SDS Case Number 87-312-A

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

VOLUME 90

Held: November 01, 1988

At: St. Andrew's Church Hall
Bentinck Street
Sydney, Nova Scotia

Before: Chief Justice T. A. Hickman, Chairman
Assoc. Chief Justice L. A. Poitras, Commissioner
Hon. G. T. Evans, Commissioner

Counsel: George MacDonald, Q. C., Wylie Spicer, & David Orsborn: Commission Counsel

Clayton Ruby, Ms. Marlys Edwardh, & Ms. Anne S. Derrick: Counsel for Donald Marshall, Jr.

Ronald N. Pugsley, Q. C.: Counsel for John F. MacIntyre

Donald C. Murray: Counsel for William Urquhart

David G. Barrett: Counsel for the Donald MacNeil estate

Jamie W. S. Saunders, & Darrel I. Pink: Counsel for Attorney General

James D. Bissell: Counsel for the R.C.M.P.

Al Pringle: Counsel for Correctional Services Canada

William L. Ryan: Counsel for Evers, Green and MacAlpine

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

Bruce H. Wildsmith: Counsel for Union of N. S. Indians;

E. Anthony Ross: Counsel for Oscar N. Seale, and for Black United Front.

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ORAL SUBMISSIONS

INQUIRY RECONVENED AT 9:35 o'clock in the forenoon on Tuesday, the 1st day of November, A. D., 1988, at Sydney, County of Cape Breton, Province of Nova Scotia.

MR. CHAIRMAN:

Mr. Ruby.

MR. RUBY:

Thank you, My Lords.

I want to address you for a couple of hours this morning on four related questions if I may.

First, I want to explore with you what the real problem in the case was in terms of causing Donald Marshall so much difficulty over these years initially, the initial problem. And under that heading, I want to deal with police corruption.

Second, I want to ask the question: Does the system have effective built in checks and balances? And there are a number which are considered in my brief, crown counsel, defence counsel, and the trial judge, for example. I leave those to you in writing. But I want to orally comment on two aspects of the checks and balances system; one, the question of full disclosure, and second, the duty of the Court of Appeal.

The third question that flows logically is: What do we do when the system fails? And it's my submission that we have no effective institutional avenue of redress, and I propose one.

And the fourth question: How do we deal with our failures? It's a critical question for the administration of justice. It's not one we ever ask. It's my submission we do so inadequately

and unfairly, and I want to talk about three things in that connection; first, the "blame the victim" response; second, the question of compensation and it's fairness; and third, almost a footnote, the parole system.

This will, as Your Lordships will realize, leave much of the brief for you in writing and I don't want to intimate that by selecting these items out, I think the others unimportant. There are important recommendations elsewhere and I know you'll give them full consideration.

At the outset, on behalf of Donald Marshall, Jr., I want to express my broad agreement with the analyses and conclusions of Commission Counsel. Indeed I think it's appropriate that I express my admiration for the work they've done, the skill of which the document was prepared, the economy and clarity of its language, and the obvious care that was taken in its preparation. It discloses a dedication to the principles of justice. It is a thoroughly admirable job. And except where specific issue is taken with one of the points they raise, we agree with the submissions made in it.

Second, I want to thank and complement all counsel at this hearing who have exhibited a very high standard of advocacy and competence, and that is helpful to us as counsel if others are working at such a high level because it makes our job easier, not more difficult, and no doubt, it's of help to you as well.

As you will have seen by an examination of our submissions

in writing, in a few areas commission counsel have been somewhat more conservation and more restrained in their approach and their conclusions than we have been. They have been throughout very cautious in their submissions. But we feel that it is possible to go beyond their recommendations and their findings in certain areas because really when properly analyzed, the evidence leads farther. And that takes me to the first of the questions that I want to deal with which is whether the problem in this case involves police corruption.

Staff Sergeant Wheaton said, "I do not feel Donald Marshall was the author of his own misfortune. He is the victim of a unscrupulous police officer, John MacIntyre." And he's correct. And if you look at page 19 of the materials, you'll see some dictionary definitions of that famous word, "corrupt", just so we'll have a context for the submission that I'm going to make.

In this area it's important to note that commission's counsel role is a very important one. They have a duty to be dispassionate, to be careful and cautious, and "neutral, if that's the right word, in their pursuit of the truth. They have a duty to advise you candidly and honestly and they have to tell you that there is only one view that can be taken of this evidence, MacIntyre and Urquhart acted corruptly. That is a neutral, fair, and dispassionate view of the evidence and it leads to only one conclusion. There had been a failure of justice in this area, and we submit to you it's a failure which

ought to be regressed.

So I want to characterize from an ethical prospective the actions of MacIntyre and Urquhart. I submit to you that they are corrupt and unscrupulous, but they are also inept and incompetent. Two different things. And it's easy to look at the ineptness and the incompetence and think, "Well, my god, that's the problem." It is separate and different from what I want to talk about. They do not suffer from tunnel vision if tunnel vision can in one aspect be properly defined as reaching premature conclusions without any foundation of fact; for example, focusing an investigation on one particular individual and then building a case against that person. It's crucial to see that that is not what MacIntyre and Urquhart are doing. They are not building a case. They are fabricating a case.

Commission counsel have focused on the note book of Constable Wood to show that on Saturday morning, there was already the view formed that the evidence would later be created to support and substantiate that Marshall was possibly responsible and that the incident happened as a result of an argument between Seale and Marshall.

It's vitally important that the structure of the evidence came first to MacIntyre's mind, and not first in the real world. The real world reflects what he felt rather than the other way around. This is not tunnel vision. This is commencing under an assumption of guilt, inventing a state of affairs that would

account for guilt. That's the argument. And then as we shall see, creating out of whole cloth, the facts to support that assumption.

In cross-examination, commission counsel suggested to MacIntyre that he was acting with tunnel vision and define it as the concept "that you made up your mind and then you distilled the facts to support your conclusion." If you pay attention to the use of the word "distilled", you can see that this is not tunnel vision at all. Distilled means having been turned from wine to hard spirits. And to effect the similarly dramatic change in evidence is corruption, not tunnel vision.

The refusal of R.C.M.P. assistance between nine-thirty and eleven a.m. Saturday morning is inexplicable in the tunnel vision theory. It speaks only of a decision not to allow any evidence that might exculpate Marshall, evidence out of the control of MacIntyre to be sought.

Let's look at the evidence gathering process. What jumps out at you in an overview of this case as presented at trial is that the case is littered with false and perjured evidence, and that those who committed the perjuries were all independent. They had no contact with each other except, of course, through the intermediary of MacIntyre and Urquhart. They're the common link between the witnesses. They're the only common link. There is no other possible explanation for how all these people wound up producing evidence; and not just the ones who were called at

trial, but also the other statements and I'll come to some of them of those who were not called. How all these people produced evidence that was indicative of Marshall's guilt that was false, and taken from children, except that MacIntyre and Urquhart set out to create it.

Let me try and focus on some of the issues which illuminate the question of whether they were doing their inadequate best or whether they were, in fact, corrupt and unscrupulous.

Commission counsel has dealt with Ms. Harriss in some detail, but let me add some aspects that he has not touched on. It's my submission that to repeatedly tear up statements every time exculpatory evidence is mentioned, and to repeat that act, until a child witness gives up communicating the exculpatory evidence is an act that can be interpreted only as corrupt. It's not an ambiguous act. It bears only one meaning and is subject to only one interpretation. More importantly, the officers when they do that know that they're acting to conceal exculpatory evidence. And when you tear up the paper, you have to know what you're doing. You're taking evidence that exculpates and you are burying it. You are not merely ignoring exculpatory evidence. That's a different thing entirely. And that this, in fact, occurred is amply corroborated by Patricia Harriss' mother.

