, he was brought to the Sydney police station. He gave his
10 | statement to John MacIntyre that he had seen two people running
11 | from the incident and that they were people driving a white
12 | Volkswagen, and he described them. The description didn't match
13 | and in particular the descriptions already obtained by MacIntyre
14 | from Marshall and Chant. But Pratico clearly invented a story on
15 | May 30th. There is some suggestion in the evidence that the
16 | story was given to him by Donald Marshall Jr. That is based on
17 | the contents of a note in the handwriting of, I'm not sure who.
18 | It says: "Rudy Poirier talked about a visit by Marshall on the
19 | Saturday morning -- the Sunday morning at which -- "re: the story
20 | to tell." Later on there was a statement taken from Poirier and
21 | he refers to a visit from Marshall and the fact that a story was
22 | told by Marshall to Poirier and Pratico was present. But the
23 | story that Poirier related to the police doesn't conform in any
24 | way with the story that Pratico told the police, except with the
25 | reference to a white Volkswagen. That's the only -- the only

1 connection. We are not able to assist you in saying why John
2 Pratico gave that evidence he did on that Sunday, and I'll leave
3 that to others. We are not able to assist you.

4 But we do know this, that on June 4th another statement was
5 taken from John Pratico. And this statement contains the first
6 identification of Junior Marshall as the person who stabbed Sandy
7 Seale. That evidence or that statement, My Lord, is found on
8 page -- in volume 16, and in type-written form of page 41.

9 Now Mr. MacIntyre said he did not believe the first
10 statement obtained from Pratico on May 30th. But sometime during
11 the week after he had visited Doctor Virick to convince himself
12 that the wound on Marshall's arm was self-inflicted, then he
13 visited the park at midnight and was convinced that Pratico
14 couldn't possibly have seen what he related on this Sunday. He
15 then said, "I brought Pratico -- I had Pratico brought to my
16 office. I told him words to the effect, I don't believe you're
17 telling me the truth. You didn't tell me the truth in your first
18 statement. I want the whole truth." And then he took down
19 everything that Pratico said. That is Mr. MacIntyre's evidence.

20 That was his evidence until he was referred to the Pratico
21 statement. And the Pratico statement said this, "On the tracks,
22 I stopped where I showed you." Now that can only refer to a
23 visit to the park by Mr. MacIntyre and Mr. Pratico, and when did
24 that occur? "Then Donald Marshall and Sandy Seale were up where
25 the incident happened." Where was that? That as well begged

1 another question or confirmed that there was a visit to the park
2 between Pratico and MacIntyre. Mr. MacIntyre conceded then, yes,
3 he must have taken Pratico to the park.

4 We know this, John Pratico did not observe Sandy Seale being
5 stabbed by Donald Marshall, Jr. Nobody did, because that didn't
6 happen. We know that Pratico wasn't there. You have the
7 evidence of two people, Barbara Floyd and Sandra Cotie, who both
8 say Pratico was in the parking lot at the dance at the St.
9 Joseph's Church Hall when the word come back from the park that
10 a stabbing had occurred. Pratico wasn't there. Why then, did he
11 tell MacIntyre that he had been in the park and that he had seen
12 Marshall stab Seale, in the very place, in the very location,
13 where the stabbing took place?

14 At no time -- Prior to being confronted with that statement
15 on the witness stand, at no time had John MacIntyre ever
16 suggested that he took Pratico to the park before taking that
17 second statement. There was no note made of it; and in fact, the
18 evidence was clear that it didn't happen until confronted by the
19 statement.

20 You saw John Pratico. You can assess John Pratico. Is he
21 the type of person who's impressionable? Could a story be put
22 in his mouth? He didn't see what he says he saw. He couldn't
23 have, because it didn't happen.

24 On the tracks, I stopped where I
25 showed you. Then Donald Marshall
and Sandy Seale were up where the
incident happened. I heard Sandy

1 say to Junior, "You crazy Indian."
2 And then Junior called him a "black
3 bastard." They were standing at
4 this time where the incident
5 happened. They were still
6 arguing."

7 There's the first reference to arguing except in the notes of
8 Constable Wood, which we suggest to you came out of the mouth of
9 John MacIntyre. This happened during the course of an argument
10 between Seale and Marshall. Now someone is saying that. But it
11 never happened. Why is he saying it?

12 A very clear impression which Mr. MacIntyre left with me
13 throughout his evidence is that he was meticulous in recording
14 everything that was said by a witness about the crucial events.
15 He recorded them, but why didn't he record the fact that "I was
16 in the park with Pratico. We must have been in the area where
17 the incident happened. How else could he show me where the
18 incident happened?" He was being shown where he was when he saw
19 this event that never occurred. How did Pratico come up with
20 this story? You'll have to answer that. And I implore you to
21 review in some detail, the evidence of Mr. MacIntyre on the
22 taking of the statement of John Pratico. Let me just read some
23 of that to you. This is found on page 6119. This is when I
24 asked Mr. MacIntyre what does he mean "where he showed you". And
25 Mr. MacIntyre said:

A. Well, I have no recollection of -- of
 picking him up but I would say that that
 he must have -- that he must have showed
 me where he was standing and I must
 have been in the car. I don't know.

1 Q. You must have been in the park with
2 him.

3 A. No, but I mean, "I stopped where I
4 showed you."

5 Q. He stopped on the tracks, "where I
6 showed you"?

7 A. Yeh, yeh.

8 Q. He must have showed you where he
9 stopped on the tracks?

10 A. Yeh, that's what I'm saying.

11 Q. So when were in the park with him?

12 A. It must have been in the morning he was
13 picked up.

14 And then on 6121:

15 Q. And you and Pratico were together in the
16 park before he gave you the second
17 statement, isn't that correct?

18 A. I would say by this statement I must
19 have been. Although I have no
20 recollection of it now. That's what I
21 said.

22 Q. Did you walk about the park with him?

23 A. Yes.

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

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

Q. Where?

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

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

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

3 Q. I know he says that, but you just said
4 you knew where he was "supposed" to be.
5 How did you know where he was supposed
6 to be?

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

11 Now again on 6123. This is in response to further questions.

12 Q. But did you tell Pratico where Chant was
13 supposed to be?

14 A. No, indeed I didn't.

15 Q. No reference to that at all?

16 A. No, sir.

17 Q. But where was Pratico supposed to be?

18 A. Pratico -- Pratico, my recollection at
19 the time was that Pratico was supposed
20 to be up near Bentinck Street on the--
21 near the railroad tracks.

22 A. Supposed to be there?

23 A. Yeh.

24 6124:

25 Q. And you offered the comment, "he was
supposed to be some place"? And are you
saying he was supposed to be behind a
bush up on Bentinck Street?

A. No, there were bushes along the track,
along the railway along the Crescent
Street side.

Q. Is that where he was supposed to be?

A. That's where he was supposed to be,

1 yes."

2 Down the bottom.

3 Q. Okay, what does it mean: "where the
4 incident happened"?

5 A. I would say that the -- I would say that
6 he had, in that, that he had pointed
7 out where he was at and where the
8 incident happened over on Crescent
9 Street.

10 How could he do that? He didn't know where the incident
11 happened. He wasn't there. 6125.

12 Q. Now, Chief, wouldn't you have been
13 having discussions with him then when
14 you were in the car or on your foot,
15 whatever you were, you would have been
16 having discussions with him as to what
17 happened on that night?

18 A. Yes, yes, I would have.

19 Q. Then why didn't you take a statement
20 about that? Why didn't you make a note
21 about that somewhere?

22 A. Well, I haven't got it there. Only he
23 says, "I stopped where I showed you".

24 Toward the end of his evidence on this point, on page -- I think
25 it's page 6127.

 Q. Thank you. What's your best
 recollection today of where Pratico was
 supposed to be?

 A. Behind a bush, near the track, near
 Bentinck Street on the Crescent Street
 side.

 Now that's important, that that's the impression that Mr.
 MacIntyre says he had when he finished taking the statement from
 Pratico. There's nothing in the statement taken from Pratico

1 that says he was behind the bush, near the second house on
2 Bentinck Street. He says he was standing on the tracks. "I was
3 standing on the tracks where I showed you." He says -- He was
4 asked: "How far away would you be from Sandy Seale and Donald
5 Marshall when they were on Crescent Street?" "Thirty to forty
6 feet." In his evidence here, Mr. MacIntyre would not accept
7 that? He said no, no, he couldn't be thirty or forty feet. He
8 had to be a hundred and fifty feet because he was behind the
9 second bush up near Crescent Street, Bentinck Street. And he
10 couldn't be there if he was only thirty or forty feet away. He
11 had to be a hundred and fifty feet away. Read that evidence of
12 the examination of Mr. MacIntyre concerning the taking of that
13 statement from Pratico. How could he secure such a statement
14 from Pratico? Pratico didn't see Junior Marshall stab Sandy
15 Seale. He didn't see where the incident happened. He was not in
16 the vicinity of a bush near the second house on Crescent Street.
17 He never was. Isn't it surprising that that's the very place
18 Maynard Chant put him? Because Mr. MacIntyre left the Sydney
19 Police Station, where he took the statement from Pratico, and he
20 went to Louisbourg.

21 INQUIRY RECESSED AT 12:30 p.m., AND RECONVENED AT 2:03 p.m.

22 MR. CHAIRMAN:

23 Go on, continue.

24 MR. MacDONALD:

25 Thank you, My Lords.

1 When we broke for lunch, we were just heading to Louisbourg
2 in June of 1971, with Mr. MacIntyre and Mr. Urquhart for the
3 purpose of taking a second statement from John -- from Maynard
4 Chant. Now obviously if the statement that had been taken that
5 morning from John Pratico was true, then Maynard Chant could not
6 have been telling the truth when he gave his earlier statement on
7 May the 30th, and there was good reason to go and visit him in
8 Louisbourg.

9 Here again Mr. MacIntyre testified that the scenario was as
10 follows: A preliminary statement was made to Chant and his
11 mother that MacIntyre didn't believe he had received the full
12 story on the first occasion and he wanted to get the truth.
13 Chant then began to talk and MacIntyre says he took down
14 everything that was said. Chant's second statement in
15 typewritten form is found in volume 16 at page 46.

16 COMMISSIONER EVANS:

17 Volume 16?

18 MR. MacDONALD:

19 Yes, My Lord, 16, page 46.

20 Now first of all, he describes a route that he walked which
21 is contrary and not the same route that he described on May 30th,
22 not the same route that he actually walked, not that the same
23 route that anyone would logically walk if they were leaving the
24 bus station on Bentinck Street and heading to George Street. He
25 took a completely illogical route and then the next thing he

1 said was this:

2 I noticed a dark haired fellow,
3 sort of hiding in the bushes about
4 opposite the second house on
5 Crescent Street.

6 Now that is where Pratico was supposed to be but Pratico wasn't
7 there. Then how did Chant put him there? Is that pure
8 coincidence that Chant saw this dark haired fellow, Pratico
9 who's dark haired, hiding in the bushes opposite the second house
10 on Crescent Street, where he never was? How could Chant possibly
11 by coincidence come up with that unless either Pratico was there
12 or someone told Chant that Pratico was there. There's no other
13 reasonable explanation for Chant having said that. He goes on
14 to talk about -- on the bottom of the page:

15 I wish to say that when he was
16 arguing, I mean Donald Marshall
17 with the other man.

18 Here, again, you have the threat of the argument. There's no
19 evidence that there was any "argument" between Marshall and
20 Seale. How did Chant have those two people arguing? And then
21 there's the damning statement that he saw Marshall haul the knife
22 from his pocket and jab it in the side of the stomach of the
23 other man. That never happened. Why did Chant say that it
24 happened?

