MEDIA POOL COPY

KG44 Vol 258 M4

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.

Court Reporters: Sydney Discovery Services

INDEX - VOLUME 90

ORAL SUBMISSIONS

By Mr. Ruby 16043

By Mr. Pugsley 16098

By Mr. Murray 16164

By Mr. Barrett 16180

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

3 MR. CHAIRMAN:

4 Mr. Ruby.

5 MR. RUBY:

6 Thank you, My Lords.

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

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

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

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

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

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

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

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

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

25 As you will have seen by an examination of our submissions

1 in writing, in a few areas commission counsel have been somewhat
2 more conservation and more restrained in their approach and their
3 conclusions than we have been. They have been throughout very
4 cautious in their submissions. But we feel that it is possible
5 to go beyond their recommendations and their findings in certain
6 areas because really when properly analyzed, the evidence leads
7 farther. And that takes me to the first of the questions that I
8 want to deal with which is whether the problem in this case
9 involves police corruption.
10 Staff Sergeant Wheaton said, "I do not feel Donald Marshall
11 was the author of his own misfortune. He is the victim of a
12 unscrupulous police officer, John MacIntyre." And he's correct.
13 And if you look at page 19 of the materials, you'll see some
14 dictionary definitions of that famous word, "corrupt", just so
15 we'll have a context for the submission that I'm going to make.
16 In this area it's important to note that commission's
17 counsel role is a very important one. They have a duty to be
18 dispassionate, to be careful and cautious, and "neutral, if
19 that's the right word, in their pursuit of the truth. They have
20 a duty to advise you candidly and honestly and they have to tell
21 you that there is only one view that can be taken of this
22 evidence, MacIntyre and Urquhart acted corruptly. That is a
23 neutral, fair, and dispassionate view of the evidence and it
24 leads to only one conclusion. There had been a failure of
25 justice in this area, and we submit to you it's a failure which

1 ought to be regressed.

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

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

21 It's vitally important that the structure of the evidence
22 came first to MacIntyre's mind, and not first in the real world.
23 The real world reflects what he felt rather than the other way
24 around. This is not tunnel vision. This is commencing under an
25 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

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

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

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

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

1 Edwards of the Attorney General's office back in 1982, he puts
2 forward the misleading statement he obtained from Harriss, the
3 later one. Edwards says that MacIntyre pinned his argument on
4 the fact that Marshall had met Harriss and Gushue in the park and
5 they said there was only one person. He pinned his argument.
6 And according to Edwards, this seemed critical in Chief
7 MacIntyre's mind and this proved Marshall was lying. He knew in
8 1982 how significant this was. Yet at the same time as he's
9 telling Edwards this "cock and bull" story about the second
10 statement, he knows. On his own admission, he must know that
11 there was a first statement to the opposite effect and he
12 doesn't tell that to Edwards. He doesn't tell Edwards, "There's
13 another statement, by the way, taken earlier which contradicts
14 this completely, this theory that I'm putting to you." He knows
15 the importance of what he did on the 17th.
16 Second, that statement -- the early statement, the
17 exculpatory one is not signed. That was a matter that Sergeant
18 Urquhart under oath found inexplicable but, in fact, it is quite
19 explicable. The June 17th statement, the first of the two, did
20 not confirm what Urquhart and MacIntyre were creating as a theory
21 of Marshall's guilt, as evidence of Marshall's guilt. It was
22 exculpatory and, therefore, not worth anything to them. That's
23 why it stops in the middle. That's why it's not signed by her,
24 and that's why it was not signed by Urquhart. They intended
25 from the beginning to suppress that statement. If they didn't

1 intend to suppress it from the very beginning, that statement
2 would have been signed, it would have been completed, and it
3 would have been signed by Urquhart like all the other statements
4 are. He knew once he got to that point in the statement, "Hey,
5 this is evidence we're going to have to bury. No point in
6 getting this one signed by her. It's helpful to Marshall. No
7 point in my signing it. It's helpful to Marshall. I'm going to
8 bury this in any event, so why bother." Similarly it's not typed
9 up. "Why bother typing it? I'm never going to give this to
10 anyone. This is never going to see the light of day." All the
11 other statements are typed, but not this one.
12 It's in this context that you have to look at the much
13 disputed episode about what happened when Wheaton and Davies
14 attended upon Sergeant MacIntyre in 1982. Okay, we're not
15 talking about just any statement. We're talking about a
16 statement of a particular kind with a certain effect and we know
17 things about it. Let's view that as background. Let's keep it
18 in mind.
19 Let me go through that meeting because I want to make
20 submissions to you about what occurred. Commission counsel, you
21 recall, did not find it possible to sort out with certainty what
22 had occurred and I think I can assist Your Lordships in doing
23 that.
24 MacIntyre prepared before that meeting took place a
25 detailed inventory list of all the statements that he was going

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

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

1 dates from this list. And it was the addition of the verbal
2 information which you could see in paragraph 27 of my materials,
3 "P. A. Harriss, one statement given to Staff Sergeant Wheaton
4 already". Now Wheaton's comment on this seems perfectly
5 acceptable. He had indeed already been given one Patricia
6 Harriss statement, the one dated June 18th, 1971, on an earlier
7 occasion, February 26th, 1982. That accords with the plain
8 meaning of the entry. What I point out is that when you look at
9 all of this evidence and particularly the notation as to what he
10 was receiving in his own handwriting, it seems clear that the
11 17th statement, the earlier exculpatory statement, was not handed
12 over at that meeting. The only one that was handed over was the
13 incriminating statement of the 18th. Now Wheaton and Davies say
14 the incriminating one went under the table and got into Wheaton's
15 possession by being retrieved in the episode you recall.
16 Mr. Pugsley on behalf of Mr. MacIntyre has an explanation
17 for these events, and let me just take you through my analysis
18 of it since I will not get a chance to reply to him. He accepts
19 -- and if I misstate his argument, I'm certain he'll clear it up
20 when he gets an opportunity. He accepts that it's impossible
21 that the exculpatory, earlier statement was handed over at the
22 June 26th meeting. There's just no evidence of it, so he starts
23 with that premise. April 26th. Sorry, at the April 26th
24 meeting. But he seizes upon errors in the date of the notes that
25 Wheaton and Edwards made. They've got the date April 16th.

1 Wheaton says that's an error and Edwards says, "I accept my
2 notes". That's the recollection I have. And so he says, "Well,
3 all right, if it wasn't handed over, the exculpatory statement,
4 at that time, it had to be handed over earlier". And so he says
5 there were two meetings after February 27th, the first one on
6 April 16th according to the notes and the notes are correct in
7 that respect, and there's the second meeting after the Attorney
8 General's direction. We all know that occurred on the 20th
9 because the paper makes it quite clear, which would be the 26th.
10 Now Officer Wheaton says the only meeting after the February 27th
11 meeting was the one that occurred, the single meeting. There
12 were no two meetings.
13 There are a number of problems with the theory that there
14 was an intervening meeting on June -- on April 16th. First,
15 whenever this meeting occurred, the one where the alleged
16 incident happened, it had to be a meeting where Davies was
17 present because Davies is the one that says it occurred and
18 Davies only went once. And he remembers, first of all, reading
19 the Attorney General's direction before they set out in that
20 meeting. Hardly something he would forget because it's an
21 unprecedented instruction. Two, Davies remembers this was a
22 meeting at which they were confronted with an inventory when they
23 went in, Exhibit 88, and there was some typing of a further
24 document, the fourth page to Exhibit 88. Third, he remembers
25 that the document that was found was a Harriss statement because

1 it was read to him in the car. Mr. Pugsley omits that last fact
2 in his argument because it's -- it puts Davies' recollection
3 directly at opposition with his theory, but he, in fact,
4 remembers that it was a Harriss statement.
5 Second, Wheaton remembers only one meeting after February
6 27th regarding documents, the one with Davies. And third, and
7 perhaps the biggest problem, John MacIntyre doesn't suggest that
8 there was any meeting concerning documents on April 16th, not
9 the slightest suggestion of it in the evidence. But he needs
10 that meeting in order to explain how the document got into
11 Wheaton's hands, if it didn't get first buried under the table.
12 My submission is it would surely be a most unfortunate
13 coincidence if two independent police officers chose to lie and,
14 indeed, to frame a fellow police officer (A very rare occurrence
15 when some police officers decide to frame others, one might
16 think.) over the concealment of a statement that by pure chance
17 is omitted from the inventory he, himself, carefully prepared
18 regarding the meeting. It's my submission that you can reach a
19 conclusion as to whether Wheaton is telling the truth or whether
20 MacIntyre is telling the truth, and you do it by looking at
21 Davies.
22 Davies has only a brief involvement in this case. He's
23 quite independent. He's not closely involved with Wheaton. It's
24 not as if they were partners or worked together in any
25 significant way. He's a body who happened to be around the shop

1 and was asked to come along for a witness. He has no motive to
2 lie, and it's not as if his evidence was open to interpretation.
3 I grant that whether or not somebody deliberately places
4 something under the table or not or drops it accidentally is a
5 hard call for anyone, but what he testifies that he recalls, just
6 as Wheaton does, is that when they went back in, MacIntyre looks
7 flustered and says, "I might as well give you it all." "I might
8 as well give you it all." Damning words. Words that are
9 capable of only one interpretation. He had deliberately held
10 back what they had now found. And why would Davies make up such
11 an incriminating episode from whole cloth? No. With the
12 greatest of respect, Mr. Pugsley in his argument ignores Davies'
13 evidence. He has to ignore it because it's independent
14 corroboration that the event occurred -- took place. And the
15 documents make it clear that it must have taken place on the
16 26th.
17 Once again, as is so often seen in this case, if MacIntyre's
18 telling the truth, all those who were present beside him,
19 possibly Urquhart, are lying. He's done that again and again in
20 his evidence. He says, "This is what happened." And it has to
21 be the case that if he's telling the truth, everybody else who
22 was watching was lying. That can't be so. That can't be
23 credible, especially when viewed in the context that he had
24 every reason to try to continue the concealment of Harriss's
25 first statement.

