

1 MR. BARRETT:

2 I've indicated, My Lords, that the only allegation -- substantive  
3 allegation that commission counsel suggest against Mr. MacNeil  
4 was that he had -- there was a suggestion that he had an  
5 obligation to disclose the first statements of Chant and Pratico,  
6 independent of any request. Commission counsel have  
7 characterized the Marshall defence efforts as incompetent. Mr.  
8 Khattar acknowledged that he did not speak directly with either  
9 Thomas Christmas or Mary Theresa Paul and he acknowledged only  
10 having a faint recollection of speaking with someone at the  
11 hospital with respect to Marshall's injuries. And may have  
12 talked to someone on Crescent Street about Marshall calling an  
13 ambulance, but neither witness was called. He acknowledged that  
14 the only evidence he or Rosenblum received from Marshall's  
15 friends between the preliminary and the trial was that Pratico  
16 was drinking heavily the night of the stabbing. Khattar  
17 testified they had no information on Chant whatsoever. In five  
18 months from the time of the trial -- of the arrest to trial, they  
19 came up with one fact that Pratico was intoxicated and no efforts  
20 were made to interview witnesses as to how intoxicated he was.  
21 Khattar nor Rosenblum interviewed any of the Crown witnesses  
22 because this was not their practice. Although Judge Matheson  
23 testified when he was defence counsel, he regularly interviewed  
24 Crown witnesses. And as crown counsel he expected crown  
25 witnesses to be contacted by defence.

1 Khattar testified it was not his or Rosenblum's practice to  
2 contact Crown to discuss the case against their client. In the  
3 Marshall case they did not contact Crown for statements because  
4 they didn't expect to get them. Mr. Khattar, however, was vague  
5 in supplying names to confirm this practice of the Cape Breton  
6 Bar.

7 Matheson's evidence was in complete contradiction of  
8 Khattar's testimony. He testified that most defence counsel  
9 should, in the course of preparing for trial, approach Crown to  
10 discuss their case. Statements would be provided upon request.  
11 Matheson testified that this was the practice of Donald C.  
12 MacNeil. Mr. Matheson was asked to comment on Khattar's  
13 practice and he testified:

14 If that was his practice not to  
15 ask for them, then probably he  
16 didn't get any from me and  
obviously I didn't go out and  
volunteer to give him one.

17 Khattar testified that the first information he had that  
18 Marshall had given a statement to police was when it was tendered  
19 as an exhibit at the Preliminary Inquiry. He first denied  
20 receiving a copy, then testified he thought he'd got it, and then  
21 acknowledged later it was the only statement he had received. As  
22 defence counsel one would think the very first question to ask of  
23 an accused person is, "Did you give a statement to police? When?  
24 What did you say?"

25 Khattar twice testified that as a former prosecutor he knew

1 that it was John MacIntyre's practice to take statements and  
2 assumed statements were taken in this case. When Khattar or  
3 Rosenblum became aware of the eyewitnesses, wouldn't you expect  
4 them to question Mr. Marshall. "Did you see either witness in  
5 the park? Did you see them after the stabbing? When? Where?

6 We note Chant, Pratico, and Marshall were at the police  
7 station for a considerable length of time on the 30th of May,  
8 1971. Chant at least spoke to Mr. Marshall on that occasion.  
9 Khattar claimed during the trial defence counsel were unaware  
10 that Maynard Chant had given an untrue statement to the police  
11 because of fear of the accused or that Chant had given any  
12 written statement to the police at all.

13 Khattar during his testimony was unable to explain Mr.  
14 Rosenblum's cross-examination of Chant. Chant revealed he had  
15 told the police an untrue story, then admitted later he had  
16 provided a written statement to the police.

17 Khattar admitted no attempt was made to get the statement of  
18 Patricia Harriss. When she testified at the preliminary, she had  
19 twice been interviewed by the police and had given at least one  
20 statement. Khattar acknowledge there was no legal impediment to  
21 prevent him from either discussing the case with Crown or  
22 requesting disclosure. Khattar was unaware of the law in 1971  
23 which would have permitted a trial judge to order that witness  
24 statements be produced for defence counsel's examination.