25 If you are to accept the evidence of John MacIntyre, you
must conclude that this is pure coincidence that these two people
unconnected, Chant and Pratico, living some distance apart,
independently came up with this statement that put Chant--

1 Pratico in a particular place, saw an argument occurring which
2 never happened, and saw Marshall stab Seale which never happened.

3 Chant says Mr. MacIntyre told him that there was a witness
4 who saw Chant there on the night of the stabbing and that
5 ultimately Chant said something to the effect, "Okay, what did
6 this other guy say I saw? I give up."

7 Mrs. Chant referred to the fact that MacIntyre told Maynard
8 Chant that they had a witness who saw him in the park. And
9 listen to this evidence from Wayne Magee. This is found in
10 volume 20 of the evidence starting on page 3634.

11 COMMISSIONER POITRAS:

12 3634?

13 MR. MacDONALD:

14 Yes, My Lord.

15 Q. Do you recall the format of the
16 interview whether or not it was a
17 discussion or whether or not it was a
18 more formal question and answer
19 approach?

20 And here's Magee's answer:

21 A. Detective MacIntyre conveyed to Maynard
22 that certain information in a prior
23 statement did not correspond with other
24 information that they had obtained
25 afterwards and that they wanted more or
26 less some clarification pertaining to
27 the first...statement.

28 And down the bottom of 3635:

29 A. ...Detective MacIntyre would ask
30 certain questions and Maynard would
31 answer them. I think perhaps the answer
32 wasn't written down immediately, but

1 they would -- they would -- quiz each
2 other so to speak and for clarification
3 and they would -- this is the way the
 statement was conducted. And I do not
 recall, in fact, I thought, you know,
 that it was done in a very...

4 "generally interested enough..." -- Oh, I'm sorry. I don't have
5 the page that follows. So I -- You should also look at page 35
6 -- 3636 to get the full context of that. On page 3647 though:

7 Q. Now you've related to us the -- you
8 recall comments being made to the effect
9 that there was information that was
 inconsistent with what Maynard had said
 --

10 A. Yes.

11 Q. -- and you wanted to question Maynard
12 again. Do you have any recollection of
13 what that other information was that the
 police had at the time?

14 A. I can't recall specifics. I do recall
15 that there wa answers that Maynard gave
16 to Detective MacIntyre that, I think, he
17 felt that wasn't quite right and that he
 would -- he may say well, we were
 talking with this individual and they
 said this -- and that line of
 questioning...

18 He was asked -- 3648:

19 Q. When you say it was outlined, the
20 circumstances of the stabbing, how was
 that outlined?

21 A. I think Mr. Chant was advised that well,
22 the bridge is here and the band shell is
23 there and this one was supposed to be
 here. That's sort of dialogue was
 going on between them.

24 Q. Okay. If I understand you correctly,
25 and please correct me if I'm wrong, was
 there a sort of scene painted for
 Maynard so that he could put himself

1 into it?

2 A. I don't think that would -- that that
3 was the case. I believe that Maynard
4 was -- he might have been getting
5 confused and he was given advice as to
6 well, you know, this one in this
 statement didn't say that. ... there may
 be five minutes or two minutes or a
 minute and a half of questioning before
 an answer was written down.

7 That's not what Mr. MacIntyre told you. Everything was written
8 down. "I never told him that we had a statement from somebody
9 else that contradicted what he was telling me." 3650:

10 Q. Would there be suggestions made to Mr.
 Chant?

11 A. I don't recall any suggestions being
12 made. It -- There was no arguing going
13 on. The questions were asked and there
14 may have been -- may have been a pause
15 by Maynard or maybe a mistake that
16 Detective MacIntyre knew and he would
 put the question to him again but it
 was a very -- I recall, a very straight
 forward undertaking by the detective.

17 On page 3660, this time Mr. Magee was being questioned by my
18 friend, Mr. Ruby.

19 Q. Give me an example of Maynard Chant
20 quizzing Mr. MacIntyre. What would have
 happened?

21 A. He would be asked a question. Maynard
22 would be asked the question by Detective
23 MacIntyre and he would give an answer
24 and it wouldn't correspond apparently,
 that would be by opinion, that it
 wouldn't correspond with other
 information and he would ask him to
 elaborate more on it.

25 Does that sound like an interview that was described by Mr.

1 MacIntyre, being told "You tell me the truth and I'm going to sit
2 here and take down everything that you've said." Can you
3 possibly reconcile that with the evidence of Magee. Forget the
4 Chants who say, "We were told I had a statement or that the
5 police had a statement that someone saw me there and that what I
6 was saying didn't correspond with what another statement said."

7 Did Magee just dream this up? Why did Maynard Chant lie?
8 Why did Maynard Chant say that he saw Pratico in a place where
9 Pratico never was? Why did he say Seale and Marshall were
10 arguing? Why did he say that he saw Marshall stab Seale? None
11 of that happened. Where did he get it?

12 For whatever reason on June the 4th, we have two people who
13 have now told the police that Junior Marshall killed Sandy Seale.
14 Not surprising that that would lead a -- anyone to conclude we'd
15 better lay an Information here for murder.

16 Then a couple of weeks later for whatever reason Patricia
17 Harriss was brought to the police station. Again we don't know
18 why but we do know she was brought to that police station and she
19 was brought there early in the evening. There is a statement
20 partially completed in the handwriting of William Urquhart and
21 it's found in the handwritten form in volume 16 of page -- or in
22 the typewritten form, volume 16 at page 63. In that statement
23 Patricia Harriss says:

24 On the night of the stabbing, I saw
25 Donald Marshall and he was with two
other men, one of whom he described
as short with a long coat, grey or

1 white hair.

2 That description corresponds relatively closely with the one
3 Marshall gave to MacIntyre on May the 30th, with the one Marshall
4 gave to Detective MacDonald on the night of the stabbing, and
5 with this description that was given to John MacIntyre on May
6 31st by George and Sandy MacNeil.

7 One man, grey hair, grey or white
8 topcoat, five foot nine, hundred
9 and eighty pounds, hair flat on his
10 head, no wave, straight back, round
11 face, trampish looking, late
12 fifties.

13 Patricia Harriss didn't leave the police station that night
14 until about twelve-thirty. The evidence is clear out of the
15 mouth of Mr. MacIntyre that during that time he spoke with
16 Patricia Harriss and she was adamant that she saw two people
17 with Junior Marshall, one of whom she described in -- as in
18 contained in that partially completed statement. She was
19 adamant.

20 Now, My Lords, you don't have to have me tell you that in
21 order for someone to be adamant, you've got to be -- have some
22 dialogue going on. And then she was sent out of the room to see
23 her mother who was outside the room, to talk with her; and when
24 she came back in, she then gave the second statement. The other
25 fact, and Mr. MacIntyre agreed, is that before she was sent out
of the room, she had been told by MacIntyre that they had a
statement from another person who said there was only one person
which Marshall on the night of the stabbing.

1 Now according to Mr. MacIntyre when Patricia Harriss said
2 there were two people there, he then got a statement from
3 Terrance Gushue who said there was only one and that is the
4 statement that he was referring to when he told Patricia Harriss,
5 "We have a statement from somebody else.", but that can not be at
6 least if you accept the totality of what Mr. MacIntyre says
7 because he said: "Patricia Harriss was being adamant. I told
8 her we had this other statement which would have to be Gushue's
9 and then I sent her out of the room and she came back. She
10 stayed out there for awhile and she gave back and gave me the
11 different story."

12 The statement from Gushue was completed at 12:03 in the
13 morning of June 18th. The statement from Patricia Harriss that
14 was taken by John MacIntyre commented at 12:07. You have four
15 minutes in which all of this is supposed to have happened. That
16 was the first time Mr. MacIntyre admitted having told a witness,
17 "We have a statement that is different than what you are telling
18 us." It's the first time he admitted that Patricia Harriss was
19 being adamant to him that she saw two people with Marshall. He
20 has never said that before. Why didn't he take that statement
21 down from Patricia Harriss, when she was being adamant that there
22 were two people with Marshall? Where is that statement, if his
23 practice always is to sit down and take down everything that's
24 said? Where is it? When you have a 14-year old child in a room
25 alone with policemen of the size of Mr. MacIntyre and Mr.

1 Urquhart being adamant and you then later get a statement from
2 that child changing what she was being adamant about, is that
3 right? Is that fair? Is that something that you will endorse,
4 that type of behaviour by a policeman? Who cares if her mother's
5 outside the door? Four hours you have a kid in the room being
6 adamant and finally at twelve-thirty in the night, she gives in
7 and tells a lie. Why? Why did she tell that lie?

8 In our brief we have made this conclusion. It's on page 54
9 and it's underlined.

10 It is our view that MacIntyre and
11 Urquhart employed reprehensible
12 techniques and conduct in their
13 questioning of Patricia Harriss and
14 that they coerced her to give a
statement which they knew she did
not believe, and one that in fact
was completely different than she
wanted to give.

15 And we suggest to you that that's the only conclusion that can
16 be reached based on all of the evidence about what took place on
17 that night.

18 If MacIntyre was prepared with that child to tell her, "I
19 have a statement from somebody else that doesn't correspond with
20 what you're telling me.", would he not employ the same tactic
21 with Chant? Would he not employ the same tactic with Pratico
22 because both of those people say that's exactly what he did?

23 At the time of the trial of Donald Marshall, Jr., the jury
24 had the evidence of these two eyewitnesses saying that they saw
25 Marshall stab Seale. Further Patricia Harriss testified that

1 she saw Junior Marshall with one other person on Crescent Street
2 at about the time of the stabbing. The totality of that evidence
3 had to be compelling to a jury.

4 Let me just read to you some of the comments that were made
5 to that jury by council and the judge. (These are all taken from
6 volume two of the exhibits, My Lords.) First on page 58. I
7 believe this is the Crown Prosecutor talking.

8 Now, gentlemen, my learned friend
9 is right. These two men, Chant and
10 Pratico, did not know each other
11 before the police action in this
12 case. Then how is it they would
13 come up with the identical stories
14 at different times, one in
15 Louisbourg and one in the city of
16 Sydney and they had no
17 communication between them.
18 There's no evidence whatsoever that
19 these men got together and cooked
20 up a story. They gave their
21 evidence as they saw it.