1 It's my submission that a charge of perjury under Section
2 132 of the Criminal Code is justified on this evidence and
3 appropriate and the Commission should recommend such a charge.
4 It would be wrong to let clear perjury of that sort by a public
5 official go without redress.
6 I have focused on the fact that there is no common link
7 between all the witnesses who now say that they were coerced
8 into giving statements, bullied into giving statements, or had
9 words put in their mouth except MacIntyre and Urquhart.
10 Commission counsel suggested that if you found facts, then
11 you should recommend the charges be considered. It's my
12 respectful submission that you can go farther. If you find those
13 facts, there's no question that a prima facie case of obstructing
14 justice has been ignored by the authorities and you should not
15 merely recommended that they consider laying charges. If you
16 find those facts to be true, you should recommend the laying of
17 charges.
18 I reject the notion that Mr. Urquhart is a mere passive
19 participant, passive observer. He certainly not passive with
20 regard with Ms. Harriss but ever on the other witnesses.
21 I'd ask you to take note of the law of criminal breach of
22 trust. It is -- been held by English courts that to stand by and
23 be a police officer and watch a prisoner be assaulted is a
24 criminal breach of trust. It's a mere omission to act.
25 Omissions are not non-culpable. The test is a serious and marked

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

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

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

1 criminal record at that point; and it may well be that that is
2 why he got abuse of a physical nature rather than merely verbal
3 abuse, and it may explain the liberties that the police took
4 with him on his account. And again with commission counsel, I
5 say, what makes him credible is, first of all, the Commission
6 went to him. He didn't seek the Commission out. And secondly,
7 why are MacIntyre and Urquhart telling such obvious lies about
8 this man, and being unable to find him, and of not being
9 interested in finding him in the first place? Unless they know
10 -- they know they've got something to hide if he's discovered.
11 Isn't it that at the end of the day, that the most telling
12 argument in favour of Patterson's credibility is the lies that
13 MacIntyre and Urquhart told about being unable to find him, not
14 knowing him, having had no involvement with him? He couldn't
15 have seen anything anyway. Why are they trying to bury Patterson
16 from this Commission if not to conceal what they knew Patterson
17 would tell of their encounters with him? There's no other
18 explanation for all those tissue of lies. That's what makes him
19 credible. They wanted him buried.
20 Mary O'Reilley's statement has been touched on, I think,
21 briefly by Commission counsel and let me just spend a little more
22 time on it. At paragraph 49, you'll see a quotation of the
23 passage that she allegedly gave to MacIntyre in her statement.
24 > I told her there was supposed to be
> a grey-haired man there.
25 "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

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

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

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

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

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

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

1 Would you turn to the Pratico matter at page 44? At page
2 44, I turn to the quotation that I've set out there; and once
3 again, I'm only going to touch on those matters which commission
4 counsel has not already detailed to you.
5 When asked about Pratico's statement, Mr. MacDonald asked
6 him:

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

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

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

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

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

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

1 man. There's nothing else on which you could form a conclusion
2 that Marshall was a suspect, was probably guilty, to use the
3 language of the telex and the writings. So the answer may well
4 be, yes, he did subjectively hold that view but he held it
5 without evidence for quite some time. Even if that were so.
6 Even if he subjectively believed Marshall was guilty, he and
7 Urquhart could not have fabricated this case in the way we know
8 they did without knowing then and thereafter that the case
9 they'd created was false. They had to know it. The people who
10 they interviewed had no idea what the facts were. The facts were
11 spoon-fed to them. They had to know these witnesses were not
12 real witnesses because they knew nothing of what had transpired
13 and so they're fabricating a case consciously; and whether
14 they're doing it with or without a knowledge or a belief
15 subjectively held, truly held, that Marshall was guilty, is not
16 the point. The question is, could they have done these things
17 without knowing if the evidence they were creating was, in fact,
18 false? They didn't merely put evidence in their mouths, people
19 like Chant and Pratico. They went farther. They snatched the
20 truth from the mouths of others, like Harriss. They ripped it
21 from her mouth. It is a pattern of corruption.
22 At the end of this case when the jury brings in its verdict
23 of guilty, MacIntyre must walk from that court room knowing that
24 there was no evidence of guilt that he himself had not
25 deliberately created. A belief in guilt in that circumstance can

1 only have come from racism, a willingness to believe without
2 evidence that this Indian was guilty of a murder. He was there.
3 He was young. He was Native. And a form of belief based on that
4 is only racism.
5 Why, it is asked, unless he had a subjective belief in
6 Marshall's guilt, would he call the Mounties in 1971 when MacNeil
7 comes forward? The answer's simple. He knew that he couldn't
8 re-investigate his own case and get away with it. There was no
9 way anyone would accept a re-investigation by him. It would be
10 far to dangerous. He figured he could handle it by letting the
11 R.C.M.P. send somebody in, and he would deal with it with
12 misinformation and the "old boy chumminess" and the "We're just
13 police officers all doing our job together."; and you know, he
14 was right. He was dead right. He could handle it in that way
15 and he did handle it in that way; and for eleven years, he
16 handled it one way or the other. In 1974, he sloughed it aside.
17 And when in 1982 the R.C.M.P. came by again, he has no fear of
18 involving the R.C.M.P. He's handled them before with
19 misinformation, with lies. I mean Marshall, Inspector Alan
20 Marshall, is an honest man. There's no doubt about it. He is an
21 honest man and he says, "Well, no. I mean, I was told lies. He
22 hid stuff from me. He hid the crucial material. He told me
23 things that weren't true. He mislead me and I relied on him."
24 Once again is MacIntyre telling the truth and everybody else
25 lying? Has to be. What there is, is a judgement call. He was

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

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

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

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

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

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

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

25 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

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

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

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

1 do.

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

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

5 That's their recommendation.

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

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

19 In (d) I make a change:

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

22 They talk about who the prosecutor intends to call; but, in fact,
23 if the witness is relevant and could be called, then why would
24 there be disclosure of it? It makes no sense to me and I've
25 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

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

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

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

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

13 And then sub-letter (i):

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

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

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

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

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

1 to come out with a tough, clear disclosure scheme, and an ernest
2 entreaty that the various jurisdictions adopt one.
3 COMMISSIONER EVANS:
4 Mr. Ruby, before you leave that, what you're talking about here
5 is instructions by crown attorney -- or to crown attorneys.
6 What -- what about the gap when the police officer fails to give
7 the necessary information to the crown attorney?
8 MR. RUBY:
9 You have to have the power and some body responsible to
10 discipline police officers who are corrupt. And that is
11 corruption. If a police officer buries exculpatory material, he
12 should be fired. And that's the simple answer.
13 Now I'm not going to tell you that any system is going to be
14 devised that will prevent the rotten apple from being there.
15 There'll be rotten apples from time to time. But a proper
16 system of police discipline, a proper understanding of the police
17 officer's duty, which I think most police have. I don't think
18 that's a very big problem in this country. I think very few
19 police officers on their own decide to bury statements that are
20 exculpatory. It happens very rarely. It happens, god knows, but
21 the answer is discipline those people properly.
22 COMMISSIONER POITRAS:
23 Mr. Ruby, do you cover here information obtained between trial
24 and, say, the appeal?
25

1 MR. RUBY:
2 With the words "and thereafter" at the bottom of page 122, it's
3 not limited as to time. And I mean by that, perpetual.
4 COMMISSIONER POITRAS:
5 Yes.
6 MR. RUBY:
7 And if indeed something that emerged after he was in prison and
8 after the appeals had been exhausted. I would expect that
9 obligation to be a continuing one.
10 COMMISSIONER POITRAS:
11 Okay.
12 MR. RUBY:
13 It may well be that a code of ethics for Police officers will be
14 a useful one. And you might give consideration for a code of
15 ethics, in connection with the prosecution of criminal cases. It
16 might be particularly useful, I suppose, in jurisdictions where
17 there's relatively little crime. I don't think it's a big city
18 problem, primarily. But in jurisdictions with not much in the
19 way of crime, I suspect that officers may not have thought
20 through very carefully their obligations to the system of
21 justice and an explicit statement of that might be very helpful.
22 The other check and balance that I want to talk about is the
23 Court of Appeal, and it's a short comment. At page 4 of my
24 materials, I must respectfully take issue with the reticence,
25 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

1 is done. So it illustrates the point. It cannot be the case
2 that judges at any level have the right to pick and choose
3 between the raising an argument that will be helpful to an
4 accused and not.
5 It's my submission that you ought to find that the Court of
6 Appeal should be criticized for failing to scrutinize the
7 transcript and raise the issue that Professor Archibald has so
8 accurately said, "leap out at you." This is not an apologia for
9 counsel. In my respectful submission, crown counsel had an equal
10 duty to raise that on appeal and to point out to the Court that
11 there was a real problem that might have effected the trial
12 result. So, too, to defense counsel. But I simply take the
13 position that there is an obligation to justice in Appellate
14 Courts which puts part of the responsibility on them as well.
15 COMMISSIONER EVANS:
16 Mr. Ruby, I would also like to add R.v Simpson 20 C.R., a
17 judgement of the Ontario Court of Appeal, Martin giving the
18 decision, in which a new trial was directed on an issue that was
19 not raised by -- in the factum or by Counsel.
20 MR. RUBY:
21 Yes, My Lord. I'm very grateful to you for that. And I can,
22 without citing cases, indicate that on a number of occasions
23 I've found it very helpful that a point I have missed has been
24 drawn to my attention by the Appellate bench, and I've never
25 thought that was being done as a courtesy to me personally or as

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

1 And in some years, "we are very, very hard pressed." Well, I
2 simply say this is an inadequate response to the kind of problem
3 that we've had and we've had to deal with. There are no
4 resources of significance dedicated to this problem. Nothing.
5 And those few lawyers who have the expertise and who deal with it
6 part time are very over burdened.
7 Commission counsel and I start with a factual premise that
8 we share in. You'll see that set out in paragraph 1 on page 11.

> 9 There can be little doubt...(that
> 10 the R.C.M.P.)... were reluctant to investigate the work of another
> 11 police department. In the Thornhill and MacLean cases, they
> 12 simply seemed to be reluctant to press ahead in the face of
> 13 opposition from the Attorney General's Department.

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

1 that will, in fact, be trained, staffed, and funded to do
2 reinvestigations in those cases where it appears that a
3 miscarriage of justice may have occurred.
4 What are the characteristics of such an agency? First, it
5 must be independent. The Attorney General's office has a vested
6 interest in the correctness of the original verdict; and as this
7 case shows, in avoiding having it's own incompetence and neglect
8 of duty publicly disclosed. That's what the problem was in the
9 Attorney General's Department. They had just too much dirty
10 linen in this case to ever deal with it fairly. So it should
11 have no part to play in a reinvestigation. And it's also better
12 for them if they're apart from this task. As Frank Edwards said,
13 he had basically gotten along well with the Sydney City Police
14 force, but since his involvement in this case and the R.C.M.P.
15 report, the relationship had been diminished somewhat, that it
16 had been effected by the case. And that's the inevitable problem
17 of agencies that have to work together and cooperate together.
18 You can't set them against each other without having
19 repercussions. So you need an independent agency. That would
20 also ensure that people come forward even if they fear the
21 original police department. It'll encourage cooperation by
22 ordinary citizens.
23 MR. CHAIRMAN:
24 When you're speaking of an independent agency, are we entitled to
25 assume you're thinking in terms of a national agency?

1 MR. RUBY:
2 As my recommendation makes clear, it will be far preferable if a
3 national agency were created because the problem is common across
4 the country. And it also would permit a more efficient
5 deployment of resources.
6 So I recommend that the Government of Nova Scotia commence
7 discussions with the Federal Government and the other provinces
8 towards -- with a view to creating such an agency but in the
9 alternative, that in any event, an agency within the province be
10 created to do this. It would be a much smaller agency, but that
11 would probably be appropriate to the smaller number of cases it
12 would have to handle. But ideally, it will be a national agency
13 which all the provinces would fund jointly together, the Federal
14 government, and which all could draw upon.
15 Second, the skill level would have to be exceptionally high.
16 There are different levels of skill in investigative and police
17 work across the province or across the country. It's inevitable.
18 But the levels of skill that are brought to bear on a
19 reinvestigation must be of a vastly higher order. And they've
20 got to have access to modern scientific techniques. They've got
21 to understand the limits of expert evidence. They've got to know
22 of the latest scientific developments and what's available to
23 test a conviction on a factual basis.
24 Third, it has to have a rule of openness to the subject of
25 the application, the person who applies for relief or for help.

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

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

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

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

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

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

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

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

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

25 Superintendent Scott is one example of an office who does

1 feel that knowledge of an attempted robbery would have made a
2 difference. He agrees that it's speculative and he also agrees
3 that whether the information was available or not, nevertheless
4 when speaking to Marshall he would certainly take what he had
5 said and investigate it fully and that's the obligation of any
6 honest police officer. That's what was not done in this case.
7 Whatever strength that theory might claim is correctly put
8 forward by Superintendent Scott. He said, quote,

> 9 It would have been more credible to
> 10 them (the Police) of what he was up
> and doing that night in the park,
> 11 rather than just up talking to two
> people that looked like priests.