I want you to note that the significance of this suppression of evidence was never lost on MacIntyre. When he met with Mr.

Edwards of the Attorney General's office back in 1982, he puts forward the misleading statement he obtained from Harriss, the later one. Edwards says that MacIntyre pinned his argument on the fact that Marshall had met Harriss and Gushue in the park and they said there was only one person. He pinned his argument. And according to Edwards, this seemed critical in Chief MacIntyre's mind and this proved Marshall was lying. He knew in 1982 how significant this was. Yet at the same time as he's telling Edwards this "cock and bull" story about the second statement, he knows. On his own admission, he must know that there was a first statement to the opposite effect and he doesn't tell that to Edwards. He doesn't tell Edwards, "There's another statement, by the way, taken earlier which contradicts this completely, this theory that I'm putting to you." He knows the importance of what he did on the 17th.

Second, that statement -- the early statement, the exculpatory one is not signed. That was a matter that Sergeant Urquhart under oath found inexplicable but, in fact, it is quite explicable. The June 17th statement, the first of the two, did not confirm what Urquhart and MacIntyre were creating as a theory of Marshall's guilt, as evidence of Marshall's guilt. It was exculpatory and, therefore, not worth anything to them. That's why it stops in the middle. That's why it's not signed by her, and that's why it was not signed by Urquhart. They intended from the beginning to suppress that statement. If they didn't

intend to suppress it from the very beginning, that statement would have been signed, it would have been completed, and it would have been signed by Urquhart like all the other statements are. He knew once he got to that point in the statement, "Hey, this is evidence we're going to have to bury. No point in getting this one signed by her. It's helpful to Marshall. No point in my signing it. It's helpful to Marshall. I'm going to bury this in any event, so why bother." Similarly it's not typed up. "Why bother typing it? I'm never going to give this to anyone. This is never going to see the light of day." All the other statements are typed, but not this one.

It's in this context that you have to look at the much disputed episode about what happened when Wheaton and Davies attended upon Sergeant MacIntyre in 1982. Okay, we're not talking about just any statement. We're talking about a statement of a particular kind with a certain effect and we know things about it. Let's view that as background. Let's keep it in mind.

Let me go through that meeting because I want to make submissions to you about what occurred. Commission counsel, you recall, did not find it possible to sort out with certainty what had occurred and I think I can assist Your Lordships in doing that.

MacIntyre prepared before that meeting took place a detailed inventory list of all the statements that he was going

to give to Wheaton, and we see that in Exhibit 88, the first three pages. Clearly he wanted to prepare the inventory carefully. He had just received an unprecedented, written order from the Attorney General's Department to produce the file. And obviously he wanted no mistake about what he was giving to Wheaton. And if you look at page one of that Exhibit 88 in the list that MacIntyre prepared, he says and lists statements, plural, (And I'll come to that.) June 18th. That is the second statement. There is no mention in the inventory he prepared of the earlier statement, the 17th. I say that's because he never intended to hand over that statement of that meeting. No significance should be attached to the use of the plural. It seems to have been an error. Marvel Mattson and Terrance Gushue, for example, gave a single statement only, but they're also referred to in MacIntyre's list in the plural. So it doesn't appear to be a matter of crucial significance.

And what happened was Wheaton starts making a list of what he receives, and he makes it in his own handwriting and you can see a copy of it at page 29 of my materials. And he lists all the statements and he signs his initial beside each one. The whole document is in his handwriting. And halfway down, you'll see listed, "Patricia Harriss, 18, June '71", with his initials. Not the 17th, just the 18th. When the fourth page of Exhibit 88 and the fourth page of Exhibit 88-A, which are copies of each other, are typed up by Mr. MacIntyre's sister, she omits the

dates from this list. And it was the addition of the verbal information which you could see in paragraph 27 of my materials, "P. A. Harriss, one statement given to Staff Sergeant Wheaton already". Now Wheaton's comment on this seems perfectly acceptable. He had indeed already been given one Patricia Harriss statement, the one dated June 18th, 1971, on an earlier occasion, February 26th, 1982. That accords with the plain meaning of the entry. What I point out is that when you look at all of this evidence and particularly the notation as to what he was receiving in his own handwriting, it seems clear that the 17th statement, the earlier exculpatory statement, was not handed over at that meeting. The only one that was handed over was the incriminating statement of the 18th. Now Wheaton and Davies say the incriminating one went under the table and got into Wheaton's possession by being retrieved in the episode you recall.

Mr. Pugsley on behalf of Mr. MacIntyre has an explanation for these events, and let me just take you through my analysis of it since I will not get a chance to reply to him. He accepts -- and if I misstate his argument, I'm certain he'll clear it up when he gets an opportunity. He accepts that it's impossible that the exculpatory, earlier statement was handed over at the June 26th meeting. There's just no evidence of it, so he starts with that premise. April 26th. Sorry, at the April 26th meeting. But he seizes upon errors in the date of the notes that Wheaton and Edwards made. They've got the date April 16th.

Wheaton says that's an error and Edwards says, "I accept my notes". That's the recollection I have. And so he says, "Well, all right, if it wasn't handed over, the exculpatory statement, at that time, it had to be handed over earlier". And so he says there were two meetings after February 27th, the first one on April 16th according to the notes and the notes are correct in that respect, and there's the second meeting after the Attorney General's direction. We all know that occurred on the 20th because the paper makes it quite clear, which would be the 26th. Now Officer Wheaton says the only meeting after the February 27th meeting was the one that occurred, the single meeting. There were no two meetings.

There are a number of problems with the theory that there was an intervening meeting on June -- on April 16th. First, whenever this meeting occurred, the one where the alleged incident happened, it had to be a meeting where Davies was present because Davies is the one that says it occurred and Davies only went once. And he remembers, first of all, reading the Attorney General's direction before they set out in that meeting. Hardly something he would forget because it's an unprecedented instruction. Two, Davies remembers this was a meeting at which they were confronted with an inventory when they went in, Exhibit 88, and there was some typing of a further document, the fourth page to Exhibit 88. Third, he remembers that the document that was found was a Harriss statement because

it was read to him in the car. Mr. Pugsley omits that last fact in his argument because it's -- it puts Davies' recollection directly at opposition with his theory, but he, in fact, remembers that it was a Harriss statement.

Second, Wheaton remembers only one meeting after February 27th regarding documents, the one with Davies. And third, and perhaps the biggest problem, John MacIntyre doesn't suggest that there was any meeting concerning documents on April 16th, not the slightest suggestion of it in the evidence. But he needs that meeting in order to explain how the document got into Wheaton's hands, if it didn't get first buried under the table.

My submission is it would surely be a most unfortunate coincidence if two independent police officers chose to lie and, indeed, to frame a fellow police officer (A very rare occurrence when some police officers decide to frame others, one might think.) over the concealment of a statement that by pure chance is omitted from the inventory he, himself, carefully prepared regarding the meeting. It's my submission that you can reach a conclusion as to whether Wheaton is telling the truth or whether MacIntyre is telling the truth, and you do it by looking at Davies.

Davies has only a brief involvement in this case. He's quite independent. He's not closely involved with Wheaton. It's not as if they were partners or worked together in any significant way. He's a body who happened to be around the shop

and was asked to come along for a witness. He has no motive to lie, and it's not as if his evidence was open to interpretation. I grant that whether or not somebody deliberately places something under the table or not or drops it accidentally is a hard call for anyone, but what he testifies that he recalls, just as Wheaton does, is that when they went back in, MacIntyre looks flustered and says, "I might as well give you it all." "I might as well give you it all." Damning words. Words that are capable of only one interpretation. He had deliberately held back what they had now found. And why would Davies make up such an incriminating episode from whole cloth? No. With the greatest of respect, Mr. Pugsley in his argument ignores Davies' evidence. He has to ignore it because it's independent corroboration that the event occurred -- took place. And the documents make it clear that it must have taken place on the 26th.