22 No they didn't but they still had no opportunity to get
23 together. They still lived in different towns but they didn't
24 give their stories as they saw it. Again on page 59:

25 I agree Mr. Pratico had been
drinking. But he did not get in
cahoots with Chant and make up a
story! If they were both living in
the same house, if they knew each
other, if there was any evidence
that they corroborated and got
together and made up this story,
then I would say it was an
entirely different composition!
But this statement on which they do
not conflict with one another in
any way shape or form -- those
statements were given to the police
at Louisbourg and at Sydney!

1 There's no communication between
2 the two men.

3 What's the common link? Page 63.

4 You have two eyewitnesses to this
5 murder! Two completely unrelated
6 men! Two men that there has not
7 been the slightest suggestion that
8 there was any communication between
9 the two of them at any time to make
10 up a story and yet they gave
11 identical stories, corroborated
12 stories in two areas, Louisbourg
13 and Sydney!

14 And here's what the trial judge told them, page 88:

15 I think it is clear that the
16 Crown's case is based principally
17 upon the evidence of two witnesses,
18 Maynard Chant and John Pratico.
19 There are of course a couple of
20 other witnesses too to whose
21 evidence I will refer.

22 On page 94:

23 You will have to ask yourselves
24 what possible motive, what motive
25 would Maynard Chant have, in
 telling the story implicating the
 accused, Donald Marshall. It seems
 to me -- now, that's my opinion,
 and I caution you, you do not have
 to accept my opinion; you do not
 have to accept my opinion. In my
 opinion there is not the slightest
 suggestion in this case that
 Maynard Chant was in collusion with
 John Pratico, that they acted in
 cahoots together, to concoct a
 story. There's not the slightest
 suggestion that these two people
 were anywhere near one another
 prior to the events of that night
 or around that time up to the time
 when Chant saw Pratico, and that
 afterwards they got together to
 tell a story implicating the

1 accused...

2 Again, on 99:

3 ...what motive -- what possible
4 motive could this young man,
5 Pratico, have to put the finger or
6 guilt on the accused, Marshall?
7 What motive would he have? What
8 motive would Maynard Chant have to
9 say that what he said here in court
10 to you...

11 Is there any wonder that the jury would convict? Here's what
12 the Appeal Division said in 1980 -- 1972 when they filed their
13 decision from the Appeal of the conviction:

14 It was quite proper for the trial
15 judge in the circumstances to
16 address the above remarks to the
17 jury.

18 And the above remarks are what I just read to you about these
19 people not being in cahoots, no collusion.

20 Two very important and independent
21 eyewitnesses with no apparent
22 motive for collusion and with no
23 evidence to give the slightest
24 support to any such suggestion
25 have given to the court mutually
corroborative testimony that had a
direct bearing on the very issue to
be decided.

And on page 131 of that decision:

Chant's evidence corroborated in
every material particularly that of
the witness Pratico.

The very same points that were compelling to counsel, to the
trial judge, to the jury supposedly, and to the Appeal Division
exist today. Chant and Pratico had no opportunity to collaborate

1 to concoct a story that they saw Junior Marshall stab Sandy
2 Seale. They were totally unconnected people. No opportunity to
3 get together. How then did they come up with the identical
4 story?

5 None of the evidence that those people gave at trial was
6 true except for Chant's story about having met Marshall on Byng
7 Avenue and going back with him to the scene of the crime. Other
8 than that, none of it was true.

9 We do not think it is reasonable to suggest that these
10 witnesses could have independently arrived at the conclusions
11 they did. The only common denominator is that Mr. MacIntyre took
12 the statements from each witness and we are driven to the
13 conclusion that the evidence must have been suggested to these
14 witnesses by Mr. MacIntyre.

15 Similar conclusions, My Lords, were reached by Staff
16 Sergeant Wheaton when he did his work in 1982. Frank Edwards
17 obviously directed his mind to the same type of thing. At no
18 time, however, was Mr. MacIntyre ever questioned by the R.C.M.P.
19 At no time has he been questioned about what took place here.
20 Further it is obvious from the evidence of Mr. Edwards, Mr. Gale
21 primarily, that no person in the Attorney General's office has
22 yet directed his mind or his attention to the question whether
23 any charges should be laid against Mr. MacIntyre. The apparent
24 reason for this lack of action is the belief that Mr. MacIntyre's
25 activities while improper, even reprehensible to use some of the

1 words that have been used here at trial -- I'm sorry, at this
2 Inquiry. It may be improper and it may be reprehensible, but
3 they are not illegal, but no one has yet looked at the law. No
4 one has yet analyzed it to see if, in fact, the activities would
5 support a prima facie case, a violation of some section of the
6 Criminal Code.

7 Now given the fact that no investigation was carried out,
8 perhaps it's understandable that no legal analysis was conducted.
9 But Your Lordships have heard all the evidence and it's not going
10 to be satisfactory, I don't think, or acceptable for you to duck
11 that issue. You're going to have to direct your mind to that
12 question. Having made whatever findings you ultimately do, if
13 you believe and if you find that the evidence of these key
14 witnesses, this perjured evidence, was put in their mouths by
15 John MacIntyre, you must go beyond that and you must say whether
16 in your view that supports -- at least supports the requirement
17 that the appropriate people in the Attorney General's Department
18 direct their mind to that question. We have not attempted to
19 identify all possible, potential charges which may be available.
20 We do, however, suggest that you give serious consideration to
21 determining whether the activities of Mr. MacIntyre in securing
22 that evidence, would constitute obstruction of justice, contrary
23 to the provisions of Section 127 of the Criminal Code. The
24 appropriate Section is sub-section 3(a) which says:

25 Every one shall be deemed willfully
to attempt to obstruct, pervert, or

1 defeat the course of justice, who
2 in a judicial proceeding, existing
3 or proposed, dissuades or attempts
4 to dissuade a person by threats,
5 bribes or other corrupt means from
6 giving evidence.

7 Our review of the authority satisfies us that an attempt to
8 dissuade a witness from testifying in a certain way as opposed to
9 attempting them to -- attempting to dissuade them from testifying
10 at all still constitutes a violation of that section provided
11 corrupt means are used to dissuade the witness from testifying in
12 the way they want to. The key point is whether corrupt means are
13 used.

14 Eighty years ago in Ontario, Mr. Justice Offman of the Court
15 of Appeal of Ontario when talking about an earlier similar
16 section, at page 81 of the decision said this: (And this is on
17 page 61 of our submission, My Lords.)

18 Whether the accused was honest in
19 his belief or not is immaterial.
20 It would not have been unlawful for
21 him by argument or explanation to
22 have attempted to dissuade the
23 witness from giving what the
24 accused may have honestly believed
25 to be an untrue account of the
 transaction and to give what may
 have appeared to him to be the true
 one. The offense consists in doing
 it corruptly, whether by threats,
 bribes, or other corrupt means
 which have a direct tendency to
 influence the witness not to give
 the true version of the facts as it
 may really have appeared to him.
 But what may be so far as the
 knowledge or belief of the witness
 himself is concerned, a false one.
 And that's to interfere with or

1 obstruct the administration of
2 justice.

3 That's the test. Whether John MacIntyre honestly believed that
4 Donald Marshall stabbed Sandy Seale is not relevant. The
5 question to be asked is whether he employed corrupt means to have
6 witnesses testify to a series of events that MacIntyre believed
7 to be the truth rather than the series of events which the
8 witnesses wished to tell.

9 What constitutes corrupt means? That's what you have to
10 direct your mind to. Now obviously the bribing of a witness to
11 give evidence would be corrupt. The threatening of witnesses, if
12 they did not give the evidence you wanted, that they would be
13 subject to severe consequences. Would that constitute corrupt
14 means? There is evidence before you from many witnesses and I've
15 outlined those -- I've identified the conflicts in the book for
16 you. Many witnesses said that one of the tactics employed by Mr.
17 MacIntyre in questioning witnesses was to tell them they would be
18 in serious difficulty unless they told him the truth. They
19 possibly could go to jail. They may be committing perjury. You
20 have to decide whether you accept that evidence. Mr. MacIntyre
21 denies ever having said any such thing to any witness. Obviously
22 there would be nothing wrong, nothing improper telling a witness,
23 "I expect you to tell the truth. I do not think you're telling
24 me the truth." There can't be anything wrong with that. But
25 when do you cross the line? When do you adopt corrupt means? Do
you adopt corrupt means if you say, "If you don't tell me the

1 truth, you're going to jail. If you don't tell me the truth, you
2 are committing perjury."? Is it corrupt means to say to a
3 witness, "You cannot be telling me the truth because I have
4 another witness who tells us something different. And if you
5 don't tell me the truth -- In other words, if you don't tell me
6 what that other person says, then you're going to be in serious
7 difficulty." Those are difficulty questions, but you can't duck
8 them. You're going to have to direct your attention to it.
9 You're going to have to decide, did John MacIntyre threaten any
10 witness with perjury.

11 Now when you are directing your mind to this, I suggest
12 you're going to have to consider the evidence of Robert Patterson
13 and you're going to have to consider the evidence of Patricia
14 Harriss and the O'Reilley twins.

15 Both Mr. MacIntyre and Mr. Urquhart say no interview was
16 conducted of Patterson. Both of them said, however, that they
17 wanted to examine him. And we know that he was readily
18 available. We know he was in gaol in September. He was in the
19 same gaol that Marshall was. They had no trouble finding him to
20 arrest him three times that year. Mr. Urquhart knew his mother
21 well enough to say, "Oh, yes, Geraldine, I know her". Was he
22 interviewed? If not, why not? If you conclude that he was
23 interviewed, you must then access his evidence as to what
24 happened during the course of that interview. He says he was
25 asked to sign a statement which had already been prepared saying

1 that Marshall -- that Patterson saw Marshall stab Seale. He said
2 he was told by MacIntyre that the police had other witnesses who
3 said Patterson was in the park and did see the event.

4 Patterson says he was physically abused. If you accepted
5 that evidence, surely that would constitute corrupt means. And
6 if you accepted that evidence, you would be hard pressed to
7 reject the evidence of Pratico, Chant, and Harriss, who all say
8 they were pressured to give evidence that was untrue.

9 I referred you also to the O'Reilley/Harriss incident. That
10 is covered in our brief on pages 55 to 59 and I will not take the
11 time at this stage to go through that, but that is a point you
12 will have to address as well.

13 The first reaction that one has to all of this is to say
14 that John MacIntyre must have set out deliberately to frame, to
15 use a colloquial term, "this boy". But that can't be. I cannot
16 accept any such suggestion when you consider that MacIntyre was
17 the person who called in the R.C.M.P. on two occasions. That's
18 not the mark of a man who deliberately set out to commit criminal
19 activity, to invite another force in to investigate himself.
20 That doesn't wash. Neither does it wash that if he deliberately
21 did this that he would retain that partially completed statement
22 from Patricia Harriss for all these years and put it in his file.
23 That's not the mark either of a man who deliberately set out to
24 accomplish something, who sat down and said, "I'm going to get
25 that Junior Marshall." We're not suggesting that.

1 We're prepared to accept that Chief MacIntyre believed for
2 whatever reason that MacIntyre was the guilty party. We are not
3 prepared to accept what he did. We think he put the witness--
4 the evidence in the witness's mouth. We think he did it by being
5 overbearing or being a bully, by threatening, and we suggest to
6 you that his activity probably will constitute the necessary
7 grounds for a prima facie charge, and that charges should be laid
8 for obstructing justice among other things.