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

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

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

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

1 is to take the descriptions of the two men and do some
2 investigation, to explore it, to go interview Patterson, to find
3 some evidence. It doesn't matter whether it's an attempted
4 robbery or not. You do exactly the same thing either way. And
5 so ultimately commission counsel is quite correct, it makes no
6 difference one way or the other. And it's not surprising that
7 MacIntyre did not suggest that it would have made a difference.
8 The criticisms that had been made of his conduct would have
9 existed whether he had been told that or whether he hadn't. The
10 Counsel for the Attorney General, as I'll come to, take some
11 comfort from this robbery point.
12 I want to take this moment to deal with the one point that
13 is not answered in my written material, about whether or not
14 there's any evidence that satisfies there being a robbery and
15 that is what's pointed to by counsel. That is when Marshall
16 speaks with Lawrence O'Neill, his lawyer's assistant, on January
17 11, 1980 at Springhill, Nova Scotia, in prison. He speculates
18 that Mickey Flynn, which was the name he thought of his assailant
19 that time, may have felt that Marshall was going to rob him. And
20 the argument goes that's made by the other side, "Well, that's
21 before Sarson came forward.", and it is. So how would he know
22 that Ebsary was going to claim it was a robbery unless there
23 really was an attempted robbery. That's the argument. And the
24 answer can be seen in part at page 154 of my materials.
25 Marshall's in jail for eleven years for a crime he didn't

1 commit. At that point, he's been in prison almost ten years.
2 Day after day, he could have thought of little else but the
3 events that had transpired that tragic evening. He would
4 naturally wonder whether whoever did the killing might have
5 thought they were being robbed. People do not ordinarily kill
6 for no reason. It's a rare event. And in this case, it would be
7 a specially illogical inference to draw because what he did here
8 is consistent with Ebsary having a subjective belief that he was
9 being robbed. I didn't include the quote of what Ebsary heard--
10 what Ebsary said and what Marshall heard, but the language is,
11 "I got something for you." That's what he heard Ebsary say. He
12 knew that in 1980. It's almost the only thing he did know about
13 what was going on in Ebsary's mind and what was really happening.
14 (You can find that evidence at Volume 82, page 14375.) So it is
15 perfectly normal that he would have it in his mind that Ebsary,
16 or the assailant, might well have believed he was being robbed
17 when he and MacNeil were being called back by the two boys.
18 The Attorney General in his factum to my deep regret
19 recycles the "blame the victim" theory. If you look at his
20 passage at page 127. I'll read it. I think -- You don't have it
21 before you.

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

25 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

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

2 The conclusions...

3 They go on.

> 4 ...recorded by our Nova Scotia Court of Appeal in their decision
> 5 were not lost on Mr. Douglas Rutherford, Assistant Deputy
> 6 Attorney General, with the Federal Department of Justice. He
> 7 commented on the "conclusion from a five member bench of the Court of
> 8 Appeal of this province" which read:
> 9
> 10 "There can be no doubt that Donald Marshall's untruthfulness through
> 11 this whole affair contributed in a large measure to his conviction."
> 12 And that this was a:
> 13 "...judicial finding that was part of that judgment."
> 14
> 15 We submit that this court had a duty to speak out and comment on
> witness' credibility and veracity.
> 16
> 17 How could any government department ignore the decision filed by a
> 18 court which had been directed to consider the case by the Minister
> 19 of Justice?

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

1 We also submit...

2 They say.

3 ...that it would have been foolish,
4 unreasonable and unrealistic to
have expected either this
5 Department or the Federal
Department of Justice to have
6 ignored such commentary from Nova
Scotia's highest court.

7 Not surprisingly,...

8 They say.

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

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

22 With the greatest of respect, that is yet one more slap in
23 the face to Donald Marshall. It is yet again a refusal to accept
24 responsibility on the part of this government, and it is a
25 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

1 to mislead. It leaves the impression if you don't read it very
2 carefully that Mr. Justice Campbell approved the fairness of this
3 figure when, in fact, he did not. No, the process, as the
4 material I put before you in writing indicates, was shoddy,
5 scandalise, humiliating and ultimately demeaning, not to
6 Marshall. Demeaning to us. Demeaning to the citizens of Nova
7 Scotia on whose behalf he spoke. That they should engage in this
8 process with so little sense of high office, so little sense of
9 tradition and duty, and so much sense of how to save a dollar.
10 It's my submission as you'll see in paragraph 79 that you
11 are uniquely placed to recommend that Donald Marshall, Jr.,
12 should receive a fair and generous compensation award. At page
13 198 -- Sorry, 197, you'll see what the factors are that I submit
14 you ought to recommend should be taken into account.
15 First, the approach to compensation should be based upon
16 principles. That was not done here. In a sense, what was done
17 was ethically a nullity. There should be a reopening and a re-
18 analysis of what is due Mr. Marshall based upon principles rather
19 than a desire to get out cheaply. And that compensation should
20 include, amongst other things, the anguish and frustration
21 occasioned to him by the previous compensation process itself.
22 You can't fix the quantum because you've not heard evidence that
23 would enable you to do that, but you can and should set the
24 principles that must govern such a process and you can see in
25 your recommendations that this injustice is not left uncorrected.

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

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

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

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

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

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

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

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

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

1 As far as jurisdiction is concerned, how could it be
2 appropriate, and they made no objection to the process of
3 compensation being examined minutely -- How could it be
4 appropriate for the process of compensation to be within the
5 jurisdiction of this Commission and yet for the adequacy of the
6 result of that process, to be a matter in which you were
7 forbidden to comment? It would make the Inquiry and the process
8 meaningless if you were not able to do that. Why understand the
9 nature of the wrong done, only to refuse to recommend that it be
10 made right? What would be the point of it? Surely this is a
11 related matter within the meaning of the terms of reference.
12 In any event, I remember being at the Court of Appeal during
13 the appeal on Cabinet confidentiality on September 14th, '88.
14 And the then counsel for the Attorney General of Nova Scotia, Mr.
15 Joel Fichaud, acknowledged to the Court of Appeal that
16 compensation was within the mandate of the Commission. He made
17 no reservation about quantum not being within it. He simply
18 acknowledged that compensation was within the mandate of the
19 Commission. Why two positions? My submission is that you can't
20 intelligibly look at the process without also looking at the
21 result of that process and deciding whether it was adequate or
22 inadequate, and making recommendations as to the process which
23 should be followed to set the wrong right. They are inter-
24 connected. They cannot manage to be separated, and that Your
25 Lordships should proceed to deal with it in the manner I've

1 suggested.

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

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

1 nature of the present policy should be sufficient to effect some
2 changes.
3 I've talked for a long time and I'm going to sit down. I
4 don't want to pass from this case which on my part and I think on
5 the part of others has been almost a litany of criticism without
6 singling out two lawyers whose work for Mr. Marshall would fill
7 any member of the bar with a sense of justifiable pride. Steve
8 Aronson and Felix Cacchione laboured under adversity that was not
9 of their own making. They dedicated themselves to the interests
10 of their client in the best traditions of the bar at great person
11 cost. There are heros in this world and we have been privileged
12 to glimpse the work of two of them and they should not go
13 unmentioned in your report.
14 My Lords, you've been very patient. Thank you.
15 MR. CHAIRMAN:
16 Thank you, Mr. Ruby. Now Mr. Pugsley, you go next.
17 MR. PUGSLEY:
18 Yes, sir.
19 MR. CHAIRMAN:
20 You may want a few minutes to --
21 MR. PUGSLEY:
22 That would be helpful.
23 MR. CHAIRMAN:
24 Twenty minutes.
25

1 MR. PUGSLEY:
2 Fine. Whatever is convenient, My Lord.
3 MR. CHAIRMAN:
4 All right.
5 INQUIRY RECESSED AT: 11:20 a.m., AND RECONVENED AT: 11:41 a.m.
6 MR. CHAIRMAN:
7 Mr. Pugsley.
8 MR. PUGSLEY:
9 Thank you, My Lords.
10 The role of Commission Counsel has been set forth with
11 clarity by my friends on the first few pages of their memorandum
12 and that was referred to yesterday by my friend Mr. MacDonald.
13 And it speaks of a balanced view --
14 MR. CHAIRMAN:
15 I'm not sure you're coming through. I don't -- Can counsel --
16 COMMISSIONER EVANS:
17 It's the background music.
18 MR. CHAIRMAN:
19 All right. Now we're fine. Thank you.
20 MR. PUGSLEY:
21 I was saying, My Lords, that the role of Commission Counsel has
22 been set forth on the first few pages of the brief dealt with
23 yesterday by my friend, Mr. MacDonald. And there he advances the
24 thesis that it is up to commission counsel to present a balanced
25 view in an impartial fashion, that commission counsel have a

1 unique perspective in that they are carrying a brief for no
2 particular interest, that no counsel other than commission
3 counsel can reasonably be expected to review the totality of the
4 evidence objectively. In view of what was said yesterday by my
5 friend concerning John MacIntyre, I suppose I should be grateful
6 that counsel did not take an adversarial or partisan approach.
7 It's difficult to remain objective to present a balanced
8 view and not to become personally involved because this case
9 raises strong emotions and passions. It's evident in my
10 submission that commission counsel has identified personally with
11 the issues in this Inquiry, and in my submission, that was
12 evident from their submission yesterday and as well as a
13 consequence of examining their brief, words such as, "In our
14 opinion we consider it is inconceivable; if as we believe; we do
15 not consider that explanation to be believable; it is our view;
16 we're of the view; the only other possible explanation we can
17 suggest; we cannot forget; we cannot forget." I do not
18 criticise commission counsel for this personal involvement, but I
19 submit that it should be recognized when considering counsel's
20 submissions.
21 MacIntyre's involvement and actions in 1971 have to be
22 considered in light of the information he received at that time
23 and his demeanour on the stand in December, 1987, has to be
24 considered in the light of the circumstances that existed at that
25 time. Commission counsel took pains to ensure that the evidence

1 of many of the chief witnesses was elicited in a manner that was
2 designed to put the witness at his or her ease. Certainly with
3 respect to some witnesses who were labouring under difficulties,
4 this was appropriate and served the ends of justice. I don't
5 suggest that MacIntyre should have been treated with a
6 consideration for comfort with which Patricia Harriss was
7 treated or the gentleness with which her past criminal record was
8 extracted, but I do suggest that in considering the personal
9 beliefs of commission counsel, that MacIntyre was less than
10 prompt, that he couldn't sit still, that he fidgeted with papers,
11 that one should bear in mind the circumstances under which
12 MacIntyre testified. MacIntyre was the villain.
13 In the application for funding in May, 1987, I stressed that
14 he was the one who had the most to lose in this Inquiry. He was
15 the one that was going to be in the hot seat. He'd been vilified
16 by the Canadian Press for five years from coast to coast. He
17 was the best known policeman in Canada. He was the last witness
18 before the first substantial break in these hearings. And in
19 addition to being castigated by witnesses and counsel on national
20 television claiming he was corrupt, he was in for a long, hard
21 session. He was going to be cross-examined by at least seven
22 vigorous, capable counsel adverse in interest to him. He was
23 retired. He was sixty-eight years of age. And the next five
24 days were going to be the focus of all the stress that he and his
25 family had experienced since the first allegations were raised

against him in the spring of 1982. Don't misunderstand me. I'm not looking for sympathy. I'll handle the points raised by my friends by dealing with the evidence. What I am looking for and did not find in the submissions of commission counsel was an understanding of the circumstances in which he gave his evidence.