Once again, as is so often seen in this case, if MacIntyre's telling the truth, all those who were present beside him, possibly Urquhart, are lying. He's done that again and again in his evidence. He says, "This is what happened." And it has to be the case that if he's telling the truth, everybody else who was watching was lying. That can't be so. That can't be credible, especially when viewed in the context that he had every reason to try to continue the concealment of Harriss's first statement.

It's my submission that a charge of perjury under Section 132 of the Criminal Code is justified on this evidence and appropriate and the Commission should recommend such a charge. It would be wrong to let clear perjury of that sort by a public official go without redress.

I have focused on the fact that there is no common link between all the witnesses who now say that they were coerced into giving statements, bullied into giving statements, or had words put in their mouth except MacIntyre and Urquhart.

Commission counsel suggested that if you found facts, then you should recommend the charges be considered. It's my respectful submission that you can go farther. If you find those facts, there's no question that a prima facie case of obstructing justice has been ignored by the authorities and you should not merely recommended that they consider laying charges. If you find those facts to be true, you should recommend the laying of charges.

I reject the notion that Mr. Urquhart is a mere passive participant, passive observer. He certainly not passive with regard with Ms. Harriss but ever on the other witnesses.

I'd ask you to take note of the law of criminal breach of trust. It is -- been held by English courts that to stand by and be a police officer and watch a prisoner be assaulted is a criminal breach of trust. It's a mere omission to act. Omissions are not non-culpable. The test is a serious and marked

departure from the standards required of a police officer, and you might want to consider that possible offense as well in connection with these facts.

Also there is no mere passive acquiescence in these situations. You've got a person who is being questioned in a police officer with two -- in a police station with two police officers present. Standing by in that context is not merely passively observing because you're a police officer. Where it is a communicating of a fact that there will be no help from the authorities, that you have no alternative, that those in power do not care what is happening to you and will not help you, that's what a police officer standing by and watching means. Urquhart can not wriggle out by saying "I didn't do any of this stuff. I just stood by at the very most." Standing by in those circumstances is communicating something. It's saying "I'm an aider and abettor. I am making sure that the authorities will not respond."

I turn to Patterson briefly and the argument is very thoroughly set out in writing on page 33 and following but let me touch just on one aspect of it. It is true that Patterson is the only one of a child witnesses who alleges that he was physically abused. Otherwise his evidence is quite congruent with the pattern of questioning and the kinds of threats and inducements that were made. I simply point out that Patterson was the only one of the child witnesses who had a significant

criminal record at that point; and it may well be that that is why he got abuse of a physical nature rather than merely verbal abuse, and it may explain the liberties that the police took with him on his account. And again with commission counsel, I say, what makes him credible is, first of all, the Commission went to him. He didn't seek the Commission out. And secondly, why are MacIntyre and Urquhart telling such obvious lies about this man, and being unable to find him, and of not being interested in finding him in the first place? Unless they know -- they know they've got something to hide if he's discovered. Isn't it that at the end of the day, that the most telling argument in favour of Patterson's credibility is the lies that MacIntyre and Urquhart told about being unable to find him, not knowing him, having had no involvement with him? He couldn't have seen anything anyway. Why are they trying to bury Patterson from this Commission if not to conceal what they knew Patterson would tell of their encounters with him? There's no other explanation for all those tissue of lies. That's what makes him credible. They wanted him buried.

Mary O'Reilley's statement has been touched on, I think, briefly by Commission counsel and let me just spend a little more time on it. At paragraph 49, you'll see a quotation of the passage that she allegedly gave to MacIntyre in her statement.

> I told her there was supposed to be a grey-haired man there.

"Her" being Patricia Harriss.

> I told her if she was questioned by the police, she should tell about the grey-haired man that Junior told me about.

That statement was never made to MacIntyre and there never was such a conversation. It's an untrue statement. Mary O'Reilley's quite clear about it. She says," Somebody must have put it here because I didn't."

There is only one possible explanation for this peculiar fabrication. MacIntyre and Urquhart thought that they had a frail read in Patricia Harriss, and that she might at any time break and once again tell the truth about the two men and describe Ebsary in a manner that would support Mr. Marshall. They had an awfully difficult time on the evidence, getting her to except that there were "no two men" in her statement. They must have realized that there was a real danger she would recant.

This statement by Mary O'Reilley, once it's created, does two things. First, it conveniently blames Marshall for the change that would occur in her evidence and thus provides incriminating evidence against him in and of itself. It's what we lawyers call "conscientious of guilt" evidence. You wouldn't make this statement unless you were conscientious of your own guilt. Second, and more importantly for my present purposes, it's a convenient statement discrediting her evidence on this crucial point if Patricia Harriss ever decided to tell the truth. This argument is supported by the peculiar note in MacIntyre's own handwriting indicating that the night before he saw the

O'Reilley twins, Patricia Harriss told him that and it's quoted in paragraph 52:

> In school last Thursday, the O'Reilley twins told me...to tell the story about a grey-haired man.

That's the corroboration for this. When MacIntyre was asked for an explanation for this note in his own handwriting, he was unable to give one. He said, "Really I can't, no." Well, there is an obvious explanation but only one. That note was clearly not from an interview with Patricia Harriss at all. In deed, there's no suggestion that he met with Patricia Harriss around that time. Rather it was a note of what he intended to attribute to Patricia Harriss if she began to tell the truth and to use it to discredit her in court if that happened.

Commission counsel take no firm position on this issue but I submit that the logic of their own argument impels inextricably towards that conclusion. When all possible innocent explanations have been ruled out, then that which remains must be true.

Now I've analyzed this incident in more detail than commission counsel have, and it's my submission that the evidence fairly leads to the conclusion that this, too, is part of an obstruction of justice and that a charge of both perjury and obstructing of justice ought to be laid with respect to the evidence in this regard.

I'm going to leave the Chant matter to you in writing. It's been covered by commission counsel.

Would you turn to the Pratico matter at page 44? At page 44, I turn to the quotation that I've set out there; and once again, I'm only going to touch on those matters which commission counsel has not already detailed to you.

When asked about Pratico's statement, Mr. MacDonald asked him:

> Q. You thought you were getting the truth?
>
> A. I thought I was, yes.
>
> Q. Did you ask him why he told you an untrue statement earlier?
>
> A. No.
>
> Q. Why not?
>
> A. Well, I didn't, sir.
>
> Q. But that would be a -- I would think-- just a fundamental question you would ask him. Weren't you interested?
>
> A. It would've been here if I'd asked him that question.
>
> Q. Well, weren't you interested?
>
> A. Well, I was interested. Yes, I was, but I didn't ask him the question there.

Now the significance of this, in my submission, is that any police officer who honestly thought, and I stress the word "honestly", upon re-questioning that he was now getting the truth would, of course, ask why he had earlier gotten a lie. Indeed, you couldn't be satisfied that you were now getting the truth, as opposed to what you really wanted to hear, without understanding why the truth had not been forthcoming earlier. And the failure

to ask that is explicable only on the theory that MacIntyre knew he was not getting the truth but also knew, also knew, that he was getting precisely what he had set out to get, evidence that would convict Donald Marshall.

And MacNeil joins in this process, the Prosecutor. He and MacIntyre tell Pratico the lie that "they found a couple of beer bottles with my fingerprints on it. And I was never fingerprinted," he says, "by the City Police in my life." We don't know who said that but they said in each others presence. It took place after the incriminating statement had been given so it was intended, in my submission, to induce him to stick to a false story. There's no need for such a false allegation unless they knew his evidence was false and wanted to make sure that he was kept in line.