9 Now Mr. MacIntyre had an assistant in the conduct of the
10 investigation in this case. William Urquhart was present with
11 Mr. MacIntyre during the course of most of the investigation. He
12 was present when the statements were taken from those three key
13 witnesses.

14 There is some conflict whether Mr. Urquhart was present on
15 June the 18th at midnight when that second statement was taken
16 from Patricia Harriss. He says he doesn't remember but if he
17 didn't sign the statement indicating he was present, then he
18 wasn't. The handwritten copy of that statement is not signed by
19 William Urquhart. His name doesn't appear on it anywhere. The
20 typewritten copy says he was there. Nobody could explain why but
21 he was present earlier in the night. That must have been the
22 time Patricia Harriss was being adamant.

23 He was present in Louisbourg and he says he has a vivid
24 recollection of the Louisbourg afternoon. He was asked why,
25 because if you recall the evidence of Mr. Urquhart, he wasn't

1 very vivid about anything. He couldn't remember very much. On
2 page 9534:

3 Q. So is it your evidence that this
4 statement from Mr. Chant is totally
5 voluntary and that no advice,
6 assistance, or prompting was provided to
7 him?

8 A. That's correct, sir.

9 Q. And you have a good recollection or you
10 have a recollection of the taking of
11 this statement?

12 A. Yes, I have.

13 Q. You have a good recollection of it?

14 A. Well, I have a recollection of it
15 because it was an eyewitness account of
16 a murder that took place.

17 Q. Are you able to suggest why your
18 recollection of this particular
19 statement appears to be somewhat clearer
20 than say your recollection of Mr.
21 Pratico's statement who was also an
22 eyewitness and the first one?

23 A. This is the second eyewitness in the
24 same day that you get on a murder and I
25 -- that would be the main reason why I
would remember it so vividly. It's the
second eyewitness account of a murder
that took place. You don't often get
two eyewitnesses to a murder on the same
day.

That's nonsensical. Why would you remember the second
eyewitness and not the first? You don't often get an eyewitness
to a murder. That's his explanation. But having a vivid
recollection, and he must, in our submission, either sink or
swim, with Mr. MacIntyre. He was there. If you find that

1 corrupt means were employed in Louisbourg by Mr. MacIntyre to
2 obtain the evidence of Pratico -- I'm sorry, of Chant, then his
3 principal assistant must go with him. And the same with respect
4 to Pratico. And the same with respect to Harriss. It's not
5 enough to say, "I wasn't in charge. I was only doing my job.
6 There's nothing I could do about it." Sure there was. If he
7 thought something improper was happening, he should have reacted.

8 Now, My Lords, to this stage I have dealt only with the
9 issue of how the perjured evidence was obtained. You must also
10 determine why no one was able to pick up the fact that this
11 evidence was untrue.

12 The first check and balance supposedly existing in the
13 system is with the Crown Prosecutor. We are satisfied that
14 Donald MacNeil at least had access to all the information in the
15 Sydney City Police files. Included in those files were the first
16 statements taken from Chant, Pratico, and Harriss. We are also
17 satisfied that the practice followed in Sydney in 1971, was that
18 the Crown Prosecutor, and Mr. MacNeil in particular, would
19 disclose the existence of statements to those defence counsel who
20 asked for them, but he would not voluntarily seek out defence
21 counsel and tell them the details of the case he had against
22 their client or disclose to them evidence which would be of
23 benefit to the defence. This was the accepted practice
24 apparently in Sydney in 1971. It was contrary to what the
25 authorities said.

1 The authorities said there was a positive obligation on the
2 Crown to disclose the existence of contradictory statements to
3 the defence. In the letter from Malachi Jones to I guess it was
4 Lou Matheson, (At least it came up through Lou Matheson.) there
5 are reference to the authorities that were in existence at the
6 time.

7 There doesn't appear to have been any effort by the Attorney
8 General's Department to make certain the guys in the field, the
9 guys in the trenches, complied with the authorities. There was
10 no standardization saying that this is what you must do. And the
11 fact is Mr. MacNeil followed the locally accepted practice. You
12 will have to determine whether someone who is doing that has done
13 anything wrong.

14 The next check and balance would be defence counsel.
15 Unfortunately, we were unable to secure the evidence of Mr.
16 Rosenblum but his co-counsel, Simon Khattar, did give evidence to
17 you. He advised you that his practice and that of Mr. Rosenblum
18 was not to ask for any statements. They did not ask Donald
19 MacNeil, "What do you have against me? Is there anything you
20 have that can help Marshall?". They did have a copy of the
21 statement that was given by Junior Marshall. They obtained that
22 at the preliminary inquiry. They interviewed Donald Marshall,
23 Jr., on a couple of occasions. Other than that, they did no
24 preparation.

25 The statement of Donald Marshall refers, for example, to

1 Robert Patterson. No interview of conducted of him. In the
2 preliminary inquiry, Patricia Harriss said, "I gave written
3 statements to the police." No request was made for those
4 statements. No attempt was made to interview Patricia Harriss.
5 No attempt was made to interview John Pratico, Maynard Chant.
6 They didn't even know that Maynard Chant spent the time between
7 the preliminary and the trial in the Nova Scotia Hospital, a
8 mental institution.

9 MR. ORSBORN:

10 Pratico.

11 MR. MacDONALD:

12 Pratico. I'm sorry, Pratico. He didn't know that. They
13 appeared to be content to rely on their ability as skilled court
14 room advocates to destroy the Crown's case by cross-examination.
15 That's the extent of their work.

16 We consider defence counsel owe a greater obligation than
17 that to their clients. We consider they have an obligation to
18 carry out independent investigations, and not rely totally on the
19 efforts of Crown Counsel to obtain and present all relevant
20 evidence.

21 Mr. Khattar said that their investigation and conduct of the
22 case would have been handled entirely differently if only Junior
23 Marshall had told them he and Seale had accosted MacNeil and
24 Ebsary with the attempt of taking money from them. What
25 investigation? Considering the fact that they didn't interview

1 anyone referred to in the statement which Marshall did give and
2 that that statement contains a description of Ebsary and MacNeil,
3 we have some difficulty in concluding that they would have
4 proceeded any differently had they been told that one additional
5 fact.

6 In our written submissions, My Lords, we have dealt with
7 other points where we suggest defence counsel did not discharge
8 the obligation they owe to this accused.

9 The next check is the trial judge. He presides over the
10 trial and is required to make rulings from time to time on
11 evidentiary points. You have a report filed and prepared by
12 Professor Archibald which is highly critical of some of the
13 rulings made in this case by the trial judge.

14 During the course of this trial, a very dramatic occurrence
15 took place in the court room -- or in the hall where Pratico
16 attempted to re-camp and say, "I didn't see anything. I'm
17 lying. When I gave the evidence at the preliminary, I was
18 lying." That should have been manna to a defence counsel. That
19 should have been it. It should be over. Counsel weren't even
20 able to attack Pratico at all on the witness stand because the
21 judge completely, erroneously misinterpreted the law and
22 prohibited counsel from going at it.

23 Pratico told you, "I was just waiting. I wanted to tell
24 them." But nobody was allowed to ask him. The trial judge made
25 a serious error; and according to Archibald, that error

1 significantly contributed to the conviction of Donald Marshall,
2 Jr.

3 Isn't it incredible that none of the checks and balances in
4 this case came down on the side of Marshall? Why?

5 The jury -- I have great difficulty believing that anyone on
6 that jury could possibly have reached a conclusion other than
7 they did. If you have two people totally unconnected get on the
8 witness stand and say, "I saw Marshall stab Seale.", how could
9 you possibly expect that that jury is going to acquit? The
10 criticism is not of the people on the jury, not of the
11 individuals, not withstanding what someone may have referred or
12 talked about to Alan Story years later. But there may be
13 criticism of the jury system.

14 Is it really a jury of your peers when you have a seventeen
15 year old Native being tried by twelve "W.A.S.P.S.", I suppose is
16 the term that would be used? Does he believe -- can he possibly
17 believe that he is going to be judged fairly? Put yourself in
18 that position. What would you feel like, walking in tomorrow to
19 be tried by a jury of Natives and your charged was having killed
20 a Native? Do you believe -- would you think that you were going
21 to get justice? You may well, and you may get justice. I'm not
22 suggesting that you wouldn't. But would you believe it? Is
23 there some change that has to be made in our system to ensure
24 that there are truly peers who are judging you? That's something
25 you will have to consider.

1 Even though Junior Marshall had been wrongfully convicted of
2 murder, his period of incarceration would have been limited to a
3 few weeks served in the Cape Breton County Gaol if the R.C.M.P.
4 had performed as expected in 1971.

5 When Jimmy MacNeil attended at the Police Station in Sydney,
6 on November 15, 1971, he spawned a series of events which in
7 retrospect can only be classified as an example of complete
8 ineptitude at work. John MacIntyre interviewed MacNeil and
9 Ebsary. He didn't bother to determine whether Ebsary had any
10 previous involvement with the police. All he had to do was walk
11 to the drawer, pull out the card and he would have seen that
12 Ebsary, a year before, had been convicted of a knife offense.
13 Ebsary told him he didn't carry a knife.

14 He didn't interview Ebsary's daughter even though he had
15 been told by MacNeil that the daughter was present during the
16 conversation between MacNeil and Ebsary. He didn't ask very
17 basic questions of Ebsary's wife and son. But in fairness to Mr.
18 MacIntyre, he recognized that he was biased. He believed that
19 the murderer was gaol and rather than take control of this
20 investigation to test the validity of this new information, he
21 requested that another police force be brought in. We consider
22 that response to have been perfectly proper. MacIntyre
23 recognized he couldn't objectively carry out a reinvestigation of
24 his own work. So he turns to the police force that is highly
25 regarded across this country. "You do it."

1 I can't put it in any better words than he did himself, the
2 incompetency of the investigation carried out by Inspector
3 Marshall. That incompetency led to Marshall remaining in gaol
4 for 11 years. Inspector Marshall obviously was prepared to
5 accept the opinion of John MacIntyre concerning the guilt of
6 Junior Marshall and he just went through the motions. But he did
7 have a polygraph examination carried out. Again, a check and
8 balance that doesn't work for Marshall. But he didn't even talk
9 to the witnesses at trial. He listened to John MacIntyre. Much
10 of what is contained in the report that he wrote for his
11 superiors is information that could only have come from Mr.
12 MacIntyre. It wouldn't come from the materials that Inspector
13 Marshall had. But that again is only illustration of John
14 MacIntyre's belief that the murderer had been caught. I don't
15 fault him for that. Marshall -- Inspector Marshall should have
16 done his own investigation. His performance must be condemned.

17 But there's no check and balance that you can put in the
18 system to prevent the reoccurrence of somebody "botching it", and
19 that's what happened. He didn't adopt the most fundamental
20 techniques that were and are well known. But it doesn't stop
21 there.