What kind of a man was John MacIntyre? Well, some guide-- some guide is found in the comments of fellow police officers and lawyers with whom he dealt in Sydney for a period of thirty years. And their comments are found at the end of our submission at around page 333. And I'm not going to read those seriatim but I'd like to highlight some of the comments that were made.

Norman MacAskill was his predecessor. Norman MacAskill's evidence is precised -- his evidence on this point is precised at page 335 and 336. Norman MacAskill was MacIntyre's predecessor as Sergeant of Detectives, and he said in response to a question at page 336:

> Q. Would he in your experience set up certain facts and ignore other facts?
>
> A. Oh, no.

Staff Sergeant David Wood was stationed in Sydney from '64 to '72 and he had occasion to work with MacIntyre from time to time. When asked of his opinion he said, "I'd say that Detective Sergeant MacIntyre was conscientious." Joseph Ryan was Wood's partner. He said as well, "I would say that he was conscientious; and on the surface as I had known him, I would also say that he was competent." Douglas James Wright at page

338 said:

> And I think he fit that bill very, very well to be quite frank with you, but certainly a very, very diligent investigator. Quite frankly speaking, I never saw him do anything in an interrogation that would concern me in the area exceeding his authorities or doing anything that was unethical or trying to fabricate anything or anything of that nature. There was nothing to concern me.

Simon Khattar who's practiced law in Cape Breton since 1936 at page 340:

> Both of them were -- I found MacIntyre a tougher officer than Urquhart. You could talk to -- you could talk to both of them. I found MacIntyre as I say as a very tough officer but from my own personal experience, an honest officer.

and at page 341:

> Both Mr. Rosenblum and I thought that Detective Sergeant MacIntyre was a good officer and a tough prosecuting officer. That was my feeling and I took that to be that of Mr. Rosenblum. We both thought he was an honest officer.

Provincial Judge Lewis Matheson who had worked as a Crown Prosecutor between 1964 and 1980 had significant dealings with MacIntyre and at 342, he said:

> A. I'm satisfied that the statement John MacIntyre was the one that he received from those people.
>
> Q. Of course, you say that, but what do you base that on?

1 A. On -- on the -- on my dealings with John
2 MacIntyre at the time and throughout his
entire career, sir. Inasmuch as I was
3 aware. I've known him since 1957 to
today.
4
Q. And it is indeed unfortunate then that a
5 number of different people are now
saying that Sergeant MacIntyre inserted
6 these bits of evidence into their
statement?
7
A. Yes, it's - from my association with the
8 man, it's...unthinkable.

9 A. I considered John MacIntyre to be
honourable in every way. I considered
10 him a formidable officer to cross-
examine, not in the sense that he
11 wouldn't disclose but in the sense that
John MacIntyre -- Cross-examination
12 usually disclosed that John MacIntyre
had done his homework and my experience
13 as a defence was that you got yourself
into trouble when you looked -- looked
14 behind it. I considered at all times
that John MacIntyre was an honourable
15 police officer and I say so today.

16 Mr. Whalley's comments to the same effect, "a good police
17 officer.", never any suggestion that he abused prisoners, never
18 that any suggestion to the Police Commission that he was a
19 racist, never any improper conduct alleged against him. Then
20 finally Superintendent Vaughan at page 345, a most telling
21 comment in my submission, at the bottom of the page. He says:

22 On the basis of my review of the
file I did not see what is alleged
23 to be criminal activity on the part
of Mr. MacIntyre. I read over
24 zealousness. I read retaining or
detaining witnesses for a long
25 period of time. I read allegations
of desk pounding and using a loud

1 voice. But I didn't read anything
2 in there of...that would connote criminal activity.

3 Q. And are you saying, in effect, that you
4 believe the witnesses lied because of an error on their part?

5 A. I believe they incorrectly interpreted Mr. MacIntyre's actions.

6 In my submission a telling response.

7 What happened here? Was this particular case an aberration?
8 Did MacIntyre lose his competence for this particular case or for
9 the time period this investigation was under way or did he, in
10 the words of commission counsel, conclude immediately upon
11 becoming involved in the case that Donald Marshall, Jr., had
12 stabbed Sandy Seale and Mr. MacIntyre was interested only in
13 finding evidence which would support his belief and that is
14 suggested on page 14 of commission counsel's brief. Interested
15 only in finding evidence which would support his belief. Did he
16 conclude to early?

17 Well, let's just take a look at the circumstances as they
18 existed in 1971 on the Saturday morning and the Sunday morning
19 when it is alleged that MacIntyre concluded as soon as he came on
20 duty at 8:30 in the morning on Saturday the 29th -- allegedly
21 concluded that Marshall had committed the crime. Superintendent
22 Vaughan testified MacIntyre and his investigators certainly had
23 grounds to suspect Marshall. Harry Wheaton said, "If I were
24 investigating the case, I would have Marshall in mind at the
25 beginning." Exhibit 40, which is the exhibit that was put in by

1 Constable Wood of the R.C.M.P. -- Exhibit 40 is pointed to as
2 being an example of a conclusion that MacIntyre had reached
3 concerning Marshall's guilt between the hours of nine-thirty and
4 eleven o'clock on Saturday, May 29th. Wood could not assist in
5 any personal recollection. All he could do was read his notes.
6 He had no personal recollection of the meeting at all and the
7 critical comment: "conversation with Edward MacNeil and
8 Detective MacIntyre. Feeling at the time Marshall was
9 responsible. Feeling at the time Marshall was responsible, and
10 happened as a result of a argument between both Seale and
11 Marshall." Wood says that he's -- believes that he saw them
12 together but he's not even sure of that. He's not sure who made
13 this comment. I draw to your attention a subsequent comment that
14 appears in Wood's handwriting in the same exhibit, exhibit 40, on
15 the last page and it says, "Marshall as suspect. Marshall as
16 suspect.", a comment that appeared on June the 3rd in Woods
17 writing, not on Saturday, May 29th, but on June 3rd. So at that
18 time Marshall was only and I -- the word "only" is mine--
19 Marshall only a suspect.
20 The City Sydney Police -- Sydney City Police as well as the
21 R.C.M.P. were on the lookout for a white volkswagen as early as
22 Sunday the 30th and Monday the 31st. Constable Wood was looking
23 for the white Volkswagen on the 31st and he said he had no idea
24 where the request came from except that a request to be on the
25 lookout for such a Volkswagen had come from the Sydney City

1 Police. The white Volkswagen first appears in comments addressed
2 to Oscar Seale in a telephone conversation at 7:30 on the
3 Saturday morning by Donald Marshall. You will recall that Seale
4 gave evidence and said he phone Marshall's house to find out what
5 had happened to his son and the white Volkswagen first appears,
6 if my recollection serves me correctly, in that conversation.
7 It next appears on the Sunday morning, on the 30th, when
8 John Pratico was sitting on his steps on Bentinck Street with
9 several of his friends including Rudy Poirier, and Marshall came
10 along and according to Poirier, and his statement is found in
11 exhibit 16, Marshall described a white Volkswagen. That
12 information appears in the statement of Pratico given to
13 MacIntyre that afternoon, the Sunday afternoon. Pratico, in his
14 evidence, states that he doesn't know where he got it from. In
15 fact, he even goes so far as to suggest that the police -- that
16 MacIntyre suggested to him the appearance of the white
17 Volkswagen which in my submission is nonsensical. The
18 information and the germ in Pratico's mind was planted by
19 Marshall when he saw -- when Marshall saw Pratico on the Pratico
20 steps on the Sunday morning.
21 The significance of the white Volkswagen is that MacIntyre
22 gave this information to Sydney Police and to the R.C.M.P. to be
23 on the lookout for the white Volkswagen. It does not indicate a
24 closed mind on Sunday or Monday when directions were given to an
25 allied police force to be on the lookout for that kind of a car.

1 Indeed there was another trip by the R.C.M.P. as late as
2 June the 3rd, the Thursday before the statements were given on
3 Friday, June the 4th, the critical statements. On June the 3rd
4 between eight o'clock in the evening and 12:30 a.m. in the
5 morning, MacIntyre went with Constable Ryan, Wood's partner, down
6 to Louisbourg to determine if there was anyone in the area -- I'm
7 sorry. New Waterford -- who may be able to give him information
8 as to the identity of persons in the park that evening. Ryan was
9 not of the view that MacIntyre was working on the investigation
10 with a closed mind at that time on Thursday, June the 3rd.
11 The M.C.I.S. telex is pointed to by counsel to show that
12 MacIntyre had a closed mind. This was the telex that occurred in
13 the early hours of Sunday morning; yet my suggestion and my
14 submission is that a fair reading of that telex is not that it
15 shows that MacIntyre had a closed mind but that MacIntyre, if
16 indeed MacIntyre was the author of that telex, had an open mind.
17 It says and I believe it's found at page 115 -- Page 90? I'm
18 sorry, it's found in volume 16 at page 90 but I believe it's also
19 found in our brief at 115 -- a reference is found at 115. In any
20 event it says, in part, --
21 MR. CHAIRMAN:
22 Which page of your factum?
23 MR. PUGSLEY:
24 It's found at page 90 of volume 16, and in my memorandum there is
25 a reference to it at page 115.

1 MR. CHAIRMAN:

2 Thank you.

3 MR. PUGSLEY:

> 4 At 3:11 a.m. a telex was sent to
> 5 the Maritime Crime Index Section
> at "H" division in Halifax from the
> 6 Sydney Detachment of the R.C.M.P.
> The telex indicates one time of
> 7 3:11 a.m. on Sunday, May 30, '71
> and a handwritten notation on the
> 8 document indicates that it could
> have been handled by the C.I.B.
> 9 the next morning, May 31. The
> telex does identify Donald
> 10 Marshall, Jr. as "possibly the
> person responsible"...

11 Not as the person responsible but as "possibly the person

12 responsible".

> 13 ...the telex recounts the version
> of events which is attributed to
> 14 Donald Marshall...
>
> 15 Marshall states he and deceased
> were assaulted by an unknown male
> 16 approx. 5'8 to 6' tall, grey haired
> approx. 50 yrs. who stated he did
> 17 not like Indians or Negroes and
> assaulted both persons with a large
> 18 knife.

19 The telex goes on to say may records be checked

> 20 ...for a persons(s) in Sydney met
> area (metropolitan area) using
> 21 similar type MO with photos etc....

22 So that the telex is not something that should be considered as

23 showing MacIntyre had a closed mind, but rather MacIntyre had a

24 open mind. He was asking for assistance. If I say if it was

25 him, certainly the Sydney Police were asking for assistance to

identify people in accordance with the description Marshall had given.

The story related by Marshall was somewhat bazaar. Priests from Manitoba stabbing Sandy Seale because he was Black after a friendly conversation about cigarettes, women, and bootleggers. The kind of impression that Marshall created on friends and those who knew him is set forth at pages 187 of our brief. Bernard Francis, who sat in on Donald Marshall's first interview with his lawyers, said that Marshall acted typically for a Native person by saying nothing more than was absolutely necessary and the responses which were given were not even satisfying to Francis.