Once again, I submit, there should be charges laid of perjury and obstructing justice in connection with Pratico's evidence.

Commission counsel raise an issue that's interesting: Did MacIntyre and Urquhart honestly believe that Marshall was guilty? It's a peculiar use of language. Their belief at best was not honest in the normal sense. What "honest" means and it can only -- the most it can mean in that context was, was it actually subjectively held? Since there was no evidence at the early point when he forms his first conclusion that Marshall was guilty, that can only be a belief based upon the racism of the

man. There's nothing else on which you could form a conclusion that Marshall was a suspect, was probably guilty, to use the language of the telex and the writings. So the answer may well be, yes, he did subjectively hold that view but he held it without evidence for quite some time. Even if that were so. Even if he subjectively believed Marshall was guilty, he and Urquhart could not have fabricated this case in the way we know they did without knowing then and thereafter that the case they'd created was false. They had to know it. The people who they interviewed had no idea what the facts were. The facts were spoon-fed to them. They had to know these witnesses were not real witnesses because they knew nothing of what had transpired and so they're fabricating a case consciously; and whether they're doing it with or without a knowledge or a belief subjectively held, truly held, that Marshall was guilty, is not the point. The question is, could they have done these things without knowing if the evidence they were creating was, in fact, false? They didn't merely put evidence in their mouths, people like Chant and Pratico. They went farther. They snatched the truth from the mouths of others, like Harriss. They ripped it from her mouth. It is a pattern of corruption.

At the end of this case when the jury brings in its verdict of guilty, MacIntyre must walk from that court room knowing that there was no evidence of guilt that he himself had not deliberately created. A belief in guilt in that circumstance can

only have come from racism, a willingness to believe without evidence that this Indian was guilty of a murder. He was there. He was young. He was Native. And a form of belief based on that is only racism.

Why, it is asked, unless he had a subjective belief in Marshall's guilt, would he call the Mounties in 1971 when MacNeil comes forward? The answer's simple. He knew that he couldn't re-investigate his own case and get away with it. There was no way anyone would accept a re-investigation by him. It would be far to dangerous. He figured he could handle it by letting the R.C.M.P. send somebody in, and he would deal with it with misinformation and the "old boy chumminess" and the "We're just police officers all doing our job together."; and you know, he was right. He was dead right. He could handle it in that way and he did handle it in that way; and for eleven years, he handled it one way or the other. In 1974, he sloughed it aside. And when in 1982 the R.C.M.P. came by again, he has no fear of involving the R.C.M.P. He's handled them before with misinformation, with lies. I mean Marshall, Inspector Alan Marshall, is an honest man. There's no doubt about it. He is an honest man and he says, "Well, no. I mean, I was told lies. He hid stuff from me. He hid the crucial material. He told me things that weren't true. He mislead me and I relied on him."

Once again is MacIntyre telling the truth and everybody else lying? Has to be. What there is, is a judgement call. He was

right. He said, "I can handle any re-investigation the mounties will pull on me." He's aware of what we now have come to recognize in this Commission as the reluctance of one police force to investigate another. He knew that in his gut. He relied on it and he was correct in relying on it.

The problem is that Wheaton's to sharp for him, to dedicated, to honest. He's an honest cop doing his job; and that, MacIntyre and Urquhart didn't count on. They didn't count on someone doing a serious job like a police officer should.

It is ironic that the strength of the case against MacIntyre on this issue of corruption is precisely that which made the case against Marshall so strong. You've got a lot of witnesses who otherwise have suspect credibility because they're of bad character or they have a history of mental illness or are perjurers. What makes them credible is they tell such strikingly similar stories, having had no chance to concoct their evidence in consultation with each other. And this time, as then, there is nothing to indicated that the police investigators acting as intermediaries gave them that opportunity. It is indeed ironic.

What we can say is that we have explored thoroughly, unlike the jury at trial, whether the common denominator, the police who gathered the evidence, were in any way corrupt. We've looked at that carefully and it is clearly not so, and even Mr. Pugsley does not suggest that it is so. And yet absent a corrupt common denominator, why are all these people telling the same lies about

me? That's the question and there is only one answer.

Let me turn, My Lords, to the second issue that I want to deal with. Let's look at the process itself. Do we have effective built-in checks and balances? I agree with what commission counsel has said in my brief. You'll note that crown counsel is, in my respectful submission, treated somewhat too charitably by commission counsel. And I have made an argument that the inflammatory jury addresses, and the way in which they called certain pieces of evidence, ought to be criticised strongly by you. I won't repeat that here but let me spend some of my time on full disclosure because it's a crucial issue. Indeed if there's an issue on which the country, as a whole, is waiting for the views of this Commission, it is certainly this one. Disclosure is an issue that is of vital importance in all the jurisdictions across this country and many jurisdictions are trying to anticipate or are waiting for your recommendations on disclosure.

It is my submission that the appropriate form of disclosure is an adaption that I have prepared at the end of Tab 6 of the Recommendations of the Law Reform Commission of Canada given in Report Number 22, entitled "Disclosure by the Prosecution". It's a 1984 report. It's relatively recent. I have made some changes and I will go through those changes, if I may, by way of comment as I take you through the provisions.

This is a provision which could be an act in Legislation but

it is also if the judiciary will, by consent, agree, it need not be the form of legislation at all. It could simply be a instruction from the Attorney General to his law officers.

COMMISSIONER EVANS:

I don't wish to interrupt but are you now making some suggestions for the amendments of the 1984 Law Reform?

MR. RUBY:

Yes.

COMMISSIONER EVANS:

Thank you.

MR. RUBY:

I've set out my amendments at the end of Tab 6 and I'm going to got through them if I may. Start at the bottom of the page headed "Recommendations: Crown Disclosure", 2.1 is the title I've given this particular paragraph, and I say:

> Without request to the prosecutor...

Let me stop because that's the first change. Most traditional disclosure models require request. This has always seemed to me utterly illogical. Assume that your lawyer is too stupid or lazy to ask for disclosure, okay? That's the only situation we're talking about, where there's no request. If your lawyer is stupid or lazy, that's precisely when you most need Crown Disclosure. You shouldn't be penalizing the accused because his lawyer is stupid or craze -- or lazy. We should be giving him help and it is no great hardship to say to the Crown, "You're

going to disclose in every case; not merely the cases where there are -- is counsel present making a request." Because the purpose of disclosure is to preserve the integrity of a system of justice. It's not to make counsel happy or a polite accommodation in the "old boy" network. It's not a matter of politeness. He makes a request, I honour it. It's a fundamental requirement of justice. So there is no reason for a request to be required. I don't for a minute say that defense counsel ought not to request it. They ought to as a matter of doing their duty to their client. I can imagine no case where it's appropriate or you can say you've done your duty where you hadn't request disclosure. All I say is that the obligation is one which is owed to justice, not to the opposing lawyer. So there shouldn't and needn't be a request.

> Without request to the prosecutor,
> the accused is entitled...

and then I've listed not just summary conviction offenses but all forms of criminal trial. They don't have summary conviction offenses included in their model, but it seems to me quite self-evident that the disclosure will be simpler in summary conviction cases ordinarily. They are the majority of cases tried in our courts. They affect the public most widely. The ordinary citizen is most likely to find himself in a criminal court on a summary conviction offence, and he is the one we want to help; not the rounder who is familiar with the system but the man who really wanders in the first time and doesn't know what to

do.

And I've used the words, "and thereafter," as they do, to indicate a continuing obligation.

> ...to receive a copy of his criminal record;

That's their recommendation.

> (b) to receive a copy of any relevant statement made by him...