22 The Attorney General's Department knew that Jimmy MacNeil
23 came forward in 1971. They knew that he told the Police that
24 this murder was committed by Roy Ebsary. They knew that a
25 reinvestigation was being carried out and they knew that an

1 appeal had been taken on Junior Marshall's behalf to the Nova
2 Scotia Court of Appeal.

3 None of that information was brought to the attention to
4 Junior Marshall's lawyer. They did not know of Jimmy MacNeil's
5 existence. They didn't know anything about Roy Ebsary. They
6 weren't told any of this. Had they been aware of this new
7 evidence, do you have any doubt that it would have affected the
8 conduct of the appeal, that there may well have been a new trial
9 ordered?

10 We consider that this failure, both by Donnie MacNeil and by
11 the officials in the Attorney General's Department, right up to
12 the Attorney General, was one of the most serious failures that
13 the system committed in the handling of the Donald Marshall, Jr.,
14 case. There is no excuse for defense counsel not having been
15 apprised of that fundamentally important information. And it
16 also -- that failure led to Marshall remaining in gaol for eleven
17 years for a crime he did not commit.

18 Now the other thing that happened in 1971-'72 was that the
19 Nova Scotia Court of Appeal heard the appeal from the conviction.

20 I'm sorry. My Lord?

21 COMMISSIONER EVANS:

22 I'm sorry to interrupt you. Are you contending that the actions
23 or the failure to act of the Attorney General's Department was an
24 obstruction of justice?

25

1 MR. MacDONALD:

2 An obstruction of justice? I have not directed my attentions on
3 it, My Lord, and I wouldn't want to make such a statement without
4 having looked at it. I would suggest that if it was a
5 deliberate act, that it would certainly have to be looked at but
6 I have not directed my attention to it.

7 COMMISSIONER EVANS:

8 I just thought that you were moving on to something else and
9 before you left it, I thought I'd better --

10 MR. MacDONALD:

11 During the time Professor Archibald was giving evidence to you,
12 it was suggested to him both by Council and I believe by Your
13 Lordships (I don't recall which one or if all.) that the Nova
14 Scotia Court of Appeal in 1971 or '72 should have picked up
15 these fundamental evidentiary ruling errors that were committed
16 by the trial judge. And they should have on their own motion
17 have asked Counsel to comment on those, that they should have on
18 their own motion, to use the words of Professor Archibald,
19 "picked up the ruling that significantly contributed to the
20 conviction of Donald Marshall, Jr." Do you remember Professor
21 Archibald was asked, "Is that hidden? Do you have to really
22 search through the transcript to find it hidden behind
23 somewhere?", and he says, "No, it jumps right out at you." Well
24 if it jumped right out at him, shouldn't it have jumped right out
25 at the Appeal Division? And if it did, should they have required

1 Counsel to file briefs on that point, to argue that point?

2 We have not been able to find any authoritative statement
3 that says that the Court of Appeal has a duty to take such a
4 step. Maybe you can't find such a statement because it is so
5 fundamental to our whole system of justice. But the Court is the
6 final protector. And if the Court sees something, if it jumps
7 out at you, shouldn't they react? They have the right to react.
8 No one would question that. Do they have a duty?

9 In our written submission, we have referred to the role
10 played by Correctional Services of Canada. We have talked about
11 the approach to the Sydney Police in 1974 by David Ratchford,
12 Donna Ebsary and Gary Green. We did not refer in our submission
13 to the attendance at the Sydney Police in, I think it was 1975,
14 by Constable Cole at which time he asked for, received, and
15 reviewed the Marshall file, because we don't find any evidence
16 to establish why he was doing that. These various matters were
17 only referred to demonstrate that there were a couple of
18 occasions between 1971 and 1975 when positive action by various
19 people could have resulted in the earlier release of Donald
20 Marshall, Jr.

21 We know that Maynard Chant told several people, including
22 his parents and his minister, prior to 1972, that the evidence he
23 gave at trial was false. Unfortunately, none of these people
24 felt any obligation to Junior Marshall to take any action of any
25 kind which may have secured his release.

1 Then 1982 came, and I will not go through the details of
2 that reinvestigation conducted by Staff Sergeant Wheaton and
3 Corporal Carroll in 1982, in any detail at all. We consider that
4 the investigation in the main was carried out competently and it
5 certainly did lead to the eventual release of Marshall.

6 As stated before, we regret that Staff Sergeant Wheaton
7 refused to meet with us prior to taking the witness stand and we
8 think that that refusal probably led to his giving evidence
9 dealing with issues concerning people not before you, and we
10 criticize him for giving that type of evidence. But we do not
11 criticize what he did in 1982.

12 Your Lordships have indicated on several occasions your
13 interest in the conflict of evidence between Staff Wheaton and
14 Chief MacIntyre and Herb Davies concerning the passing of a
15 piece of paper on the floor -- the alleged passing or placing of
16 paper on the floor. We've dealt with that in our submission.
17 We've referred you to the evidence. Whether that occurred or
18 not is not important to any conclusion we have submitted to you.
19 So we take no position on that particular point.

20 One point that occurred in the reinvestigation that I do
21 wish to deal with is the taking of the statements from Junior
22 Marshall at Dorchester. It is that statement, and the suggestion
23 in that statement, or the state -- the expression in that
24 statement of an attempted robbery that has been used over and
25 over again in an attempt to demonstrate that a robbery was

1 underway.

2 I would like to refer you, My Lord, to some evidence on the
3 circumstances that existed at the time that statement was taken
4 from Junior Marshall. This is first of all from Staff Wheaton,
5 being questioned by David Orsborn, page 7634. This is Wheaton.

6 A. ...I said, "Junior it's tremendously
7 important that you be honest and
8 truthful. Now I'm going to give you a
9 warning. I'm going to take a statement.
10 You've had an opportunity since I was
11 here last and I know what jails are
12 like, to speak to a lot of legal eagles
13 in the cell blocks, but you're the chap
14 that wants to get out of here. Be
15 honest and be truthful with me."

16 Q. Did you give him any information on your
17 investigation to date?

18 A. No, sir.

19 And then when he was questioned by Mr. Ruby, Staff Wheaton said
20 this on page 7966:

21 A. I told him that if he had any hope of
22 getting out of Dorchester that it was
23 extremely important for him to be
24 absolutely truthful with me and give me
25 honest facts which I, in turn, could go
out and investigate and they would prove
out that what he said was truthful. And
I emphasize that very strongly to him
right at the beginning of the
conversation.

Q. Did you attempt to be hard with him on
that issue?

A. Yes, sir.

Q. You would appreciate that he was under
the pressure of having spent 11 years in
prison at that point, I think?

1 A. Yes, sir.

2 Q. With no prospect of release since he
3 wouldn't admit his guilt?

4 A. That's correct, sir.

5 This is what Sergeant Carroll said:

6 A. I believe Wheaton asked him about the
7 circumstances in which he and Seale were
8 in the park that night. I don't think
9 that he mentioned the robber attempt at
10 that time. He may have, but I don't...
11 recall.

12 I'm sorry.

13 He may have, but I don't believe
14 that he did. Marshall eventually
15 came out with something that
16 resembled that, that there had been
17 something more than a casual walk
18 through the park.

19 Q. Is it possible that Wheaton had said
20 that to him first, made some reference
21 about a robbery attempt having been in
22 place?

23 A. I don't think he did.

24 Q. How did he get that stage? That's
25 important to what's going on here. So,
I'd like you to tell me in as much
detail as you can what was said by
Wheaton or you before you took pen to
paper?

And he says:

At this late date I certainly
couldn't quote it word for word,
but I suggest that it was something
to the effect that

"We are reviewing the circumstances
surrounding your conviction, your
trial, and having talked with some
other witnesses prior to coming

1 here to see you, we feel that there
2 was something else going on in the
3 park other than just a casual walk
through the park to catch a
bus."...

4 And Frank Edwards said this, on page 11,765:

5 ...but I can recall Sergeant
6 Wheaton, Staff Sergeant Wheaton,
telling me that he and Carroll had
7 met with Donald, and I may not have
this word for word, but this is
8 pretty close. They said, "Look,
we're looking into this thing. Now
9 you can tell us anything you want
and we'll sit here and listen
10 politely and then we'll leave and
you'll never see us again or you
11 can tell us what really happened
and we'll do our best from there."

12 Now picture this, you have a guy that's in gaol for 11 years, who
13 has consistently told the story of having come across two people.
14 They talked about women, talked about liquor, thought they looked
15 like -- he said they looked like priests, said they were from
16 Manitoba, and they stabbed him. Everybody knows that. He's
17 told, "You can tell us everything you like and we'll sit here
18 and then you'll never see us again, or you can tell us the
19 truth. And we know that there was something more than a casual
20 walk going on through the park that night." And Marshall knows,
21 by this time, Ebsary had told Sarson about a robbery. What did
22 you expect him to say?

23 I think we would all have no difficulty in concluding that
24 if Marshall had been charged with robbery and you tried to get
25 that statement into court, you'd never get it in. That's not a

1 voluntary statement. Surely there's an inducement there. And
2 that's what Marshall testified in the third Ebsary trial. It's
3 found on page 114, of Volume 9. In effect, "I told him about the
4 robbery because that's the only way I was going to get out of
5 gaol. I knew about it. I knew that Ebsary was out there saying
6 this happened. The only way I'm going to get out of gaol is to
7 say that there was a robbery. So, I said it."

8 I also think, My Lords, that there's no doubt that in the
9 minds of the public of Nova Scotia, certainly in the eyes of some
10 members of our Court, he has been tried and convicted of robbery.

11 Marshall has given evidence now, five, six times about the
12 events of that night and I'm not going to review all of those
13 instances. I do remind you that in this Inquiry, Roy Ebsary said
14 that he invited Seale and Marshall, who he considered to be nice
15 guys to his home for a barbecue before any stabbing occurred. On
16 the other hand, consistently, almost all -- certainly always
17 since 1982, there is reference to a discussion, Ebsary and
18 MacNeil walking away and coming back. And there's reference
19 consistently to the words, "Dig, man, dig." or "I'm going to give
20 you everything I have." or "Do you want everything I have?"

21 There may have been something happening in the park that
22 night. There may have been panhandling. There may have been a
23 request for money. But was there a robbery? Was there an
24 attempted robbery? Robbery requires proof of violence in the
25 course of a theft. Now if you accept Ebsary walked away and was

1 called back, there can't be much of violence. I mean, why would
2 he come back? If you consider it necessary to determine whether
3 a robbery was in progress, you must be satisfied that Seale and
4 Marshall violently attempted to commit a theft. You must ask
5 yourself why Sandy Seale, a youngster who had no previous
6 involvement of any kind with the police, who was a mere
7 acquaintance of Marshall, how could he be convinced in a very
8 few minutes, because he was only in the park for a very few
9 minutes -- How could he be convinced in that period of time to
10 embark on a life of crime, to participate in the commission of a
11 violent crime? What evidence could you possibly have to support
12 such a conclusion? But that's what the Seale family has lived
13 with since 1982.