Could it have been any different for MacIntyre on May 30th? Francis also advised this Commission in relation to a comment attributed to him in a later Parole Report that although he had never called Donald Marshall, Jr. "an excellent liar", he testified:

> I thought that in this particular case, he wasn't telling the whole truth. I felt that way, in all honesty, -... that he wasn't telling the full truth.

Roy Gould said, (This is at the bottom of page 187.)

> I could put it to you this way, he was never that honest with me about everything.

Simon Khattar said

Q. Did you believe him?

His answer was

> I had my doubts. I didn't say, "I don't believe you". I had my doubts.

And Harry Wheaton gave contradictory evidence about the robbery theory. He first responded to a question from Mr. Orsborn (This is found at page 189 of our brief.)

> The Chief Justice asked you what steps you would have followed had you been confronted with that situation that night. Would the steps that you would have taken been any different had you know about the robbery?

And Wheaton answered,

> Yes, I, to me, then, it would seem more, I suppose, Marshall would have been more credible to me. His story would have been more credible.

Wheaton changed his mind later on and gave different as has been pointed out by my friend, Mr. Ruby. Eunice Harriss, Patricia Harriss' mother said, "It sounded like Halloween to me, this story."

There's an interesting exchange in the evidence of Debbie MacPherson and this is found at page 183 of our brief in paragraph 253. Debbie MacPherson was interviewed on June the 3rd, on Thursday, the day before June 4th, in the presence of her brother and uncle and found that MacIntyre was suggestive. MacIntyre interviewed her for an hour or an hour and a half. The points about which MacIntyre was being suggestive were "things that I didn't see that maybe I should have seen or something."

> Well, for instance a man in a trench coat which I had no recollection of at all but it was suggested more or less that I did see him, but I didn't...

And the "trench coat", I suggest, is consistent with the explanation Marshall gave of who encountered him in the park and who was responsible for the criminal activity. So this was as late as June 3rd where a witness is suggesting that MacIntyre was being suggestive about her seeing someone in the park, which to some extent fitted a description that Marshall had given.

A small point, Donald Marshall was not warned by MacIntyre when he took the statement on Sunday, May 30th.

MacIntyre warned Roy Ebsary when he took his statement in November of 1971 because he felt that he could possibly have been implicated.

The indication from some of the other police officers, Ambrose MacDonald, Walsh, and Young, evidence they gave (And this is referred to on page 172 to 174 of our brief.) suggests that there is no rumour that they heard around the police station that Marshall was the prime suspect. There is evidence given by other police officers to the opposite effect, particularly Butterworth who came on duty later on that week, around the 3rd or 4th.

The circumstances surrounding the cut on the arm have been referred to by my friends, commission counsel, as being an example of MacIntyre trying to build something out of nothing, but the fact is that Maynard Chant said, "There was no blood on

1 the arm when I first saw him." Merle Davis who was the nurse who
2 examined Marshall and treated Marshall in the hospital said,
3 "There was no bleeding. It was not severe. It was not very
4 deep." And Doctor Virick confirms that there was no bleeding.
5 If MacIntyre had his mind made up on the Saturday or the
6 Sunday, why did he not exert pressure on Maynard Chant who he
7 interview alone without anyone else being present on Sunday
8 afternoon, May 30th, to implicate Marshall? Why didn't he do it
9 then? Why wait five days until June 4th when he's got a room
10 full of people at Louisbourg and allegedly try to pressure Chant?
11 Why not take the opportunity of -- when he had him alone on the
12 Sunday of trying to pressure him then? But Chant says, and
13 Chant's evidence is categorical on this point, he was not
14 pressured on Sunday, June -- on Sunday, May 30th at all.
15 So that this point being one of the four points raised by my
16 friend, Mr. MacDonald, in his submission yesterday to have you
17 view MacIntyre's evidence with a jaundiced eye. One of four
18 points on the plank that leads to the possibility of MacIntyre
19 being charged with obstruction of justice. I suggest it's simply
20 not born out by the evidence, that MacIntyre did not make his
21 mind up on the Saturday or the Sunday. He had an open mind on
22 both these days and the evidence indicates that he did.
23 A second point that my friend relied upon as being
24 significant was MacIntyre's statement in evidence as to where
25 Pratico was supposed to be in the park when they went to the

1 park. And I think a fair and thorough reading of the evidence
2 given by MacIntyre is important and it's found in volume 33 at
3 pages 6120 to 6122. The thrust of my friends argument was that
4 MacIntyre didn't tell you that he had taken Pratico to the park
5 sometime between the 30th and June 4th and had gone over the
6 terrain with him. Didn't tell you that. And that he should have
7 but if you -- and that MacIntyre made a mistake, a slip of the
8 tongue, when he talked about Pratico supposed to have been in a
9 certain location in the park. But if you read MacIntyre's
10 evidence, it's evident that MacIntyre just had no recollection of
11 going to the park with Pratico. He says at the top of page 6120,

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

15 A few lines later:

16 Q. Did you pick him up?

17 A. I've -- I've no recollection of it at
18 this time.

19 Page 621

20 A. I would say that I was over at -- must
21 have been over at the Park with him;
although I got no recollection of it.

22 A few lines later:

23 A. I would say I must have been.

24 Q. And you and Pratico were together in the
25 Park before he gave you this second
statement, isn't that correct?

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

Page 6122:

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

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

So instead of this point as being a second plank in the platform to hang MacIntyre, I suggest, that a fair reading of the evidence indicates that MacIntyre just does not recall this incident at all and that he was being forthright in his response.

The third plank was the inconsistency as to whether M. R. MacDonald, the detective who was on duty the night of the stabbing, came out on the Saturday, on the day after. M. R. says that he did come out. He came out. He was up till four in the morning with the Chief and that he then came at around 7:30 or eight o'clock in the morning to the police station and that MacIntyre arrived about 8:30 and that he spent the day with MacIntyre going over his notes and doing certain things in connection with the investigation, that they went to the Park on at least four occasions and carried out some investigation there. MacIntyre says he doesn't recall M. R. MacDonald being out on the Saturday at all and my friend points to this as being say, this is -- this is a throw-away point for MacIntyre. This is pure-- this is inconsequential. It's not important whether or not M. R.

1 was out or not but what my friend suggests is that is important
2 is that MacIntyre didn't tell the truth on this occasion. You
3 know, if he was going to lie in little matters, then he'd lie in
4 the big ones and in effect that was the thrust of the argument.
5 With respect there is another explanation and the other
6 explanation is that MacIntyre simply does not recall M. R. being
7 there at all and the M. R. was not there. I mean, that is the
8 other explanation. Why would MacIntyre not tell the truth about
9 M. R. being out on Saturday? It would be far better for
10 MacIntyre to say that, "Oh, yeh, first thing in the morning I saw
11 M. R., went over the night's that he made -- the notes that he
12 made the night before, got fully briefed in the investigation."
13 That's what one would normally think a person in charge of an
14 investigation would do. What percentage is there for MacIntyre
15 not to tell the truth about that? The easy line, the good line,
16 is to adopt what M. R. said because M. R. testified first, of
17 course, some months prior to MacIntyre.
18 There are two bits though, two bits that support MacIntyre's
19 position. One is the statement that M. R. MacDonald gave Harry
20 Wheaton during the reinvestigation and that is found in volume
21 37 -- 34 which is exhibit 98, I believe, and the statement of
22 M. R. is found at page 95 and it's a statement, a little over a
23 page. I won't read the whole thing but he says in the course of
24 reciting the events that occurred during that night:
25

> I phoned John MacIntyre who was the
> Sergeant of Detectives and told him

> what was happening, that I thought we had a murder on our hands. I asked him if he would come out and he refused. I reported this to the Chief of Police, Gordon MacLeod. I had to go to his house and see him. My next shift, as I can recall, was Sunday, the 30th of May, 1971. I worked that shift with John MacIntyre, nine to five.

Right. MacIntyre says he did. MacIntyre says he went and got him and took him to Louisbourg to see Chant.

> We checked around the Park and after dinner we went to Louisbourg. We went to Chant's home in Louisbourg and they told us their son, Maynard, was in Catalone and described the house.

But there's nothing there in M. R.'s statement that he went out on the Saturday. Nothing at all. Nothing that he met with MacIntyre on the Saturday and briefed him as to what notes he took the night before. One might characterize then the evidence that MacIntyre gave that he did not recall M. R. being out at all on the Saturday as being an honest recollection, not a plank in a platform leading to this conclusion that MacIntyre should be charged criminally.

The three key witnesses, Pratico, Chant and Harriss, my friends acknowledge that John Pratico clearly invented a story on May 30th. And there's some suggestion in the evidence that they say that Donald Marshall gave the information to him. And I've talked about the meeting that occurred on the morning of Sunday, May 30th, at Pratico's porch steps. The one comment--

There's two comments actually. There's the white Volkswagen, but there's another interesting comment in the first statement of John Pratico which is found in Volume 16 at page 22.

> I seen two fellows running from the direction of the screaming. They jumped into a white Volkswagen, blue license and white number on it. One had a brown corduroy jacket.

"One had a brown corduroy jacket." Donald Marshall said the same thing. Donald Marshall in his statement to MacIntyre on the same afternoon said "the other fellow, brown corduroy short coat." My recollection is that's the first time that description appears, brown corduroy jacket.

Commission council says they are not able to assist you why John Pratico gave the evidence he did. But in my submission, you can't stop there. You can't say we're not able to assist you and then blame MacIntyre for pressuring Pratico into everything he said in the second statement. You've got to give some thought as to why Pratico told the lies that he did. And in viewing his evidence and his statement on May 30th, it's helpful to review the exchange that Pratico had with Butterworth (And that's found in Volume 12 at page 2082.) and also the exchange he had with Leotha and Oscar Seale in 1982.

The Butterworth incident was, of course, in 1971 and it probably occurred in the week after Marshall was charged. Butterworth was not on duty the week of the incident. He came on duty the following week and there's a little confusion as to

about when this exchange between Pratico and Butterworth took place but it would appear that it was the week after Marshall was charged. And Butterworth's evidence says that -- Sorry. Pratico acknowledges that -- The reference I gave, Volume 12, page 2082 is in fact the evidence of John Pratico. And Pratico gave evidence immediately after Butterworth, and he acknowledges that he did have a discussion with Butterworth that occurred, according to Butterworth's recollection, in a restaurant.

Butterworth's evidence is found in Volume 11, and it's my recollection that it was at our request that commission council interviewed Mr. Butterworth and then called him. At page 1971 of Volume 11, Butterworth testifies:

> I was with Constable Arthur Woodburn; we were working together and Mr. Pratico appeared just as we were walking along our beat, he appeared. A short while later we went into the Maple Leaf Restaurant which is on Charlotte Street and we had a cup of coffee. Constable Woodburn, I can remember that night, -- if I can recall, was to my left and John Pratico followed us in. We didn't ask him in -- it was Constable Woodburn and I don't recall him doing -- and he saying to my right -- Constable Woodburn and I were talking then out of the blue -- well I was getting -- I can remember getting up to leave, like we were through and as we were getting up, he was facing me and he mentioned that he'd never forget what he had seen in the Park and he described the stabbing.

Q. And do you -- do you have an independent

1 recollection of that night and this
2 conversation with Mr. Pratico, do you recall that now?