Their recommendation restricts the statements they're entitled to get to statements made to a person in authority. I see no reason for such a distinction. If there's a crucial confession made to your mother, made to a co-accused, made to any one of a number of people, that should be disclosed if it's relevant and important. There's no reason to restrict disclosure and let the Crown hold back relevant evidence just because it's not made to a police officer who is the usual person in authority. So there's no rational reason for restricting disclosure to those few kinds of statements. Rather it should be a broad requirement of any relevant statement.

In (d) I make a change:

> to receive a copy of any relevant statement made by a person whom the prosecutor could call as a witness...

They talk about who the prosecutor intends to call; but, in fact, if the witness is relevant and could be called, then why would there be disclosure of it? It makes no sense to me and I've suggested that we simply have a full disclosure of anybody who

could be called as a witness and I've added in the phrase:

> ...in as much detail as the prosecution possesses.

The old double standard which was so prevalent in many jurisdictions where the Crown gets full information about these statements of witnesses with the details and the defense gets a summary without the details puts the defense at a very, very grave disadvantage and the rule ought to be equality. If the Crown knows the details, the defense should know the details, too. There should be no holding back of information.

And again on subhead (e), I've changed -- I put in the word "could" and I've added in (f) to the phrase

> ...record of any victim...

that we are given the criminal of any proposed witness that could effect the witnesses credibility. Why should we restrict giving a criminal record to just victims? I mean, they may be calling co-accused. They may be calling other persons as witnesses. The criminal record is equally important for all catagories of witnesses. Once the witness is on the stand, it should be there and I've restricted it only to the criminal records that could effect credibility, not every criminal record. And that's consistent with the recent decision of the Supreme Court of Canada which says there's a discretion not to allow a person to be cross-examined on some criminal records. For example if ten years ago someone was convicted of possession of marijuana, I don't think you have to embarrass the person by producing that

record. It's not relevant to credibility in that sense.

Again in (g) I've changed and inserted the word "could be called" -- phrase: "could be called as a witness" and I've added two new paragraphs, (h) and (i). (h) requires -- and you'll see why I want it from the facts of the Marshall case,

> full information concerning any emotional or physical disability known to the prosecution that might affect the reliability of a witness.

There's just no aversion to this problem in the Law Reform Commission Report but, of course, the practical evidence here has made that of great significance to us and I think it's obvious why it's a good idea.

And then sub-letter (i):

> any other information that might reasonably affect the innocence, guilt, or degree of culpability of the accused,

That makes clear the purpose of disclosure. That's what we're really getting at. That's what's -- the generality of what we want disclosed and I put in "degree of culpability" very deliberately. If there's evidence which shows that the man was a minor participant in something rather than a major one, whether the harm was small rather than great, that should be disclosed even on a guilty plea. It shouldn't be held back because the tribunal should be given full and accurate facts on the degree of culpability and so the obligation should arise there as well.

And then the exception is not one that I've changed at all.

It's the Law Reform recommendation and it's the decision about not disclosing being made by a judicial officer and it simply has to be an impartial decision. You can't allow crown attorneys to make the decision by themselves. And the test, of course, is a demonstration "that disclosure will probably (the civil standard) -- probably endanger life or safety or interfere with the administration of justice,..." Broad, it has to be broad. Somewhat general, it has to be general and that's acceptable provided it's an independent and judicial figure making the decision. It is of course made ex-party. You don't get any notice, but there has to be reasons. So it can't be a rubber stamp.

I have expanded in number three the remedies that are available, to insert the clear power which has now been recognized since 1984 by the Supreme Court of Canada, to stay the proceedings in appropriate and narrow circumstances. And of course, the exclusion of evidence is important as well.

If we had a disclosure scheme like this, Marshall would not have gone to gaol. It's that simple. It would have been an effective check in this case. It will be an effective check in most cases, but not all. It's only one component of a fair system. But, my god, it's an essential component. We have struggled through without full disclosure in this country for far too many years. And in my respectful submission, the most useful thing you can do for the administration of justice in Canada is

to come out with a tough, clear disclosure scheme, and an ernest entreaty that the various jurisdictions adopt one.

COMMISSIONER EVANS:

Mr. Ruby, before you leave that, what you're talking about here is instructions by crown attorney -- or to crown attorneys. What -- what about the gap when the police officer fails to give the necessary information to the crown attorney?

MR. RUBY:

You have to have the power and some body responsible to discipline police officers who are corrupt. And that is corruption. If a police officer buries exculpatory material, he should be fired. And that's the simple answer.

Now I'm not going to tell you that any system is going to be devised that will prevent the rotten apple from being there. There'll be rotten apples from time to time. But a proper system of police discipline, a proper understanding of the police officer's duty, which I think most police have. I don't think that's a very big problem in this country. I think very few police officers on their own decide to bury statements that are exculpatory. It happens very rarely. It happens, god knows, but the answer is discipline those people properly.

COMMISSIONER POITRAS:

Mr. Ruby, do you cover here information obtained between trial and, say, the appeal?

MR. RUBY:

With the words "and thereafter" at the bottom of page 122, it's not limited as to time. And I mean by that, perpetual.

COMMISSIONER POITRAS:

Yes.

MR. RUBY:

And if indeed something that emerged after he was in prison and after the appeals had been exhausted. I would expect that obligation to be a continuing one.

COMMISSIONER POITRAS:

Okay.

MR. RUBY:

It may well be that a code of ethics for Police officers will be a useful one. And you might give consideration for a code of ethics, in connection with the prosecution of criminal cases. It might be particularly useful, I suppose, in jurisdictions where there's relatively little crime. I don't think it's a big city problem, primarily. But in jurisdictions with not much in the way of crime, I suspect that officers may not have thought through very carefully their obligations to the system of justice and an explicit statement of that might be very helpful.

The other check and balance that I want to talk about is the Court of Appeal, and it's a short comment. At page 4 of my materials, I must respectfully take issue with the reticence, once again, and the caution of commission counsel on this issue.

Commission counsel said in their material that they

> ...do not support the view that there is a duty on the Appeal Court to identify and raise issues of its own volition and accordingly, we do not criticize the Court which heard Marshall's appeal for failing to identify the error of the Trial Judge.

In my respectful submission, this view portrays a Court of Appeal as helpless ciphers in the hands of counsel, impotent to do justice, which is after all their sworn duty. It's the only thing they're about. And it's a view of the bench which is inconsistent with their role in a free and democratic society. And I believe it to be inconsistent with the aspirations and sense of duty that Appellate Court Judges have. I can find no case where a Court has ever said this is the duty of an Appellate Court, because I can't imagine how the issue would ever arise in a contentious case. But there are many, many cases where Courts of Appeal and the Supreme Court of Canada have done just that.

And I refer to Irwin, where the Court of Appeal not only without mention by counsel, but over the objections of counsel raised insanity where they thought that it was an appropriate defense. And they ordered the material gathered over the objections of counsel and ultimately, substituted a verdict of insanity for this lady who had killed her infant, rather than send her off for life imprisonment on a murder charge as the jury had thought fit. Now that's an extreme example. But you could only do that if you have an over-riding duty to see that justice

is done. So it illustrates the point. It cannot be the case that judges at any level have the right to pick and choose between the raising an argument that will be helpful to an accused and not.

It's my submission that you ought to find that the Court of Appeal should be criticized for failing to scrutinize the transcript and raise the issue that Professor Archibald has so accurately said, "leap out at you." This is not an apologia for counsel. In my respectful submission, crown counsel had an equal duty to raise that on appeal and to point out to the Court that there was a real problem that might have effected the trial result. So, too, to defense counsel. But I simply take the position that there is an obligation to justice in Appellate Courts which puts part of the responsibility on them as well.

COMMISSIONER EVANS:

Mr. Ruby, I would also like to add R.v Simpson 20 C.R., a judgement of the Ontario Court of Appeal, Martin giving the decision, in which a new trial was directed on an issue that was not raised by -- in the factum or by Counsel.