14 I also ask you to consider and to refer to the evidence--
15 I'm sorry, to the statements that Frank Edwards to the trial
16 judge during the course of the third Ebsary trial. These are
17 found in Volume 9, and they occur during an exchange with the
18 Court. Page 121. Frank Edwards wanted to close this case
19 without calling Jimmy MacNeil. He called Donald Marshall at that
20 trial and did not want to call Jimmy MacNeil. And there was a
21 debate with the Court, the Court saying, "You have an obligation
22 to call all evidence."; and Frank Edwards saying, "I only have an
23 obligation to call the evidence that I want to call. And I've
24 disclose the existence of this other evidence to the defense. If
25 they want to call it, let them call it." Well, ultimately,

1 Justice Nunn ordered Frank Edwards to cough up with Jimmy MacNeil
2 on the witness stand. But during the course of that discussion,
3 listen to these remarks from Frank Edwards.

4 Now on Thursday night, without
5 getting into the details, I had a
6 discussion which told me that I
7 preferred the evidence of Donald
8 Marshall, Jr., to that of James
9 MacNeil so I had to make a decision
at that point about who was the
most credible in my view. And at
that point I decided I would go
with the evidence of Donald
Marshall, Jr.

10 And on page 126:

11 Let me say that on Thursday evening
12 it was the first time that I could
13 speak to Donald Marshall, who is
14 obviously suspicious of
15 prosecutors and who can blame him;
16 but that was the first time that I
17 had over a two hour discussion with
him. And as a result of that
discussion I cannot in conscience
now at this time urge a jury to
believe everything James MacNeil
says over what Donald Marshall
says.

18 And in his charge to the jury or his address to the jury found
19 on page 85 and 86. He refers to the statements -- to the
20 evidence of Marshall and the fact that he called this fellow a
21 captain or a priest. He said, how could Marshall possibly have
22 known that Ebsary was known as a priest if that conversation
23 hadn't taken place. And he referred to other reasons why
24 Marshall should be accepted -- why his evidence should be
25 believed. But the evidence that Marshall gave at that trial was

1 that he saw -- he came across these two guys. He said they were
2 from Manitoba. They were dressed like a priest and they asked
3 about women. They asked about liquor. Virtually the same story
4 he told at trial except, these guys walked away and we called
5 them back. That's the only difference. That's the evidence
6 Frank Edwards urged the jury to accept. In his evidence here,
7 Mr. Edwards said: "I believe something was taken place, but I
8 certainly don't believe that Donald Marshall and Sandy Seale
9 jumped these guys from the back as Jimmy MacNeil would have you
10 believe." Frank Edwards has lived with this since '82. He's
11 taken that to trial three times. It's been in the Appeal Court
12 three or four times. I'm not saying that he knows any better
13 than you, but I say at least, give reference to what his
14 conclusion was, having finally had the opportunity to sit down
15 with Donald Marshall and talk to him, he believed Marshall.

16 We do not want to express any firm conclusion whether a
17 robbery was in process. We'll leave that to you. We do not
18 accept, however, the suggestion that had Marshall told the Sydney
19 Police or his defence counsel or anyone else that he and Seale
20 were intent on obtaining money from Ebsary and MacNeil; if this,
21 in fact, were true, that that would have prevented his being
22 wrongfully convicted. We don't accept that for a minute.

23 In 1982, My Lords, the Nova Scotia Court of Appeal was asked
24 by the Minister of Justice to review the conviction of Donald
25 Marshall, Jr. You will recall the evidence that initially the

1 Attorney General's Department and the Department of Justice and
2 counsel for Marshall all wanted to proceed under the provisions
3 of a particular sub-section of the Criminal Code. I think it's-
4 - is it 713?

5 MR. ORSBORN:

6 It's 617 (c).

7 MR. MacDONALD:

8 It's 617.

9 MR. ORSBORN:

10 "C".

11 MR. MacDONALD:

12 "C". For some reason the Chief Justice of the Province
13 intervened. The result, that the appeal was taken under a
14 different sub-section. The adoption of that latter procedure
15 required counsel for Marshall to take the lead role in
16 presentation of evidence to the Appeal Court. Various
17 applications were made to the Court to identify those witnesses
18 whose evidence would be called and ultimately witnesses were
19 called and evidence taken before the members of the Appeal
20 Division. Following the introduction of that evidence, the Court
21 required written and oral submissions to be made on behalf of
22 Marshall and the Crown.

23 Frank Edwards who was acting on behalf of the Attorney
24 General believe, and he believed early, that the conviction of
25 Marshall was a miscarriage of justice. And he wanted to have the

1 Appeal Court acquit Marshall on that basis. "Marshall, we are
2 acquitting you. There has been a miscarriage of justice". And
3 that's what Frank Edwards believed. During the course of several
4 court appearances, however, he formed the view that the members
5 of the Appeal Division would likely take the option of ordering a
6 new trial rather than acquitting Marshall, unless they had the
7 opportunity to protect the system and blame Marshall for his own
8 conviction. That's what Frank Edwards told you. That is
9 shocking evidence.

10 To secure the acquittal of Marshall and contrary to his own
11 belief Edwards filed a factum and orally argued before the Appeal
12 Division that Marshall should be convicted but that the system
13 and those involved in it were not to blame -- should be
14 acquitted. Yes, I'm sorry -- The factum that was filed by Mr.
15 Edwards is found in Volume 4 of the Exhibits. At page 39, this
16 is what Frank Edwards told the Appeal Court. And he argued the
17 same thing orally.

18 The Respondent disagrees with
19 Counsel for the Appellant...

20 The Attorney General, of course, is the Respondent.

21 ... who argues that the
22 aforementioned order...

23 That's the order to acquit.

24 ... could issue on the basis that
25 there had been a miscarriage of
justice. It is submitted that the
latter phrase connotes some fault
in the criminal justice system or
some wrongdoing on the part of some

1 person or institution involved in
2 that system.

3 Remember this is the same man who months before said the best
4 course of action would be to acquit on the basis that there had
5 been a miscarriage of justice. He went on, on page forty to say
6 this:

7 Here, if the Court does ultimately
8 decide to acquit the Appellant, it
9 is no overstatement to say that the
10 credibility of our criminal
11 justice system may be called into
12 question by a significant portion
13 of the community. It seems
14 reasonable to assume that the
15 public will suspect that there is
16 something wrong with the system if
17 a man can be convicted of a murder
18 he did not commit. A minimum level
19 of public confidence in the
20 criminal justice system must be
21 maintained or it simply will not
22 work.

23 Nobody could disagree with those statements. Then he went on to
24 say:

25 For the above reasons, it is
respectfully submitted that the
Court should make it clear that
what happened in this case was not
the fault of the criminal justice
system or anyone in it including
the police, the lawyers, the
members of the jury, or the Court
itself.

Frank Edwards didn't believe that. He told you he didn't believe
it. That's what he felt he had to tell the Court in order to
secure the acquittal. Maybe he misread the Court, although you
would have great difficulty accepting that conclusion if you
read the decision filed by the Court because that's exactly what

1 they did. They acquitted Marshall. They said there isn't a
2 shred of evidence available that could convict him, but then they
3 went on to file those incredibly damning last two pages of that
4 decision. Volume four, page 145. How many times have we seen
5 this quoted and quoted and quoted:

6 Any miscarriage of justice is,
7 however, more apparent than real.

8 Isn't that the same as saying there was no miscarriage of
9 justice. How could you possibly say that there is no miscarriage
10 of justice when a kid spends 11 years in gaol for something he
11 didn't do with no evidence. How many times have you seen this?

12 There can be no doubt but that
13 Donald Marshall's untruthfulness
14 through this whole affair
15 contributed in a large measure to
16 his conviction.

17 That in the face of affidavit evidence that the perjured evidence
18 of three witnesses who convicted Marshall was obtained through
19 pressure. When there is files -- affidavits from the lawyers for
20 Marshall which must had been looked at by the Court because even
21 though they weren't introduced as evidence the Court in the
22 decision says Marshall's counsel didn't know any of this. And
23 the only way you can find that information is in the affidavit
24 filed by Khattar and Rosenblum, but they also said: "If we had
25 known of the first statements of Chant and Pratico we think we
would have got an acquittal." But Marshall contributed in a
large measure to his own conviction. No mention of the
suggestion that these eyewitnesses lied because of police

1 pressure. No mention of that. Marshall is at fault. Why?
2 Because he didn't say, "that I invited Seale and Ebsary back.
3 Called them back." That's the only thing he didn't say. If you
4 compare what he said in the Appeal Court with what he said at
5 trial, that's the difference. "I invited them back". But that
6 contributed in a large measure to his own conviction. There was
7 no miscarriage of justice. Shocking!

8 That statement has been used to make Marshall's life hell
9 ever since it was made. You've seen it throughout the
10 compensation phase of this whole thing. It's your fault.
11 There's no miscarriage of justice here. Why did they do that?
12 Was it because Frank Edwards convinced them of something he
13 didn't believe? Was he that powerful an advocate that he could
14 convince them to come up with that conclusion if they didn't
15 believe it themselves? He says that that was their belief. He
16 fed it to them and it was fed back.

17 That decision has to rank together with the failure to
18 disclose the fact of Jimmy MacNeil's attendance at the police
19 station ranked right up there with the serious miscarriages of
20 justice that have been perpetrated against Marshall by our
21 system. We do not believe that those statements in the final two
22 pages of the decision are supportable and we suggest they never
23 should have been made.

24 Extensive evidence has been presented to you, My Lords,
25 concerning the procedures that were followed in arriving at a

1 figure for compensation to be paid to Mr. Marshall. Primarily an
2 adversarial approach was adopted by the Crown and with all
3 respect to His Honour, Judge Cacchione, it appears the Attorney
4 General has a better negotiator. That negotiator, of course, was
5 armed with the statement from the Appeal Division that there was
6 no miscarriage of justice and that Marshall was largely at fault
7 for being sent to gaol. The Deputy Attorney General was adamant
8 that compensation here was to be payment for incarceration only
9 and was to consider only that period of time when Marshall was in
10 gaol. And there was to be no reference to the events leading to
11 his wrongful conviction. It appeared to be an approach that,
12 Here's the wages, the remuneration you lost or you could
13 reasonably have been expected to obtain if you had not been in
14 prison, but we're not giving you anything in the nature of
15 damages for your having been wrongfully convicted.
16 Notwithstanding this approach, of course, Marshall was required
17 to execute a complete release of all claims of any kind that he
18 would have relating to his involvement with the justice system.
19 He was also required to pay for his own counsel who were
20 necessary to demonstrate that the system had wrongfully convicted
21 him.

22 We are not in a position to comment on the adequacy of the
23 compensation that was paid to Mr. Marsh. We do suggest that if
24 similar circumstances ever occurred again, and hopefully they
25 will not, that the government should pay counsel on behalf of a

1 wrongfully convicted person and the amount of such payment
2 should not enter into the computation of the amount to be paid to
3 the victim. Further we consider it was improper to limit the
4 time period to be looked at, that there well should have been an
5 attempt to access the damages that have been suffered because of
6 your being wrongfully convicted. Remember the evidence, as I
7 understood it, given this morning by Mr. Donahoe and Mr. Giffin,
8 that they expected Chief Justice Campbell to objectively consider
9 the appropriateness of the award that was being made. We know
10 that that didn't happen. We know that award, the report of Chief
11 Justice Campbell was written by Gordon Coles, concurred in by
12 Cacchione. But there was no attempt by Chief Justice Campbell
13 independently to access the quantum that was awarded here.