25 What was the practice in regard to Crown disclosure in 1971?

1 Arthur Mollon felt the Crown freely disclosed -- discussed the  
2 case against his client and advised him of evidence they had. He  
3 completed contradicted Khattar's evidence. He recalled a case  
4 earlier in his career where he hadn't sought disclosure from  
5 Donald C. MacNeil. He recalled the incident vividly because he  
6 remembered telling MacNeil after court that he was embarrassed  
7 because he had not realized the basis of the Crown's case. He  
8 testified that MacNeil told him:

9                   Why in hell didn't you come to me  
10                   and ask for the statements or for  
11                   information that I had in the  
12                   file?

13 And he indicated in his testimony at 5423 that he never felt his  
14 case was complete until he had asked or discussed the case with  
15 Crown.

16                   At the time of the Marshall trial, Mr. Khattar had thirty-  
17 five years at the Cape Breton barr and Mr. Rosenblum, forty-five  
18 years. It is hard to explain how such experienced lawyers would  
19 lack such basic knowledge. The practice at the time was for  
20 Crown to leave a copy of the statement of facts, and indictment  
21 listing witnesses to be called at the pathonetary's office and  
22 this was to be left -- a copy was to be left for the defense.  
23 Khattar stated he did not know this practice.

24                   Judge Matheson testified that if he had in his possession  
25 information of a confidential nature, which he felt vital to the  
defense, he would disclose. He, however, qualified this by  
saying the fact would have to be one which defense could not have

1 known on their own initiative. When asked about John Pratico's  
2 hospitalization, he believed it was common knowledge. Anyone who  
3 knew John Pratico knew his whereabouts. If defense didn't know  
4 it, it wasn't because Crown tried to keep it a secret. Sydney is  
5 not a large city. Mr. Rosenblum's office was on Charlotte Street  
6 and John Pratico lived four blocks away on Bentinck Street.  
7 Matheson testified the only reference on disclosure, which he was  
8 aware of was a letter he personally received early in his career  
9 from the former director of criminal prosecution. He testified  
10 it was not in general circulation, but addressed to him  
11 personally. Matheson stated he passed the letter around but he  
12 did not specifically say Donald C. MacNeil was aware of the  
13 letter. Innis MacLeod, the former deputy Attorney General from  
14 1969 to 1972 was not aware of the letter. MacNeil was not  
15 appointed Crown Prosecutor until four years after Matheson's  
16 appointment and there is no evidence before this Commission that  
17 MacNeil was aware of the Jones' letter.

18 The former Attorney General, Mr. Pace, was asked what  
19 obligation was on the Crown to disclose witness statements in  
20 1971. Pace felt statement should be provided upon request but  
21 that you could not require Crown Prosecutors to provide  
22 statements in the absence of a request because of the state of  
23 the law at the time. He then mentioned the Supreme Court of  
24 Canada decision in Duke.

25 Innis MacLeod stated there was no disclosure policy in 1971.

1 He testified it would not be the practice of Crown to disclose  
2 witness statements unless they were requested. Commission  
3 counsel's findings were there were no written disclosure policy  
4 in Nova Scotia in 1971. Martin Hershorn, in evidence before this  
5 Commission would not agree that even today the disclosure policy  
6 was a positive obligation. Defense are expected to initiate the  
7 request. This is the triggering event. Defense and Crown do not  
8 exist in separate vacuums. They must communicate. There is no  
9 evidence before this Commission that Donald C. MacNeil willfully  
10 withheld the first statements. No one suggests key witnesses  
11 were told not to divulge the fact they had given previous  
12 statements. In this case, even when it was revealed in  
13 testimony that statements were given, defense counsel did not  
14 pursue it. The Attorney General's department will in their  
15 submission outline the law of disclosure in 1971.

16 Donald C. MacNeil should not be scapegoated due to the  
17 incompetence of the defense in the Marshall case, I submit. I've  
18 also dealt with in my brief, My Lords, the issue as to the  
19 disclosure of Jimmy MacNeil case when it became -- when it became  
20 knowledge that he had come forward. And I won't go through that  
21 in detail, I'll simply ask your Honours to consider, your Lords  
22 to consider, my submissions on that and particularly the fact  
23 that Robert Anderson -- there was not a proper transfer of his  
24 duties on the 16th of December, 1971. And I submit that MacNeil  
25 and Matheson, although aware of the polygraph results, were not

1 expected to receive the full report of the R.C.M.P. If your  
2 Lords would consider the submissions on that point, I suggest  
3 that the obligation, once the appeal was filed, the obligation  
4 rested with the Attorney General's department in Halifax to  
5 disclose that information to defense.