MR. RUBY:

Yes, My Lord. I'm very grateful to you for that. And I can, without citing cases, indicate that on a number of occasions I've found it very helpful that a point I have missed has been drawn to my attention by the Appellate bench, and I've never thought that was being done as a courtesy to me personally or as

a favour to my client. We are all engaged in the process of doing justice. And that means all of us.

The third issue that I want to deal with is the question of what do we do when the system fails. What do we do when we've got a Donald Marshall? And I start off with the assurance that only a compulsive optimist would believe that Donald Marshall, Jr., was the only mistake that the criminal justice system made and then allowed to languish behind bars. I'm certain there are many Donald Marshall's out there in the prison system. But there is no method of effectively dealing with this problem. It's a very uncomfortable problem for the system of justice, and so we've preferred not to look at it and not to provide for any solution to it. What happens presently is they rely on family and friends. They write letters to member of Parliament. They write letters to newspapers and it's all, by and large, ignored. There is no system. If they get it in the hands of a lawyer, the lawyer might tell them to make an application to the Federal Department of Justice for the mercy of the Queen and to present new evidence that they themselves will have to gather there. They don't get a hearing of any kind. We've heard Mr. Rutherford that he has difficulty with time available for people to do this. He doesn't seem to have adequate staff. There are two or three lawyers in the Department of Justice who have the expertise to deal with this kind of case, but they he says are, and I quote, "responsible for other criminal law matters, too."

And in some years, "we are very, very hard pressed." Well, I simply say this is an inadequate response to the kind of problem that we've had and we've had to deal with. There are no resources of significance dedicated to this problem. Nothing. And those few lawyers who have the expertise and who deal with it part time are very over burdened.

Commission counsel and I start with a factual premise that we share in. You'll see that set out in paragraph 1 on page 11.

> There can be little doubt...(that the R.C.M.P.)... were reluctant to investigate the work of another police department. In the Thornhill and MacLean cases, they simply seemed to be reluctant to press ahead in the face of opposition from the Attorney General's Department.

Commission Counsel do not deal with the implications of that. Let me try and deal with it. As the 1971 and '74 reinvestigations show, police officers have little enthusiasm for this particular task. One police force cannot be reliably expected to investigate another. The attitude, training and habits of a life time, the values that police officers share, play against the likelihood of an effective investigation, especially when it depends upon unearthing evidence of incompetence or corruption in the original investigating police department. They haven't got the mind set, the facilities, or the training to do this particular kind of job. It is a special job. And so my submission is that you should call for the creation of a body

that will, in fact, be trained, staffed, and funded to do reinvestigations in those cases where it appears that a miscarriage of justice may have occurred.

What are the characteristics of such an agency? First, it must be independent. The Attorney General's office has a vested interest in the correctness of the original verdict; and as this case shows, in avoiding having it's own incompetence and neglect of duty publicly disclosed. That's what the problem was in the Attorney General's Department. They had just too much dirty linen in this case to ever deal with it fairly. So it should have no part to play in a reinvestigation. And it's also better for them if they're apart from this task. As Frank Edwards said, he had basically gotten along well with the Sydney City Police force, but since his involvement in this case and the R.C.M.P. report, the relationship had been diminished somewhat, that it had been effected by the case. And that's the inevitable problem of agencies that have to work together and cooperate together. You can't set them against each other without having repercussions. So you need an independent agency. That would also ensure that people come forward even if they fear the original police department. It'll encourage cooperation by ordinary citizens.

MR. CHAIRMAN:

When you're speaking of an independent agency, are we entitled to assume you're thinking in terms of a national agency?

MR. RUBY:

As my recommendation makes clear, it will be far preferable if a national agency were created because the problem is common across the country. And it also would permit a more efficient deployment of resources.

So I recommend that the Government of Nova Scotia commence discussions with the Federal Government and the other provinces towards -- with a view to creating such an agency but in the alternative, that in any event, an agency within the province be created to do this. It would be a much smaller agency, but that would probably be appropriate to the smaller number of cases it would have to handle. But ideally, it will be a national agency which all the provinces would fund jointly together, the Federal government, and which all could draw upon.

Second, the skill level would have to be exceptionally high. There are different levels of skill in investigative and police work across the province or across the country. It's inevitable. But the levels of skill that are brought to bear on a reinvestigation must be of a vastly higher order. And they've got to have access to modern scientific techniques. They've got to understand the limits of expert evidence. They've got to know of the latest scientific developments and what's available to test a conviction on a factual basis.

Third, it has to have a rule of openness to the subject of the application, the person who applies for relief or for help.

I don't remember that here that -- until the intervention of Mr. Edwards, Mr. Aronson was unable to obtain a copy of the R.C.M.P. report, even after the investigation was well completed. That again is the Attorney General's Department tried to hide its own dirty linen. But the agency should have nothing to hide from the person who applies and asks for help. There should be full disclosure of what it is doing as it goes along and as it completes its task.

Somewhat controversially, I think the agency should have the power to grant immunity from prosecution in those cases where it thinks it's appropriate. There may be cases where people who committed perjury, for example, will be afraid to come forward unless they will know that they're not going to be prosecuted for that perjury. But when you have to weigh in the balance, if it comes to that in a certain case, (and there will be a few cases where it will come to that.) the public good in having someone who committed perjury at trial punished with the public good that results from freeing an innocent man from prison, there's no contest. The first priority has got to be to free the innocent man. And if that's the price, there are occasions where it will have to be paid.

Look at James MacNeil. He thought that he might get in trouble for failing his lie detector test. His misconceptions were profound. He said, quote, "I thought they were going to lock me up or some darn thing." There should not be that kind of

fear on the part of anybody who goes and asks for a reinvestigation. I ask that it should be composed of mixed civilian and police investigative teams simply because I don't believe that the police minds set is explicitly helpful or healthy. I think that the civilian approach needs to be blended with it in order to do an effective job.

The agency would have to be widely publicized. It was clear in this case that many people had no idea where to go or what to do in order to right the wrong that had been done to Mr. Marshall. Chant went to his Pastor. The Pastor didn't do anything. Ratchford went to the original police force. He was frustrated. Sandra Cotie, Barbara Floyd, Joan Clemens, they knew from newspaper reports that Pratico had lied. If there had been an investigative agency known to them to which they could have turned, calling Mr. Rosenblum's office fruitlessly would not have been all they could do. As Ms. Floyd so cogently said when they discussed whether they ought to do anything further after that, quote, "We didn't know what else to do." "We didn't know what else to do."

Well if my submission is accepted, there will be something else to do. And it is no more than an acknowledgement of human frailty. We have devised the best system of justice that we can. There can and should be improvements made to it, and Your Lordships will consider those as you're being urged to do. But no matter how good we are, there are going to be Donald

Marshall's, one, two, ten, dozens, hundreds. We don't know, because we've deliberately never looked. But we've got to provide for them. We have a duty in conscience and in humanity to see that to the best of our ability, that there are no more Donald Marshall's languishing behind bars. And so some investigative agency must be set up, however modest. Something must be done. We cannot leave them behind bars, friendless, alone, usually penniless, often poor, ill-educated, with their own resources.

Fourth, I want to turn to the question of how do we deal with our failures, with the Donald Marshall's of the world. It's in many ways a hallmark, a litmus test of the quality of justice. And what we did in this case, by and large, was we blamed the victim. We blamed the victim. We took the robbery theory and ran with it. At page 150 and following, you'll see that I deal with that.

There are indeed two possible ways of viewing the speculative question of what John MacIntyre would have done had he thought there was an attempted robbery going on in the park that night. It's indeed a speculative question primarily because John MacIntyre himself does not suggest that information about an attempted robbery would have made any difference whatsoever to this investigation. There's no hint of that in his evidence.