14 Given everything that we've heard and the conclusion that we
15 urge upon you, we recommend that you include in your report a
16 recommendation that the government look at this issue of
17 compensation once again for the purpose of determining if the
18 amount which was paid to Donald Marshall, Jr., constitutes a
19 reasonable and fair payment in all of the circumstances.

20 Throughout our written submission we referred to various
21 steps taken by the Attorney General's Department and its
22 employees and the R.C.M.P.

23 MR. CHAIRMAN:

24 Would this be a good time to take a short recess?
25

1 MR. MacDONALD:

2 Good as any.

3 MR. CHAIRMAN:

4 What we propose to do is to rise for probably fifteen to twenty
5 minutes and then continue to sit until Commission Counsel finish
6 their summations this afternoon. So the counsel for Donald
7 Marshall, Jr., will be on first thing in the morning.

8 INQUIRY RECESSED AT: 3:51 p.m., AND RECONVENED AT: 4:20 p.m.

9 MR. MacDONALD:

10 My Lords, just before I commence again, it was suggested to me
11 that I may have said something that I certainly didn't intend
12 with respect to laying of charges and I would like to refer again
13 to the actual recommendation that's contained in our submission
14 and state that if I said anything other than this, that it was
15 only exuberance as I was listening to myself. I didn't mean to
16 make any suggestion other than this.

17 Can I just for the record refer to what we say in our report
18 on page 65, My Lords:

19 If Your Lordships conclude that
20 the evidence given at Marshall's
21 Trial by Pratico, Chant and Harriss
22 was put in their mouths in the
23 first instance by MacIntyre, we
24 urge you to go further and to
25 recommend that consideration be
given to laying charges against
John MacIntyre for obstruction of
justice, together with any other
charge which may be supported by
the conclusion with Your Lordships
reach.

1 We did not say that we have formed the conclusion that, in
2 fact, charges are supported because no one has carried out the
3 in-depth analysis, but perhaps as should be carried out. But we
4 are saying that we urge you to recommend that such an in-depth
5 analysis be carried out to determine if, in fact, charges are
6 supported. So if I went further than that in my oral submission,
7 it was inadvertence.

8 Now, My Lords, as I have indicated, we have referred in our
9 written submission and I have today, to various steps taken by
10 the Attorney General's Department and its employees and to the
11 members of the R.C.M.P. In addition to the extensive review of
12 the evidence of the Marshall case, we presented to Your Lordships
13 evidence of two other cases for the sole purpose of illustrating
14 the manner in which the Attorney General's Department operated
15 and the relationship which existed between the R.C.M.P. and the
16 Attorney General's Department. We suggest that the evidence
17 presented establishes conclusively that the R.C.M.P. in this
18 Province did not in all circumstances discharge the obligations
19 which a police force owes to the members of the public. The
20 R.C.M.P. were prepared to bow to pressure exerted on them by the
21 Attorney General's Department. In the Marshall case the R.C.M.P.
22 were not prepared to launch an independent investigation of
23 suspected criminal activity on behalf of John MacIntyre and
24 William Urquhart. The only reason advanced for this reluctance
25 other than the reference to the directions from the Attorney

1 General's office to hold such an investigation in abeyance, was
2 the fact that another police force was involved and that future
3 dealings between the R.C.M.P. and the Sydney Police would be
4 rendered more difficult if such an examination or investigation
5 were carried out. We say that the public of Nova Scotia has a
6 right to expect more than this from the R.C.M.P.

7 In the Thornhill matter all of the R.C.M.P. who looked at
8 the details of the case and these included all of the
9 acknowledged experts in the force in the field of commercial
10 crime concluded that the facts supported the laying of charges.
11 Let me refer, My Lords, to Volume -- It's Exhibit 165 and that's
12 the booklet of documents that was filed in the Thornhill case.
13 At page 56 -- These are the minutes of that meeting that took
14 place in Ottawa in November of 1980. And here's what's
15 recorded. And remember the evidence, I think, of Mr. Quintal --
16 It was probably Quintal saying: All of the experts of the
17 R.C.M.P. were present. This was considered very serious. This
18 is what is recorded in the minutes at page 56:

19 The Halifax contingent felt very
20 strongly that the investigational
21 results supported a prima facie
22 case under Section 110-1(c)--
23 accepting benefit. A well prepared
24 submission touched on the essential
25 ingredients of the charge.

23 They listed those out.

24 The submissions and the
25 investigation were quarried on all
aspects for the investigation had
to stand the test of our own

1 internal scrutiny so as to create a
2 united front. Case law and other
3 precedents were cited to support
4 the necessary elements required to
5 support a charge.

6 On page 57:

7 Given the obviously ramifications
8 of any charge being laid against
9 the advice of the A.G., it rendered
10 it absolutely imperative that the
11 merits of the case be examined at
12 the highest possible levels within
13 the force.

14 That was the purpose of this meeting. It was a well presented
15 case. And this was the unanimous conclusion at that meeting.
16 Three conclusions.

17 ... that the investigational
18 evidence supported a prima facie
19 case. Second, that some leeway
20 must be given to the A.G.,
21 therefore, we should prepare a
22 report asking him to reconsider
23 his opinion. And third, that the
24 A.G. of the Province must be
25 informed in writing that it is our
intention to pursue a charge.

That was in November. Somehow, with no additional evidence, no
additional facts, a little more than a month later the Deputy
Commissioner directed that there would be no charges. He says,
for example, on page 94, one of the people involved in a lower
level -- the Deputy Minister had written the Deputy Commissioner,
had written a memorandum in which he said, in order for a charge
to be laid,

All that is necessary is that
there are reasonable and probably
grounds to believe that an offense

1 has been committed and reasonable
2 and probably grounds to believe
3 that the person to be charged
4 committed that offense.

5 Quintal told you that's not enough. Why? On page 95 he said:

6 It is our considered opinion that
7 charges against Thornhill and/or
8 the banks ought not to be laid
9 against the wishes of the Attorney
10 General.

11 My recollection of what he told you when he gave evidence is that
12 no charge would be laid unless we could be assured of a
13 conviction. That's not the test that's applied to anybody else.
14 Why was it applied here? The R.C.M.P. would not lay a charge
15 against the wishes of the Attorney General unless they were
16 assured they could obtain a conviction. That's the evidence that
17 you have and that is in spite of the conclusion reached by all of
18 the experts in the R.C.M.P. that charges should be laid and that
19 the Attorney General be advised in writing that they would be
20 laid. Here, as well, we say the public in Nova Scotia has a
21 right to expect more than that from the R.C.M.P.

22 In the MacLean case and now I'm referring to exhibit 173,
23 before the Attorney General's department became involved on page
24 four, it's recorded in the notes of an internal memo:

25 It was determined to our
 satisfaction that the matter
 required investigation and appeared
 to be criminal in nature.

 And on page 22 there is a memorandum from the officer in charge
 of the criminal -- commercial crime section to the officer in

1 charge of the commercial -- the criminal investigation branch
2 saying that:

3 The possible offenses requiring
4 investigation are...

4 And he listed out:

5 ... forgery, uttering forged
6 documents, false pretenses, fraud.

7 What did the R.C.M.P do? They were told to do nothing. Mr.
8 Coles was annoyed, annoyed that they were involved at all,
9 annoyed that the Auditor General had the audacity to go to the
10 R.C.M.P. Who else would you go to if you think that there's a
11 crime being committed? Told not to do anything. And you review
12 the evidence of Mr. MacGibbon -- Inspector MacGibbon.

13 Why didn't you do anything?

14 We were waiting to be told the applicable regulations. But he
15 agreed there certainly couldn't be any regulation that would
16 authorize forgery, uttering forged documents, any of the other
17 suspected crimes. Why was he waiting for that? They waited and
18 they waited and they waited until the Leader of the Opposition
19 insisted that the R.C.M.P. get off their chair. Once they did
20 they found the charges should be laid and charges were laid and a
21 conviction was obtained.

22 The public has a right to expect more than this from the
23 R.C.M.P. We say that there is no question that in this province
24 all people have not been treated equally by the R.C.M.P.
25 Wherever it is perceived that independent action by the R.C.M.P.

1 could have a negative impact on their relation with other
2 authorities the R.C.M.P. appears to back off. We urge Your
3 Lordships to remind the R.C.M.P. that the obligation owed by the
4 police to the public is to act independently and impartially and
5 that once the police force gives up such independence in
6 exchange for extraneous considerations such as more harmonious
7 relations with others involved in the system, the opportunity for
8 abuse exists and the public will lose confidence in the system.
9 They must be reminded that their obligation is to act
10 independently and impartially.

11 Let me turn to the Attorney General's Department. It
12 appears that in the Donald Marshall Jr. case whenever the
13 opportunity existed for the Attorney General's Department to take
14 a position which was unfair to Junior Marshall they seized that
15 opportunity. The department would not consider payment of the
16 account of Steven Aronson although Mr. Coles acknowledged he
17 could have. The department would not consider positive
18 responses to Aronson's and Cacchione's request for information.
19 They were denied on the basis of the Freedom of Information Act
20 without even looking in the file to find out what was there. It
21 was denied. In the submission to the Appeal Division the
22 department took the position that Marshall was the author of his
23 own misfortune and that the system should not be blamed. The
24 department consistently refused to consider a public inquiry.
25 They were asked over and over. The department resisted any

1 attempt to have an independent commission such as the Campbell
2 Commission look at the totality of the damage done to Marshall
3 when they were -- when considering compensation. The department
4 insisted on the complete release of all claims of any kind which
5 Marshall might have before any compensation was paid. An
6 analysis of the treatment handed out to Marshall and his
7 advisors reveals a department that was uncaring and that was
8 unfair.

9 Contrast that treatment with the attitude of the department
10 when dealing with the Thornhill and the MacLean cases. The
11 R.C.M.P. was denied access to a Crown Prosecutor in the Thornhill
12 matter. That's the normal practice. Without any consultation
13 with the R.C.M.P. and with a mere couple of hours notice the
14 Deputy Attorney General advised publicly that no charges would be
15 laid in the Thornhill case. Later on, the Deputy Attorney
16 General issued a press release justifying his actions in the
17 Thornhill case. That document is found in volume -- exhibit 165
18 at page 61. Among other things he said this:

19 Mr. Coles reaffirms his earlier
20 advise that from the commencement
21 of the investigation it was clearly
22 understood and agreed between the
23 commanding officer of H. division
24 and himself that upon completion of
the investigation the report would
be forwarded directly to the Deputy
Attorney General as was the
practice in investigations of this
nature.