6 I will briefly discuss several of the other allegations made  
7 against MacNeil's handling of the Marshall trial. Mr. Ruby, this  
8 morning, referred in his submissions to the fact that Donald C.  
9 MacNeil was with John MacIntyre, in the park, when Pratico was  
10 told the Sydney Police had a beer bottle with his fingerprints on  
11 it. This is not borne out by the evidence. Pratico in his  
12 testimony corrected himself and testified MacNeil was not there  
13 on that occasion. Pratico testified to meeting MacNeil on three  
14 occasions. Once in the park before the preliminary, once before  
15 the -- at the actual preliminary in which MacNeil told him, "Are  
16 you ready?" And he indicated a third meeting in which his  
17 statement was reviewed with him. I submit that in my brief  
18 between pages 11 and 13, I outline the evidence of the three key  
19 witnesses and in that evidence, there's no indication in that  
20 evidence that they were threatened and I would submit there's no  
21 evidence that they were "coached" by Donald C. MacNeil. I make  
22 reference to the fact that Maynard Chant recalled only meeting  
23 with Mr. MacNeil on one occasion. He indicated that that  
24 meeting lasted fifteen minutes. I would submit any coaching or  
25 drilling a witness certainly is not going to occur in a fifteen

1 minute period. Judge Matheson in his evidence since Mr. MacNeil  
2 is no long alive, was able to describe the practices of Donald C.  
3 MacNeil in interviewing witnesses. I would ask your Lords, it's  
4 set out in my submission, the evidence of Mr. Matheson on this  
5 point. And when you consider his evidence on it, it's clear that  
6 MacNeil did meet with three witnesses prior to the trial. He  
7 indicated that he -- that he felt MacNeil did not see much of the  
8 witnesses. He also contradicts Maynard Chant as John Pratico  
9 does as well, that Chant and Pratico were interviewed together.  
10 I submit in my brief that the likelihood is, that Maynard Chant  
11 is confusing the trip he had before the preliminary to the park  
12 with his interview he had before trial with Mr. MacNeil.

13 As evidence that Mr. MacNeil did not coach the witnesses is  
14 the evidence before this Commission of Patricia Harriss. When  
15 she was asked if she'd ever met with Mr. MacNeil, she had no  
16 recollection whatsoever of ever meeting with Mr. MacNeil.

17 The other allegation of -- against Mr. MacNeil I'll briefly  
18 touch on is the matter of the recantment in the hallway. I've  
19 dealt with that in my brief and I urge your Lords to consider the  
20 testimony of Pratico, Khattar, Matheson and the jury address of  
21 Mr. MacNeil referring to that incident. I've set out the  
22 portions of this testimony which at this point I do not propose  
23 reviewing. It suffices to say only Pratico recalls being taken  
24 alone into a room with MacNeil and MacIntyre. Only Khattar  
25 suggests MacNeil by his presence may have threatened Pratico.



1 Pratico did not support this in his evidence. Pratico was urged  
2 to tell the truth and not to worry about any testimony he had  
3 earlier given.

4 There is no evidence MacIntyre's presence was at the  
5 invitation of MacNeil and if his presence was objectionable, then  
6 surely Messrs. Khattar or Rosenblum had a duty to their client to  
7 object. What transpired in the court room after the re-  
8-encantment issue can only be described as bizarre. It's clear  
9 that MacNeil was prevented from having Pratico testify to what  
10 had just occurred, however, MacNeil, Matheson, Judge Dubinsky and  
11 the jury believe they heard the truth from Pratico on that  
12 occasion.

13 I would also submit, my Lord, that there's no other trial in  
14 Canadian history which has been subjected to the close scrutiny  
15 of this trial. Every word has been closely examined and any four  
16 day trial is going to have flaws. Its an adversarial system.  
17 The extent to which Mr. MacNeil's prosecution of the Marshall  
18 case has been closely scrutinized is perhaps exemplified most by  
19 a comment in one of counsel's submissions in reference to  
20 photographs taken at Wentworth Park by Corporal Ryan of the  
21 R.C.M.P. The submission reads:

22 Photographs were taken of the  
23 crime scene on Donald MacNeil's  
24 instructions. Photographs were  
25 personally turned over to MacNeil  
and have disappeared. The  
photographs were not used at  
trial.