3 A. What's that --

4 Q. Do you recall now the actual conversation you had with Pratico?

5 A. Not the actual word for word. I can
6 remember, you know, what I'm saying now to you, you know. That's about all I
7 can remember. The rest of the short time he was with us was probably just
8 small talk, you know, and it was-- that's the only time he mentioned
9 anything about this incident, and he described the stabbing and first he
10 said he wouldn't want to see it again. He'd never forget what he saw. And with
11 that point, we were walking on the way out the door. And I can remember -- I
12 can remember standing there and he was looking at me and I can remember I had a
13 raincoat on that night. Whether it was raining or not, I don't know, but it was
14 a traffic coat. We used to wear them sometimes in place of an overcoat or a
15 Burberry, you know. And he mentioned that he didn't mind talking to the
16 fellows who didn't wear the uniforms. They were pretty good, and he said,
17 "especially the big fellow". And I can remember that, and just out of the blue
18 I said, " John MacIntyre", and he said, "Yes, he's a good fellow".

19 Q. He remember -- He said," I don't mind
20 speaking to the fellows..."?

21 A. "That didn't wear the uniforms."

22 Q. That didn't wear the uniform.

23 A. Yeh.

24 Q. And you took that to mean?

25 A. The detectives.

1 Q. And he said, "They are good fellows, especially the big fellow"?

2 A. Especially the big fellow.

3 Q. And you said, "Do you mean MacIntyre"?

4 A. I just automatically said, "John
5 MacIntyre". He said, "Yeh, he's a good fellow"....

6 And then he was asked,

7 Before we leave that night, John,
8 you said that he described the stabbing to you?

9 A. Yes, sir.

10 Q. Could you tell us how he described the
11 stabbing?

12 A. He mentioned about a knife going in bringing her down, twisting her and
13 across. I took it to mean like an "L" shape.

14 Q. A knife going in and coming down--

15 A. Coming down and twisting, and --

16 Q. -- and twisting and across?

17 A. -- going across. I can remember that
18 like yesterday and I'm not off the side. If you're sitting with somebody and
19 they say something like that --

20 Q. And just again, it starts from the top and it's like making an "L"?

21 A. Yeh. It's just like he went down, like,
22 and he "twisted her" and he said, "he brought her across". I can remember
23 that. As a matter of fact, it was with his right hand. He was -- because I was
24 looking right at him.

25 There's the further discussion with Leotha and Oscar Seale.

1 This was at Mrs. Seale's mother's where John Pratico was a guest
2 in 1982, at a home, I believe in Louisbourg. And Leotha says
3 that this conversation took place around Christmas time which
4 would have made it before the reinvestigation, before Carroll--
5 Constable Carroll saw Pratico. He says he talked to her about
6 the stabbing and described to her what he had seen. And said
7 that, "I'd never like to see anything like that again." He also
8 described -- had a conversation with Oscar Seale. Oscar Seale
9 puts that at around Easter time or some time after Pratico had
10 met with Constable Carroll. And again, Pratico described how
11 Donald Marshall had stabbed Sandy Seale. Now in my submission,
12 that's important, if that occurred after he talked to Carroll,
13 that's important. Because Pratico suggests that there was sort
14 of an absolution when he talked to Carroll. That was the time
15 when he made his peace. It's also of some significance that
16 Pratico went on the radio after he talked to Carroll and said
17 that what he had told Carroll wasn't true and reaffirmed the fact
18 that Marshall had stabbed Sandy Seale in 1971. We don't have
19 any -- we don't have the tape, of course, but I think the sense
20 of that disavowment is contained in the evidence.
21 And in the Discovery in the CBC case, (And this is found at
22 Volume 12 at page 2187.) he acknowledges -- Pratico acknowledged
23 on the discovery, which of course took place before this hearing,
24 that he recalled the words, "Black bastard" and "crazy Indian"
25 which were contained in the statement that he gave MacIntyre on

1 June 4th.

2 So there's a number of occasions when Pratico has invented
3 things. And the question is why did he do it? And I guess
4 there's, perhaps, no answer to that except that he wanted to be
5 liked by people and he wanted to be respected by people. His
6 evidence is full of suggestions to that effect, that people did
7 not believe him, they did not accept him, and that he wanted
8 people to accept him and believe him and so that is the reason
9 that he offers for saying the things that he did. So it wasn't
10 only to MacIntyre that he told things that were untruthful. And
11 there's not really much suggestion that MacIntyre was difficult
12 with him on the first statement on May 30th. He says that he
13 was a little rough, but that there was not much to suggest that
14 MacIntyre unduly pressured him to say the things that he did.
15 And the things that he did, I suggest, came from Donald Marshall.
16 And that's a point that -- that's a thread that goes through the
17 whole investigation, as to MacIntyre's concern about what part
18 Marshall was playing in controlling, or Marshall's friends were
19 playing in the controlling of information given to him during
20 the course of his investigation. And I'll talk about the
21 Patricia Harriss and Mary O'Reilley statements later on because
22 that again is another example of MacIntyre, I suggest,
23 MacIntyre's concern that people were not telling him the truth.
24 And certainly John Pratico didn't tell him the truth on the 30th.
25 And certainly Maynard Chant didn't tell him the truth on the

1 30th. Maynard Chant says he saw -- he saw the stabbing in the
2 first statement he gave, and Maynard Chant says there was no
3 pressure on him from MacIntyre to give that story on the 30th of
4 May. Why then did Chant give the statement that he did, a false
5 statement? I said that Pratico wanted to be liked, Pratico
6 wanted to be accepted; and in view of his difficulties, that's
7 perfectly understandable. Why did Chant give false and
8 misleading statements on the 30th? The only answer, I think, is
9 a statement that Chant himself gave when he says he didn't like
10 pressure. He didn't like pressure. When pressure was on him, he
11 would say things to relieve that pressure from him. What
12 pressure was he under? He was under the pressure from Donald
13 Marshall on the 30th. He was under the pressure of having told
14 to the police the night of the incident, "I saw everything." Do
15 you remember Chant was picked up on his way home back to
16 Louisbourg, and picked up by police officers after the incident.
17 And during the course of that trip, he said, "I saw everything."
18 And that was put down on a note and put on the police file and
19 that's eventually how MacIntyre got to see Chant, because of this
20 note on the police file that Chant had seen everything. Chant
21 dug himself a hole by saying, "I saw everything", and he never
22 got out of that hole. He just kept digging himself deeper and
23 deeper. And the hole in which he dug himself was made deeper by
24 Marshall, by Marshall leaning over him at the Police station
25 before he gave his statement to MacIntyre and said,

1 Remember there were two of them, weren't there?

2 And he said,

3 He was in a rage and his eyes were
4 on fire and he leaned over me and I was frightened.

5 He was under pressure. Chant was under pressure. And that's
6 the explanation Chant gives for lying.

7 Yes, I seen it all. Marshall
8 coming over to me and leaning over me and saying there was two of
9 them, wasn't there? And I said, yeh, there were two of them.

10 Chant said, "Yeh, there were two of them." Chant didn't see
11 them.

12 He seemed to be very raged, very
13 aggressive with a strong voice. There was two of them, wasn't
14 there? I was recounting on what Mr. Marshall had told me.

15 Chant says.

16 I'd basically just given them
17 (That's MacIntyre.) the information he (i.e. Marshall) had
18 passed on to me. I put myself in a spot.

19 Were you afraid of him?

20 Yes. Rough looking character. He
21 basically gave me some indication of what they were. I remember him
22 telling me the story of what had happened and by looking at the
23 statement here in front of me, it seems to be in reference to that.
24 I was trying to help the Police and maybe I was trying to help Mr.
25 Marshall, I guess, too.

> Up until that time you gave the statement, had anything given you the impression that Marshall was a suspect?
>
> No. This statement is a hearsay or something, that I conjured up because I got myself into a fix. In reference to what had happened, according to what he had told me on the night of the incident. Pressure. Because of his appearance, anything that would cause me to feel pressure would probably cause me to lie.

Then on June 4th.

> MacIntyre knew that I had not told the truth in this statement on May 30th. I don't feel I was being actually told what to do or to-- or where to stand or anything like that. They never -- they never specifically said, "Listen, Marshall is guilty and we want him."

He introduced material, such as knowing the dark haired fellow from dances in Louisbourg, to make the story believable. That is to say, Chant introduced material, such as knowing the dark haired fellow from dances or Louisbourg, to make the story believable. (These quotations are all found in Volumes 5 and Volumes 6. That last one is found at page 817 -- 878.) To make the story believable. Chant was a -- a bit of a past master in making the story believable. At no time did the Police ever tell Chant that the person who stabbed Sandy Seale was Donald Marshall. (That's found at Volume 6, page 934.) Chant perhaps justified it because he thought that Marshall's actions were

1 suspicious. There was no blood on the cut.

2 I thought his actions were quite suspicious at the time. I don't
3 know why, I had to say something. I can't explain.

4 Now those statements that I've just read were given in the first
5 statement to the R.C.M.P. in the reinvestigation in 1982 and
6 they're found at Volume 47 -- sorry, Volume 34 at page 47.

7 I don't know why I had to say
8 something. I told the Police I saw everything.

9 referring to the cut.

10 CHAIRMAN HICKMAN:

11 Would this be an appropriate time to --

12 MR. PUGSLEY:

13 Thank you. Yes it would.

14 CHAIRMAN HICKMAN:

15 Till two o'clock.

16 MR. PUGSLEY:

17 Thank you.

18 INQUIRY RECESSED AT: 12:32 p.m.; AND RECONVENED AT: 2:04 p.m.

19 MR. CHAIRMAN:

20 Mr. Pugsley.

21 MR. PUGSLEY:

22 Thank you, My Lords.

23 Commission counsel dealt with the evidence of Wayne Magee
24 and felt that the admissions obtained from him assisted the
25 position that MacIntyre had unduly influenced Maynard Chant with

respect to the second statement given on June 4th. I think it's important to read all of Wayne Magee's evidence and at page 3634 which is found in Volume 20. Commission Counsel cited the following comment as indicative of perhaps an inappropriate discussions with Chant.

> Detective MacIntyre conveyed to Maynard that certain information in a prior statement did not correspond with other information that they had obtained afterwards and that they wanted more or less some clarification pertaining to the first -- first statement. And he then put questions to Maynard and wrote the answers down.

It's our respectful submission that nothing inappropriate for MacIntyre to do that at all. He had a statement from Chant that contained lies, wherein Chant identified other people as stabbing Seale and that certainly constituted misleading a police officer at a very critical part in the investigation. So there's no reason for MacIntyre to be other than frank and reasonably tough with Chant at that second interview. Although at the bottom of page 3635 Wayne Magee says:

> ...I do not recall, in fact, I thought you know, that it was done in a very cordial, easy going manner.

And Mr. Magee is referred to evidence he gave on Discovery in 1984, question and answer. This is found at page 3636:

> A. Question and answer. It was a written statement as I recall. Detective MacIntyre was doing the writing and Detective Urquhart as I

1 know policy, was merely a witness
2 to the taking of the statement, and
I don't recall anything that he
3 said at that particular session.
And questions were asked of Maynard
4 in a very low, mild mannered way.
No raising of voices. He was
5 merely asked questions and the
answers were written down.

6 And he is asked:

7 Is that today your evidence of how
that statement was taken?

8 And he responded to Mr. Orsborn at the top of 3637:

9 That's correct.

10 And then further down on 3637:

11 Nothing sticks out in my mind.
12 Maynard was very cooperative, as
he...

13 ...always was...

14 And he -- questions were put to him
15 and he answered them.

16 I don't recall him being nervous.
He again -- questions were asked,
17 he answered them. What was going
through his mind, of course, I
18 don't know; but there's nothing
unusual that I can state that I--
19 that I observed.