Superintendent Scott is one example of an office who does

feel that knowledge of an attempted robbery would have made a difference. He agrees that it's speculative and he also agrees that whether the information was available or not, nevertheless when speaking to Marshall he would certainly take what he had said and investigate it fully and that's the obligation of any honest police officer. That's what was not done in this case.

Whatever strength that theory might claim is correctly put forward by Superintendent Scott. He said, quote,

> It would have been more credible to them (the Police) of what he was up and doing that night in the park, rather than just up talking to two people that looked like priests.

Well, think about that for a minute. Let's examine that. That's the fulcrum of the argument. It requires as a premise, that talking to two people who look like priests is a less likely event to have taken place in a public park in peaceful downtown Sydney than attempting to rob these two people that looked like priests. That's the theory. That's the premise. Talking to them is less likely to have occurred than robbing them. Is that so? The evidence suggests that the park was not a lonely and secluded place that night, not a good place for a robbery. There were a number of people present because of the dance that recently ended. Other youths were talking in the park at that very time. It seemed to have been a common activity that night and indeed most nights. The only difference in this case, is that Seale and Marshall were not white. Now why would it be more

likely that a Black man and an Indian would be robbing two people in the park that looked like priests rather than talking to them? Only on one theory. It's a racist theory. It's the theory that fear is Blacks and Native people because they're different but assumes, without evidence, that they're more likely to have engaged in robberies than they are talking to people peacefully in a park -- in a downtown park.

You will hear submissions from Bruce Wildsmith on the question of racism. I want to adopt those now, formally. They're good recommendations. And they get at what I think is basically a racist theory, which would have no credence if it was the son of a Mayor of Sydney and the most senior alderman who were walking in the park that night. No one would say it's more likely that they were robbing these two people rather than talking to them. Neither of these two young boys had been in serious trouble with the law. And Seale's background had been in many ways exemplary.

On the other hand, there are those who don't accept that theory. Wheaton says, "I don't follow it myself. If there was a robbery or if there wasn't a robbery, it still should have been followed up." That's the crucial fact. An honest police officer following sound police practices would have acted in exactly the same way whether or not there was an attempted robbery. And I say the same for defense counsel. Whether or not defense counsel was told there was an attempted robbery, his duty

is to take the descriptions of the two men and do some investigation, to explore it, to go interview Patterson, to find some evidence. It doesn't matter whether it's an attempted robbery or not. You do exactly the same thing either way. And so ultimately commission counsel is quite correct, it makes no difference one way or the other. And it's not surprising that MacIntyre did not suggest that it would have made a difference. The criticisms that had been made of his conduct would have existed whether he had been told that or whether he hadn't. The Counsel for the Attorney General, as I'll come to, take some comfort from this robbery point.

I want to take this moment to deal with the one point that is not answered in my written material, about whether or not there's any evidence that satisfies there being a robbery and that is what's pointed to by counsel. That is when Marshall speaks with Lawrence O'Neill, his lawyer's assistant, on January 11, 1980 at Springhill, Nova Scotia, in prison. He speculates that Mickey Flynn, which was the name he thought of his assailant that time, may have felt that Marshall was going to rob him. And the argument goes that's made by the other side, "Well, that's before Sarson came forward.", and it is. So how would he know that Ebsary was going to claim it was a robbery unless there really was an attempted robbery. That's the argument. And the answer can be seen in part at page 154 of my materials.

Marshall's in jail for eleven years for a crime he didn't

commit. At that point, he's been in prison almost ten years. Day after day, he could have thought of little else but the events that had transpired that tragic evening. He would naturally wonder whether whoever did the killing might have thought they were being robbed. People do not ordinarily kill for no reason. It's a rare event. And in this case, it would be a specially illogical inference to draw because what he did here is consistent with Ebsary having a subjective belief that he was being robbed. I didn't include the quote of what Ebsary heard--what Ebsary said and what Marshall heard, but the language is, "I got something for you." That's what he heard Ebsary say. He knew that in 1980. It's almost the only thing he did know about what was going on in Ebsary's mind and what was really happening. (You can find that evidence at Volume 82, page 14375.) So it is perfectly normal that he would have it in his mind that Ebsary, or the assailant, might well have believed he was being robbed when he and MacNeil were being called back by the two boys.

The Attorney General in his factum to my deep regret recycles the "blame the victim" theory. If you look at his passage at page 127. I'll read it. I think -- You don't have it before you.

> We respectfully submit that Mr. Marshall cannot now say that he didn't mean what he said to the R.C.M.P. when they interviewed him at Dorchester Penitentiary in 1982.

That's the attempted robbery theory. You can't -- cannot now

say that he didn't mean what he said to the R.C.M.P.

> Whether he meant it, or deliberately mislead the police officers by espousing a story which he knew they had already heard from Mr. Ebsary in order to secure his release from prison, is not the point. The reality is that he said it and things happened as a result. The system and the people working within it took over as a consequence of what Mr. Marshall had revealed.

It's not their fault. They're purely acting in consequence to what he did. Don't blame them. Don't blame the system. It's not "their" fault. Dropping down on the page:

> Staff Wheaton admitted under cross-examination that had he been he investigator in 1971, Mr. Marshall's credibility in his eyes would have been enhanced had he admitted to the robbery in the first instance. It is not idle speculation to suppose that things may have been different, that Mr. MacIntyre's investigation may have been more purposeful had Mr. Marshall told the whole truth.

Well, with the greatest respect, that investigation was quite purposeful enough. No one has criticized it for not being purposeful. The problem was it was a fabrication, not that it was without a purpose.

Is it seriously being suggested that MacIntyre might not have acted corruptly, might not have put the words in the mouths of the witnesses, that Urquhart might not have torn up those statements if they'd thought there was an attempted robbery

going on in the park that night? Is that the proposition.

The conclusions...

They go on.

> ...recorded by our Nova Scotia Court of Appeal in their decision were not lost on Mr. Douglas Rutherford, Assistant Deputy Attorney General, with the Federal Department of Justice. He commented on the "conclusion from a five member bench of the Court of Appeal of this province" which read:
>
> "There can be no doubt that Donald Marshall's untruthfulness through this whole affair contributed in a large measure to his conviction."
>
> And that this was a:
>
> "...judicial finding that was part of that judgment."
>
> We submit that this court had a duty to speak out and comment on witness' credibility and veracity.
>
> How could any government department ignore the decision filed by a court which had been directed to consider the case by the Minister of Justice?

Don't blame those who do negotiating for using that comment as a club to beat Marshall into penury and submission. Don't blame them. Blame Marshall. It all began with his statement in prison. He lied to get out of prison. He's got to bear the consequences. Don't blame the Government. Blame Marshall. It's Marshall fault. He started it all.

We also submit...

They say.

> ...that it would have been foolish, unreasonable and unrealistic to have expected either this Department or the Federal Department of Justice to have ignored such commentary from Nova Scotia's highest court.
>
> Not surprisingly,...

They say.

> ...the government's position on compensation took the decision into account.

Not our fault. Marshall's fault. He made the statement. Not us. He may have been in prison wrongfully for eleven years, they say, but well, he told a lie to get out. Bad boy. He can't now say it wasn't his fault that the Court of Appeal made comments that ruined his life further. Can't say it wasn't his fault. The Court of Appeal characterized him as partly causing his own wrongful imprisonment. Not his -- Not our fault, his fault if the Attorney General of Nova Scotia didn't compensate him fairly because of that line on the judgment and the notion that he was involved in his own miscarriage of justice. And the contributory negligence theory is it's his fault, too.