25 That statement has been denied by everybody. There was no such

1 practice. This was the only case to when it happened. Why? Is
2 that fair? The Deputy Attorney General gave advise to his
3 minister in the Thornhill case that can only be considered wrong
4 and maybe considered to be misleading. On page 103 of volume 165
5 Mr. Coles wrote to superintendent Feagan who had the --who had
6 earlier referred him to a couple of decisions of the Nova Scotia
7 Appeal Division and said:

8 You may rest assured -- You can
9 assume that we are very familiar
10 with the evidence involved and the
11 decisions of our court were
12 carefully considered in assessing
13 and evaluating the police reports.

14 Now, one of those cases was the Williams case and in that case,
15 this is what the Court of Appeal of Nova Scotia said, When
16 considering cases such as they were dealing with in the
17 Thornhill matter on page 382 of the report and that decision was
18 filed as exhibit 171.

19 The offense under section 110(1)(C)
20 is the acceptance of a benefit
21 without having first obtained the
22 consent. No other intent is
23 required under that specific
24 subsection.

25 And Mr. Coles said:

 You can assume that we are very
 familiar with those cases. We
 prosecute them. We know it. We
 know the law.

Well, I challenge anybody to read the opinion that was given by
Mr. Coles to his minister which commences on page 31 of 165 and

1 find that he understood the law. He is saying there is no
2 evidence of the necessary criminal intent to justify the laying
3 of a charge, that there must be criminal intent. There must be
4 criminal activity. That is in face of the statement that I've
5 just read to you from the Court that the only intent required is
6 that you accept it, the benefit. At the bottom of page 36, this
7 is what he says:

8 Upon considering the report and
9 attachments and so on, they do not
10 disclose evidence of the kind of
11 intention necessary to constitute
12 any criminal wrongdoing on the part
13 of either the chartered banks or
14 Mr. Thornhill. Being of the
 opinion that the investigation does
 not reveal evidence to establish
 the essential ingredient of
 intention which is the fundamental
 element of the offense, it is not
 necessary to consider...

15 and so on. That's wrong. And if you review the evidence that
16 Mr. Coles gave to this Inquiry on what he intended to tell his
17 Minister, you will find widely conflicting statements. In
18 questioning by Commission Counsel, he said he intended to tell
19 the Minister that he really didn't think there was any benefit
20 and in any event the Premier would have consented to the benefit
21 being conferred.

22 When he was challenged on the evidence, when being examined
23 by Mr. Ruby, he backed off and conceded then in effect what he
24 told the Minister was that there was no intention and that
25 intention was required. That's wrong.

1 The Deputy Minister's conclusion was concurred in by his
2 senior advisors Mr. Gale and Mr. Herschorn. Mr. Herschorn said,
3 "I had a gut feeling that there was no criminal activity here.",
4 but he said the test he would apply is whether the facts would
5 lead to a "substantial likelihood of a conviction". That's his
6 phrase. Who else gets the benefit of that test in Nova Scotia or
7 anywhere?

8 In the MacLean case, the Deputy Minister took the file from
9 the R.C.M.P as we've seen, was quite annoyed that they'd been
10 involved at all, and he asked his senior man, Mr. Gale, to look
11 at the matter. Gale reviewed the facts and he filed a letter or
12 a memo with the Deputy which is found in Exhibit 173 at page 32
13 and the key part of that report is as follows: (This is on page
14 33.)

15 Although there is no hard evidence
16 as to how many trips he made or how
17 much he expended but on the other
18 hand there is no evidence on which
19 to contradict his assertions.

20 MacLean had denied everything. If one wanted evidence to prove
21 or disprove his assertions, then a police investigation would be
22 necessary.

23 On the information we have there is
24 no basis for criminal charges in
25 that there is no prima facie case
 if one accepts the explanations
 given by MacLean.

26 Surely the only logical reading of that would lead you to this
27 conclusion, based on what MacLean says there's no prima facie

1 case. If you accept that, fine. The only way to test it is to
2 carry out a police investigation. You can't read it any other
3 way. I can't. I suggest you can't. Mr. Coles didn't. This is
4 what Mr. Coles told the Attorney General on page 35:

5 It is Mr. Gales opinion with which
6 I concur that the irregularities in
7 Mr. MacLean's compliance with the
8 general regulations made pursuant
9 to the House of Assembly Act are
10 more accounting irregularities
11 rather than such as to warrant any
further criminal investigation.
Mr. MacLean of the explanation of
the manner in which he filed his
statement of travel and living
expenses -- allowances is, in our
opinion, a reasonable explanation.

12 That's not what he was told by Gale. The Attorney General is
13 being advised that Coles and Gale are of the opinion that all
14 that happened here is mere accounting irregularities and no
15 investigation is warranted. Gale denied that on the witness
16 stand here. That advise to the Attorney General is misleading.
17 That is not what he was told by Coles -- by Gale. And the matter
18 lay dormant again until the R.C.M.P. carried out the
19 investigation that should have been carried out some time ago.
20 Charges were laid and a conviction was secured. Nobody else is
21 treated like that. Why was Mr. MacLean given this preferred
22 treatment?

23 We had evidence involving a shoplifting charge in Sydney.
24 Mr. Coles had a call from senior lawyer in Sydney saying, "Would
25 you not proceed with that. Frank Edwards wants to proceed."

1 Without speaking to Edwards, without finding out the facts,
2 without determining if this person had a previous conviction,
3 without doing anything Coles said, "Drop the charge." Why?

4 That Deputy Minister, Mr. Coles, exerted pressure on the
5 R.C.M.P. He appeared to what to have complete control of the
6 administration of justice in Nova Scotia. He failed to recognize
7 the division of responsibility between the police and the
8 Attorney General's Department, notwithstanding that he admittedly
9 had no personal experience or very little in criminal law. He
10 did not seek advise from his senior people before passing along
11 the opinion in the Thornhill case, and he certainly
12 misinterpreted the law. He was appointed to his position by the
13 Attorney General directly without having had any experience. His
14 discharge of the responsibility of the office based on the
15 evidence that we have heard should be criticized. Neither did he
16 receive what one would classify as independent, objective, and
17 proper advise from his senior advisors. Those senior people
18 appeared to be content to do exactly what they were told, no more
19 and no less.

20 The administration of justice did not function fairly in
21 Nova Scotia. The Attorney General's Department has not operated
22 in a manner where we can comfortably stand before you and say to
23 the public that you should have complete confidence in those
24 senior officials. Structural changes in the operation of that
25 office may be necessary. Your Lordships have commissioned

1 studies dealing with this topic and in due course must direct
2 your attention to changes which should be implemented to avoid a
3 repetition of the favoritism which has been practiced. Whether
4 this will require the creation of the office of a Director of
5 Public Prosecutions or the use of an independent prosecutor in
6 sensitive cases or some other type of system, the result must be
7 a system which not only treats everybody equally but is perceived
8 to do so.

9 When we were preparing our submissions, My Lord, we
10 struggled with the issue of racism. We attempted to find any
11 evidence that we could direct to you which could lead to a
12 conclusion that the treatment of Donald Marshall, Jr., by the
13 system was a result of his race. We can't find any such evidence
14 but that doesn't mean that he was not treated unfairly, at least
15 in part because of his race. Very few people are going to get on
16 the witness stand and admit that they discriminate, admit that
17 they are bigoted. Many of the Natives -- I guess all of the
18 Natives, though, who gave evidence here, believe that. They
19 believe that they are treated unfairly.

20 The problems of attempting to identify racism through viva
21 voce evidence was recognized by Your Lordships early and you have
22 commissioned research projects which are directed to trying and
23 establish whether there is evidence to demonstrate the existence
24 of racism. When you get those reports, that may enable you to
25 answer the question, whether racism played any role in the

1 conviction of Donald Marshall, Jr. We think it's -- would be
2 naive to suggest that it had no bearing whatever but we cannot
3 direct you to any evidence which would support that feeling that
4 we have. Racism perhaps is a feeling as opposed to something
5 hard, something you can put your hand on but you do know the
6 people of the minority races do feel that. You've heard that
7 here.

8 In our submissions, My Lord, we have restricted ourselves in
9 large measures to dealing with the facts of the Marshall case
10 and the two other cases we have considered. Findings of fact
11 must be made by you in order to answer the question, what went
12 wrong? You must go on, however, to say what if any changes must
13 be made in our system of administration of justice in an effort
14 to prevent a reoccurrence of this tragedy and to enable all
15 people of this province to believe that their system is fair and
16 just.

17 Some of the changes which will be suggested to you and which
18 will be suggested to you would be require adoption of innovative
19 approaches. The public of Nova Scotia and its government,
20 probably people in other provinces, will be looking forward to
21 reading your findings and your recommendations. If you think an
22 injustice has occurred, you must say so. If you think people
23 acted improperly, you must say so. If you think those involved
24 in our system have treated people unfairly, you must say so. And
25 if you think there has been favoritism practiced by people in

1 the system, again, you must say so. If you think people in
2 institutions treat suspect criminals differently depending on
3 their race, you must say so. If the system or parts of it or
4 persons involved in it are flawed, it is time to stop hiding that
5 fact. It is time to stop protecting people who have not acted
6 properly and have not discharged the obligations placed upon
7 them.

8 A 17-year old boy was robbed of the prime years of his life.
9 We can not allow that to happen again. If the prevention of a
10 reoccurrence of this tragedy requires novel or innovative
11 procedures, you must be prepared to recommend their
12 implementations.

13 We have seen to many headlines ridiculing the justice system
14 in this province. There have been enough cartoons and jokes.
15 Justice is not a laughing matter. It is serious business. It
16 effects people and their liberties. There are innumerable people
17 in our system who perform their job competently day in and day
18 out treating all people equally and fairly. It's the tough cases,
19 though, that test the system and determine if it's a solid
20 system. When put to the test, our system was found to be
21 wanting. The actions of a few have tarnished the image of all.
22 The public will not put its trust in a system which treats
23 people differently depending upon their station in life. The
24 system must be fair, and it must be perceived to be fair. Your
25 task is to restore the public trust and their belief that there

1 is a fair, impartial system of justice in Nova Scotia.

2 Thank you.

3 MR. CHAIRMAN:

4 We will rise until nine-thirty in the morning.

5

6 INQUIRY ADJOURNED at 4:58 o'clock in the afternoon on the 31st
7 day of October, A. D., 1988.

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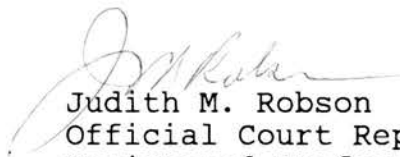
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COURT REPORTER'S CERTIFICATE

I, Judith M. Robson, an Official Court Reporter, do certify that the transcript of evidence hereto annexed is a true and accurate transcript of the Royal Commission on the Donald Marshall, Jr., Prosecution as held on the 31st day of October, A. D., 1988, at Sydney, in the County of Cape Breton, Province of Nova Scotia, recorded on tape, transcribed and checked on CAT (computer-assisted transcription) by staff of Sydney Discovery Services, and that same is valid only if it bears my raised seal.



Judith M. Robson
Official Court Reporter
Registered Professional Reporter

Sydney Discovery Services
October 31, 1988