20 And then at 3651:

21 I certainly didn't have any reasons
to believe that he told -- or
22 mislead the police officers.

23 And there's a further quotation. I have noted page 3687, but I

24 don't believe it's on that page, but the quotation is:

25 Nothing sticks out in my mind that
would lead me to believe that he

1 was, in fact, lying that day.

2 There were two points in addition that my friend raised,
3 among others, two points that my friend raised with respect to
4 the information given by Chant on the second occasion. One was
5 the gun, pulling the gun out of the pocket. And you will recall
6 that in the second statement which is found in Exhibit 16 -- I
7 beg your pardon. Knife. Knife, not gun. If I can find Exhibit
8 16, the statement of Maynard Chant on June 4th, which is found at
9 page 46 and 47. At page 47:

10 No, I just head a mumbling of
11 swearing. I think Marshall was the one who was doing most of the swearing, then I seen Marshall haul
12 a knife from his pocket.

13 And my friend said,

14 Where did Maynard Chant get that, haul a knife from his pocket.

15 And the inference being, I take it, that he must have got it as a
16 consequence of a suggestion from MacIntyre; but the fact is,
17 that's the very phrase that Maynard Chant used in his statement
18 of May 30th when he said,

19 The two fellows who stabbed Donald
20 Marshall and Sandy Seale, they talked for a few minutes over on
21 Crescent Street. One fellow hauled a knife from his pocket.

22 Now that's a direct lift out of his May 30th statement. And in
23 our submission, that's where Maynard Chant got the germ of the
24 idea for his statement of June the 4th. And then there's the
25 discussion -- another point raised by my friend was the dark

1 haired boy -- the dark haired fellow, where did Maynard get that?
2 And at page -- Volume 5, page 878, in response to a question from
3 my friend, Mr. Orsborn:

4 Q. I guess the difficulty that I have,
5 Mr. Chant and perhaps the Commissioners, as well, is we -- we
6 here have a statement which you now say is -- is untrue, that you did
7 not start down the tracks and you did not see the dark haired
8 fellow...it just didn't exist. But then we have leaping out of thin
9 air -- "Oh, I saw him before at the dances in Louisbourg". Can you
10 give us any help at all as to where that came from?

11 A. The only thing that I can say is that I
12 was trying to make the story believable I guess. I don't know where -- to be
13 honest with you -- I don't know where all the information -- I know where
14 some of it -- I know that where I was going down the tracks and stuff like
15 that, but when -- everything had left there if you want to say that I
16 conjured it up out of my mind, well, that's --

17 Q. That's not what I want to say at all.

18 A. I know.

19 Q. What I want to here is --

20 A. What I want to say is that I really
21 don't know. I really don't -- I really can't remember to the effect of how the
22 -- how the statements really came forth. Possibly I could have sought some help
23 on it. Possibly I could have dreamed it up.

24 At page 830 they're talking about the first statement. He says:

25 This statement is a hearsay or something that I conjured up

> because I got myself into a fix.

And at page 900 with respect to June 4:

> I don't (think) that I was being actually told what to do or where to stand or anything like that...

John Pratico. There was reference yesterday to Pratico talking about being on Crescent Street behind a bush. And I may have misunderstood the point that my friend was advancing, but my recollection is, you know, how did -- how did Pratico get this information because he was down on the tracks or something of that nature. As I say, I may not be putting my friend's point fairly and one will have to check the transcript to ascertain the exact point he was making, but I did note that when I was going through Pratico's evidence in Volume seven at page 2030, he was asked when he

> ... got onto Crescent Street, where did you go.
>
> A. I go toward the bushes.

And he was fairly close to South Bentinck Street and he was asked to identify where he was and he identified as being opposite 106 and 108. The numbers were pointed out to him. The houses were shown to him on the plan. And 106 nd 108 Crescent Street and he indicated that he was in bushes on Crescent Street just opposite those houses. So that there is reference in Pratico's evidence about being in the bushes and that as being the location where he was. And at page 2174 he states:

> A. I gave a statement saying that I was in

1 the bushes.

2 I can't be in two places at once.
I know I was at those bushes.

3 I mentioned this morning the information that we allege was given
4 to Pratico by Marshall on the Sunday morning about the white
5 Volkswagen. Pratico does not acknowledge that that information
6 was given to him by Marshall, although I've traced the germ of
7 the idea, firstly, Marshall advising Oscar Seale on Saturday
8 morning at seven-thirty about this and the telephone call, and it
9 again appearing in Marshall's statement on Sunday afternoon, and
10 there not being any other place where it would have appeared to
11 have come from. Pratico says when he was questioned about this,
12 he acknowledges that he was sitting on the steps of his mother's
13 house with Rudy Poirier and Glen Lawson. And he says Marshall
14 came along and said to them, "Something terrible happened last
15 night." These were Pratico's words. Something terrible
16 happened last night is what Marshall told Pratico and the others.
17 But he goes on to say that no one asked Marshall what happened.
18 They were sitting there but there was no further follow-up to the
19 conversation which one finds odd. One would have thought that a
20 teenager, 17, coming along and saying, "Something terrible
21 happened last night.", and no one else asking him what indeed did
22 happen strikes me as being odd.

23 As a matter of interest Pratico says between the first and
24 second statement he was asked if he saw MacIntyre. That, of
25 course, would refer in particular to whether or not they went to

1 the park together. And Pratico's response at page 2060 was:

2 I'm not sure if I did or not, sir.

3 When Pratico was asked what he told to Mrs. Seale in 1982, he

4 said at page 2062:

5 I saw him strike. I saw him...

6 Meaning Marshall.

7 ...strike.

8 And Mrs. Seale says that:

9 He added to that words to the
10 effect that Seale said to Marshall,
I wasn't going to do your dirty
work. I wasn't going to do your
11 dirty work.

12 And Oscar Seale recalls discussing the matter with Pratico. And

13 again Pratico said to him that his son told Marshall that he was

14 not going to do "none of his dirty work".

15 In summary, with respect to these two witnesses, Chant did

16 not like pressure. He dug himself a hole when he told the police

17 on the night of the incident that he saw everything, and he spent

18 the rest of that week and the following weeks and indeed the rest

19 of his life trying to dig himself out of that hole. He had

20 pressure exerted on him by Donald Marshall on the Sunday

21 afternoon and this lead him to give the fictitious statement that

22 he gave to MacIntyre on Sunday afternoon on May 30th.

23 Pratico wanted to be liked, wanted to be accepted. And in

24 view of the problems that he had, certainly this is

25 understandable. There is no else -- no other way to explain the

1 story that he concocted and volunteered to Butterworth. This was
2 not a conversation that Butterworth had engaged with Pratico.
3 Pratico came up to him and told him about the knife going in and
4 being twisted and going down. And also there's no better
5 explanation for in 1982 as Oscar Seale relates it, that he told
6 him after Carroll had interviewed him, after the reinvestigations
7 started, again that it was Marshall who stabbed his son.

8 The third member -- the third person on whom counsel rely
9 very heavily in their condemnation of MacIntyre is Patricia
10 Harriss. And there's no question that she endured a lengthy
11 interrogation. But again it must be viewed in the light of the
12 information that MacIntyre had at that time. He had a statement.
13 The statement was on June 17th. He had an original statement
14 from Chant that he knew was lies. That had been recounted on the
15 fourth. He had an original statement from Chant that he knew was
16 lies, that had been recanted on the 4th. He had an original
17 statement from Pratico that he knew was lies that had been
18 recanted and another statement had been given on the 4th of
19 June. And he knew that there was a trace, a thread between the
20 statement given by Pratico about the white Volkswagen, and the
21 statement that Marshall gave on the Sunday afternoon as well. So
22 there was a thread there of concern about others trying to
23 manipulate the information given to the police.

24 He interviewed Terrance Gushue and Gushue whose evidence is
25 found in Volume 15, had in our submission some very critical

1 evidence to give to this Commission. Gushue says that he was
2 concerned about getting involved. And he was concerned about
3 Patricia getting involved, about being in the park that night.
4 So he said to Patricia, "Look it, I'm going to tell the police
5 if I'm interviewed that I wasn't there and you do the same
6 thing." And at 20 -- at page 2756 he says:

7 You told her that it was all right
8 to tell the police that you left
the dance together and that you
walked to her home but that you
9 didn't go through the park?

10 The question went on.

11 And, as far as you know, (did she)
12 go along with that and (is that)
the story that she did tell the
police?

13 Yes, I believe so.

14 Says Gushue.

15 And that's the story that you told
16 the police?

17 Yes, that's the story I told them.

18 So this story was given to the police some time before June 17th.
19 Gushue tells a story that he wasn't in the park at all. He then
20 tells an entirely different story on the night of the 17th, that
21 he was in the park.

22 Patricia Harriss denies -- has no recollection of telling
23 the police earlier that she was not in the park, but Gushue
24 believes that she did tell the police that, and certainly they
25 did discuss it. And certainly Gushue, her boyfriend, told her

1 that this was the party line to adhere to because that's party
2 line he was telling. So no wonder MacIntyre had some concern
3 about what he was being told by Patricia Harriss.
4 And indeed there's another concern that he had and that is
5 the Mary O'Reilley incident. In Volume 16 at page 129 (My
6 friend, Mr. Ruby referred to this this morning.) there's a note
7 that is in MacIntyre's handwriting. We're not really sure when
8 this note was prepared, although in our submission it was
9 prepared on the 17th of June, perhaps during the time that
10 Patricia Harris was being interviewed by Urquhart. In any event,
11 there's a suggestion there in the handwriting, and it's quite
12 difficult to decipher, but there's a suggestion that at school
13 that Patricia -- it was suggested to Patricia Harriss to -- that
14 if she was asked by the police to describe the grey-haired man.
15 And as I say Mr. Ruby referred to that this morning. MacIntyre
16 did not take the opportunity of pressing that view with the
17 Commission. He said he really couldn't recall. He couldn't
18 recall why he wrote this note. It would have been very helpful
19 if one wants to -- if MacIntyre was in the habit of fabricating
20 evidence, to say that "I got the note and I got the note as a
21 consequence of information given to us by Patricia Harriss".
22 That would have been helpful in a sense, but it would have been
23 wrong to do so. And MacIntyre did not take that oar that was
24 offered to him. He just said he couldn't assist the Commission
25 as to why that note came into effect. But if you examine the

statement given by Mary Patricia O'Reilley that is found in the same volume, in Volume 16 at pages 74 and 75:

> Did you discuss this matter with Patricia Harris?
>
> A. Yes.
>
> Q. Did you tell her about the grey-haired man?
>
> A. I told her there was supposed to be a grey-haired man there. I told her if she was questioned by the police she should tell about the grey-haired man that Junior had told me about.

Now that's what appears in the statement. And counsel have made submissions that MacIntyre just fabricated this completely, just pulled it out of the air and put it in the statement and somehow got Mary O'Reilley to sign it. Mary O'Reilley's evidence on this point is interesting and it's found in Volume 18 at page 3308. And she says:

> Somebody must have put it there because I didn't.
>
> Q. Why do you say that?
>
> A. Because I don't recall saying that at all.

Now that's the reason why she said it, "because I don't recall saying that at all.