With the greatest of respect, that is yet one more slap in the face to Donald Marshall. It is yet again a refusal to accept responsibility on the part of this government, and it is a shocking and callous disregard for the plight of a young man who

had spent eleven years in prison and who had it put to him according to Carroll's evidence, "We know something more was going on and if you want to get out, you better tell us the truth about it." To blame Marshall at this late stage for the failures of this Government is unconscionable.

I turn to the question of compensation. That material is found in Tab 9. Let me start off at the outset by making clear that the evidence we heard yesterday from Messrs. Giffin and Donahoe make it clear that the instructions from Cabinet were to deal fairly and equitably of Marshall. That's what Cabinet wanted. And those instructions were not carried out. Instead the negotiations were entrusted to a cannibal who had no compunction about treating this like one corporation in a purely civil law suit against another, abstract, cold, emotionless, without feeling, and without any sense of the sense of occasion of what it was he was dealing with, that this was a critical moment for the administration of justice, that his rule was the fulcrum of a historic culmination of righting of wrongs.

I leave aside, it was also without any sense of liberality, but mostly it's bereft of any understanding of significance of the event of what it was supposed to mean, not just for Marshall, but for all of us as citizens of a free country who are concerned about justice. Instead, what we saw was an example of the "leave no wounded" school of negotiation. And the reporting letter back to Cabinet, as we heard yesterday, is craftily done

to mislead. It leaves the impression if you don't read it very carefully that Mr. Justice Campbell approved the fairness of this figure when, in fact, he did not. No, the process, as the material I put before you in writing indicates, was shoddy, scandalise, humiliating and ultimately demeaning, not to Marshall. Demeaning to us. Demeaning to the citizens of Nova Scotia on whose behalf he spoke. That they should engage in this process with so little sense of high office, so little sense of tradition and duty, and so much sense of how to save a dollar.

It's my submission as you'll see in paragraph 79 that you are uniquely placed to recommend that Donald Marshall, Jr., should receive a fair and generous compensation award. At page 198 -- Sorry, 197, you'll see what the factors are that I submit you ought to recommend should be taken into account.

First, the approach to compensation should be based upon principles. That was not done here. In a sense, what was done was ethically a nullity. There should be a reopening and a re-analysis of what is due Mr. Marshall based upon principles rather than a desire to get out cheaply. And that compensation should include, amongst other things, the anguish and frustration occasioned to him by the previous compensation process itself. You can't fix the quantum because you've not heard evidence that would enable you to do that, but you can and should set the principles that must govern such a process and you can see in your recommendations that this injustice is not left uncorrected.

It's my submission you have a duty to Donald Marshall in this regard as well as a duty to the public, both of whom would not want this matter left as it is. No member of the public of Nova Scotia, if they knew what we now know about how this was done, would want the matter left as it is. It's an embarrassment, a humiliation.

Second, in any event, there should be reimbursement with interest for legal fees, all reasonable legal fees. The Commission's comment in writing speaks of future cases and it's not clear whether they accept the proposition I'm putting to you that in any event, his legal fees ought to be given back to him and a recommendation to that effect should be made. But that is a submission I make to you.

On top of page 198, the Marshall family will have some small expenses but they, too, were involved in this whole process and they should have compensation for travel and accommodation expenses and long distance calls and the like.

I move then to a second set of recommendations which is more general and I ask you to deal with the general problem of compensation for wrongfully convicted persons. There should be a study which would culminate in the establishment of a permanent, independent body to determine such compensation. That body would be not a part of government, but it would have independence to make recommendations that would be binding on government. And there ought to be an intensive review to establish principals and

policies and I would hope that you would do much of that work now, but I don't think you can have the final word on the matter and so I ask that it be done in any event. And your study of this whole matter will, we hope, be illuminated by the Kaiser paper which is a very comprehensive analysis of the issues of compensation and explores the principles that we urge upon you. And in particular, there are criticisms we think are fairly taken of the adequacy of the federal/provincial guidelines recently set out. They did not have the benefit of the kind of illumination by evidence and study that you have had, and you should feel free to give your own views. The Attorney General of Nova Scotia doesn't want you to get into these matters. Oh, no, they say, "Don't look at this. This may cost us a dollar or two. Don't look at it." At page 141 of their brief, they say:

> 1. Quantum of compensation is not within the jurisdiction of this Commission's mandate;

It's an interesting notion put forward for the first time at the very end of the hearing.

> 2. There has been no evidence upon which a recommendation for further compensation could be based;

With greatest respect, no one is asking you to figure out what the appropriate dollar amount is but you are all equipped to deal with the principles that should be applied and make recommendations as to what should be done to right the wrong that you now know exists.

As far as jurisdiction is concerned, how could it be appropriate, and they made no objection to the process of compensation being examined minutely -- How could it be appropriate for the process of compensation to be within the jurisdiction of this Commission and yet for the adequacy of the result of that process, to be a matter in which you were forbidden to comment? It would make the Inquiry and the process meaningless if you were not able to do that. Why understand the nature of the wrong done, only to refuse to recommend that it be made right? What would be the point of it? Surely this is a related matter within the meaning of the terms of reference.

In any event, I remember being at the Court of Appeal during the appeal on Cabinet confidentiality on September 14th, '88. And the then counsel for the Attorney General of Nova Scotia, Mr. Joel Fichaud, acknowledged to the Court of Appeal that compensation was within the mandate of the Commission. He made no reservation about quantum not being within it. He simply acknowledged that compensation was within the mandate of the Commission. Why two positions? My submission is that you can't intelligibly look at the process without also looking at the result of that process and deciding whether it was adequate or inadequate, and making recommendations as to the process which should be followed to set the wrong right. They are inter-connected. They cannot manage to be separated, and that Your Lordships should proceed to deal with it in the manner I've

suggested.

Thirdly, as I indicated, almost a footnote, the parole system. The situation in which someone who has been wrongfully convicted and who's imprisoned is left by the existing rules on the evidence we've heard is bizarre. If he lies and admits guilt, surely a horrible thing to ask of someone, then his chances of being released on parole are enhanced substantially. If he does not, as Marshall did not, he is likely to languish many, many long years. The parole system should indeed work on the working assumption that people who are convicted are guilty, but it must not close its eyes to the certainty that some people will be mistakes, that some people, in fact, will not be guilty. It can operate on that working assumption and at that same time provide for exceptions and not penalize the exceptions. Surely you can distinguish between somebody who is recalcitrant and repentant and still a danger to society on the one hand, and someone who does not appear to be a danger to society but who simply cannot admit guilt in the other. That can't be too great a distinction to expect given what is at stake, liberty.

If you look at it from the point of view of Donald Marshall, it must be Kafkaesque to sit in prison knowing that you've got to admit that you're guilty in order to get out and you want to get out in order to prove your innocence. This is madness. This is a situation in which no one should be put. And a simple recommendation pointing out the circularity and the bizarre

nature of the present policy should be sufficient to effect some changes.

I've talked for a long time and I'm going to sit down. I don't want to pass from this case which on my part and I think on the part of others has been almost a litany of criticism without singling out two lawyers whose work for Mr. Marshall would fill any member of the bar with a sense of justifiable pride. Steve Aronson and Felix Cacchione laboured under adversity that was not of their own making. They dedicated themselves to the interests of their client in the best traditions of the bar at great person cost. There are heros in this world and we have been privileged to glimpse the work of two of them and they should not go unmentioned in your report.

My Lords, you've been very patient. Thank you.

MR. CHAIRMAN:

Thank you, Mr. Ruby. Now Mr. Pugsley, you go next.

MR. PUGSLEY:

Yes, sir.

MR. CHAIRMAN:

You may want a few minutes to --

MR. PUGSLEY:

That would be helpful.

MR. CHAIRMAN:

Twenty minutes.