1 Now we know Mr. MacNeil's file and the Attorney General's file  
2 were destroyed in the normal course. These photos would have  
3 presumably have shown the park as it exists today except with the  
4 trees in full foliage. To suggest that there is something  
5 sinister in MacNeil's actions, I would submit, is absurd.

6 I refer in my brief to MacNeil's handling of the charges  
7 against Tom Christmas. The evidence given by the Seale family  
8 and MacNeil's jury address. I will not review them but only ask  
9 that you consider the written submissions on these points. I  
10 also deal in my brief with the suggestion that MacNeil treated  
11 Indian accused persons any differently, or more importantly that  
12 there is no evidence that the prosecution in this case was  
13 different because Marshall was a native Indian. The only comment  
14 I would have on this besides what's contained in my material, is  
15 the suggestion in Mr. Wildsmith's brief: That Harry -- Staff  
16 Sergeant Wheaton, when he testified before this Commission  
17 indicated that he had a feeling MacNeil didn't like Indians. I  
18 would merely point out to your Lords in your consideration that  
19 -- that two points. Wheaton provided no details and more  
20 importantly when asked about these allegations against MacNeil,  
21 he said he could well have had the wrong impression of MacNeil.

22 The allegation, as well, has been made against Donald C.  
23 MacNeil by Bernie Francis that MacNeil was the type of lawyer who  
24 really wanted to win very badly. And he would do anything to  
25 win. Francis provided no examples of what he meant by "anything

1 to win." He described MacNeil as an aggressive, tenacious  
2 fighter in the court room. Judge Matheson, when asked about  
3 Francis' comments, stated that MacNeil respected the rules as he  
4 knew them and understood them and to say that he would do  
5 anything to win, was an insult to MacNeil. Simon Khattar  
6 testified he felt MacNeil was a fair prosecutor. Staff Sergeant  
7 Murray Wood of the Royal Canadian Mounted Police described  
8 MacNeil as being an extremely capable and competent prosecutor  
9 who treated both Police and accused fairly. Staff Sergeant  
10 Wheaton described MacNeil as an aggressive, competent, fair  
11 prosecutor who was very interested in his work. It is submitted  
12 that on the evidence that MacNeil's reputation was as a fair,  
13 competent, aggressive prosecutor.

14 Just in concluding I would state that Donald Marshall, Jr.  
15 was convicted on the purgered testimony of two eye witnesses.  
16 The fact was there were two independent eye witnesses who had no  
17 connection. They didn't know one another, they lived thirty-one  
18 miles apart and the only common denominator was they were both in  
19 the park the night Sandy Seale was stabbed. The Crown felt that  
20 the only way they could have had the same story was that were  
21 telling the truth.

22 The second significant factor I would ask your Lords to  
23 consider, was the threats against witnesses. And I would submit  
24 that these threats explained to Mr. MacNeil why Maynard Chant was  
25 reluctant to identify Donald Marshall, Jr. as the person who

1 stabbed Sandy Seale, at trial. The threats Donald C. MacNeil  
2 believed were the reason that John Pratico changed his story  
3 outside the court room. We now know in 1988 that the reluctance  
4 on the part of both Chant and Pratico to testify was because they  
5 were lying. But it took four Royal Canadian Mounted Police  
6 investigations, or at least looks at the incident, to determine  
7 this fact. Donald C. MacNeil was deceived by these witnesses but  
8 he was not alone. Pratico, Chant and Harriss were believed by  
9 Judge Matheson, Moe Rosenblum, Judge John F. MacDonald at the  
10 preliminary Inquiry, the grand jury and ultimately twelve members  
11 of the jury.

12 Those would be my submissions, my Lord. Thank you for your  
13 time.

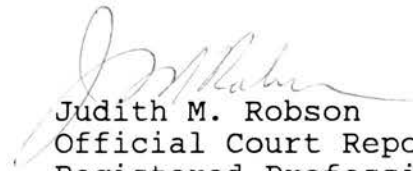
14 MR. CHAIRMAN:

15 Thank you. We will rise until nine thirty tomorrow morning. I  
16 would assume that all counsel present are prepared to be heard  
17 tomorrow if time permits.

18  
19 INQUIRY ADJOURNED AT 4:32 o'clock in the afternoon on the 1st day  
20 of November, A. D., 1988

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 01st day of November, 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  
November 01, 1988