> If I did, I did, but --

And the -- there's no more answer. "Because I don't recall saying that at all". And that's the reason she offers for saying that -- why she denied that this was part of her statement. "If

1 I did, I did, but --". Then there's dot, dot, dot.

2 Our submission is that this concern was circulating in
3 MacIntyre's mind at the time he interviewed Patricia Harriss.
4 This concern that a story was being fed that either came from
5 Marshall directly or came from his friends about other people, a
6 story that he was suspicious of. And in light of the information
7 before him at that time, it was appropriate for him to be
8 suspicious. Confirmed by Terrance Gushue giving a statement
9 earlier to the police that he wasn't in the park at all. And
10 perhaps Patricia Harriss making the same assertion. MacIntyre
11 accepted Terry Gushue's statement as being an accurate one that
12 night. He did not accept Patricia Harriss' first statement as
13 being an accurate one. Mistake in judgment? Was he wrong?
14 Well, there's arguments both ways. There was certainly
15 indication that in the youth community at that time a story was
16 being fed to the investigators that MacIntyre did not feel was
17 accurate. There was reason, therefore, for him to be forceful in
18 his interrogation of Patricia Harriss.

19 Patricia Harriss' recollection concerning who interrogated
20 her changes from time to time. The first example we have of it
21 is in the Preliminary Inquiry which is found in Volume 1 at page
22 26. And she was asked during cross-examination by Mr. Rosenblum
23 at page 26:

24 To whom did you first tell the
25 evidence about having met Donald, Jr., Marshall?

A. I don't know his name.

Q. Was it a police officer?

A. Detective.

Q. Sergeant MacIntyre here sitting beside Donald Marshall?

A. He wasn't the first.

Q. He wasn't the first. Was it Sergeant MacDonald sitting in the corner?

A. Yes.

Q. He was the first one you told it to?

A. Yes.

Not just Sergeant MacDonald, but Sergeant MacDonald sitting in the corner.

A. Yes.

Q. He was the first one you told it to?

A. Yes.

Q. How many times did you talk to him, Sergeant Michael E. MacDonald?

A. About two times.

Q. Who was the next person you spoke to, Sergeant MacIntyre?

A. Yes.

Q. How many times have you spoken to him about this evidence you're giving today?

A. Twice.

And then on page 27:

...the second interview with Sergeant MacIntyre, you gave a

1 written statement?

2 A. Yes.

3 Q. Were you asked to give a written statement before that?

4 A. I don't think so.

5 Q. Were you interviewed in the company of
6 Terry Gushue or separate from him?

7 A. Separate.

8 Q. On all occasions?

9 A. No, the second time we were together.

10 Q. The second time you were together
11 in the presence of Sergeant MacDonald or Sergeant MacIntyre?

12 A. Both.

13 Q. They were both present on the
14 second time?

15 A. Yes.

16 So no evidence about William Urquhart. You know, this was two
17 weeks after the statement was taken. No evidence of William
18 Urquhart being the individual who interrogated her originally.
19 When she came to give her statement to Sergeant Carroll in
20 1982, (That is found in Volume 34 at page 55.) she says -- I was
21 under the impression that she had identified someone there, but I
22 guess perhaps she has not. I guess there's no identification of
23 either MacIntyre or Urquhart in that statement. After that
24 statement was taken on March the 1st, she went with Wheaton and
25 Carroll down to Frank Edwards office and in Volume 17 at page

five, Frank Edwards notes:

> Wheaton and Carroll arrived. Patricia Harriss arrives a few minutes later. I question her in their presence. Says she can only recall Urquhart's name although others were present.

No identification of MacIntyre there at all. I'm not suggesting that MacIntyre wasn't there. I'm -- This is -- The point -- This is raised in connection with her own recollection.

At the Examination on Discovery that took place in 1984 she was not able to identify MacIntyre at all. And she was examined by my friend Mr. MacDonald in Volume 16 at page 2830. And her evidence upon Discovery was related to her.

> A. Well, I just remember that I was there. There was a lot of going on. Two police sergeants...

etcetera. And the question at the bottom of the page 2831:

> Q. And who was trying to do this?
>
> A. I remember Urquhart vividly and another man. I couldn't -- I don't know him yet. I wouldn't know him to see him.

Now the striking thing about that response is that that Discovery took place in Sydney in 1984 in October at which Robert Murrant, who has appeared before this Commission, was present on behalf of the C.B.C. asking questions and I was there asking questions on behalf of MacIntyre and MacIntyre was sitting beside me at the time she gave this response. And this appears in my cross-examination of Patricia Harriss. She says:

> I don't know him yet. I wouldn't

1 know him to see him.
2 And he was, you know, like a foot and a half away from her or two
3 feet across the table from her, so she was not --
4 Q. You can't identify him as being John MacIntyre?
5 A. I couldn't identify him now.
6 At page 2832. So there is a problem concerning identification on
7 her part.
8 She volunteered to Sergeant Carroll that Terry Gushue was
9 also brow-beaten at the time the statements were taken in 1971,
10 and yet Terry Gushue never told her that. This was something
11 again that she theorized she -- she thought might have happened
12 but she was never advised by Terry Gushue that he was brow-
13 beaten. And there are other points in her recollection that one
14 is surprised at. She doesn't recall her mother being there at
15 all. Her mother says she was there for an hour and a half in
16 the room with her. And other problems with her recollection are
17 found in the brief -- in our brief between pages 214 and 226.
18 The only other direct comment I want to bring to your
19 attention concerning her evidence was that relating to her
20 previous record and again I suppose this is the kind of minor
21 point that my friend alluded to yesterday. It's not a
22 significant point in itself but it does show the unwillingness of
23 a witness to be frank. Mr. MacDonald at about ten to ten in the
24 morning after we sat at -- opened at nine-thirty in the morning.
25 Twenty minutes later he says:

1 Have you ever had an occasion to be
in difficulty with the police?

2 And I'm now reading from page 221 of our memorandum:

3 Q. Have you ever had an occasion to be in
4 difficulty with the police?

5 A. No, nothing of any importance or
anything.

6 Q. Have you ever been charged
7 yourself?

8 A. Again years ago for a small shoplifting
charge.

9 Q. By years ago, can you help me on that?
10 What does that mean?

11 A. Oh, dear, I don't know how many years
ago. It's awhile back.

12 And then my friend Mr. MacDonald:

13 My Lord, we might as well take just
14 about a five minute break to check
some background information.

15 Now this is at ten to ten in the morning when Patricia Harriss
16 had been on the stand for twenty minutes and I don't think it's
17 an unfair assumption on my part to suggest that perhaps in part
18 that break was given to assist the witness in recalling her own
19 record. But at page 222, Mr. MacDonald obviously was not going
20 to let Patricia prevaricate on this so he just lead her through
21 her various offenses. He put them all to her, one, two, three,
22 four, five, and obviously had and indeed did have papers in his
23 hand when he was reading off this. So she was able to respond,
24 yes, yes, yes, yes, yes. And even that, there was a further
25 page of offenses after an R.C.M.P. search was done which she did

1 not refer to and that was brought to her attention on pages 224
2 and 225 of our brief. Again not a significant point but I point
3 this out to show in some ways she was an unsatisfactory witness
4 and not as forthcoming as perhaps has been suggested.
5 My friend referred to -- in his brief to the law with
6 respect to the necessity to show mens rea on the part of the
7 accused in a charge of this kind and I'll just try and obtain
8 the page. I think it's on page 64 and 65. Yes, 64 and 64 where
9 my friend has referred to. Regina v Walker, a 1972 decision of a
10 Provincial Court Judge in Ontario, and Regina v Silverman, a 1908
11 decision. I'm not going to get into a contrary submission
12 concerning the obligation to prove mens rea, but I do suggest
13 that there certainly is other authority that is more persuasive
14 than the Provincial Court Judges decision in 1972, and this is
15 Regina v Savinkoff, a decision of the British Columbia Court of
16 Appeal, 1962 -- 1963, Volume 3, Canadian Criminal Cases at page
17 163. This is a two-one decision, Mr. Justice Sheppard dissented,
18 Mr. Justices Tysoe and Wilson delivered the majority judgment and
19 as I read their decision, mens rea is a necessary ingredient.
20 That is in the context of what we're dealing with here.
21 MacIntyre would have had to know that and not only was he
22 pressuring these people to say things, but that he knew that what
23 they were saying was wrong and not in accordance with the facts.
24 So -- and also, a New Brunswick Court of Appeal decision, Regina
25 v Belliveau, 1978, 42 C.C.C.(2d), at page 243, where this is a

1 three man court, the Appeal Division of the New Brunswick
2 Supreme Court. Mr. Justice Ryan gave the unanimous decision of
3 the Court, Mr. Justices Limerick and Bugold sided with him. And
4 again, from my reading of that case, mens rea is a necessary
5 ingredient. So there is a difference between the law as my
6 friend and I see it.
7 In submission with respect to the Patricia Harriss
8 interrogation and statement, if MacIntyre did lean on her, if she
9 was kept too long, in my submission there was adequate reason for
10 so doing. Adequate reason because of the mis-truths that had
11 been given to him in the past by Chant, Pratico, Gushue, perhaps
12 Patricia Harriss. The information they communicated in this note
13 about Mary O'Reilley.
14 The next and final point that I wish to deal with is Harry
15 Wheaton and the incident that in our submission occurred on April
16 16th and that has been maintained by Wheaton that occurred on
17 April the 26th. This is found in our brief at pages 274 to 315.
18 Wheaton's categorical statement, I'm suggesting -- I'm not
19 suggesting, I'm stating the man perjured himself, was given in
20 January before this Commission. The excerpt is found at page
21 274. And he was given an opportunity after the lunch break to
22 amend his evidence in any way and he was not prepared to do so,
23 he knew that it was a very serious charge and he said that his
24 opinion was backed up by a Mr. Boudreau, a solicitor in Sydney,
25 who appeared before this Commission as well. It is our position

that there was a meeting between Wheaton and MacIntyre on Friday, April 16th at which time the Patricia Harriss statement was given to Wheaton. So that there's no confusion about the matter, it is also our position that there was also a meeting on April the 26th at which time Wheaton appeared in response to the direction from the Attorney General, which was signed on April 20th. Now there's a great deal of difference between the positions presented by the two opposite parties. If MacIntyre gave the Patricia Harriss statement on April the 16th, he was not attempting to act in defiance of an order from the Attorney General. But if he gave it on the 26th, and if he threw it on the floor and did not give it to Wheaton when Wheaton originally appeared in his office, but threw it on the floor and tried to conceal it, that was a criminal offense. That was a very, very serious matter and one for which there would appear to be no excuse.

But, in our submission it didn't happen that way at all. And it didn't happen that way when one analyzes exhibit 88 to 90, and it didn't happen that way when you read the evidence of Frank Edwards. And when you follow the paper trail of what in fact occurred on Friday April 16th and what was given to Wheaton at that time and indeed there's not only support from Frank Edwards, there's support from Steven Aronson, Marshall's lawyer. Because he talked about this with Harry Wheaton and his evidence if found in Volume 55 at page 10150 and 10151.

1 Q. My recollection is that, just to put
2 this in context, I'd say that Staff
3 Wheaton and I were perhaps in
4 conversation with one another two to
5 three times a week throughout this.
6 So, I'd be a little weary of trying to
7 pin it down as to when it exactly had
8 transpired, but it occurred shortly
9 after Staff Wheaton and another R.C.M.P.
10 officer, who I believe may have been
11 either Scott or Christian, the head of
12 the detachment of Cape Breton. In any
13 event, Wheaton and another R.C.M.P.
14 officer attended to Chief MacIntyre's
15 office, were in conversation with him
16 about whether they had received all of
17 the statements that had been made by the
18 witnesses in 1971. That they were told,
19 yes, that they were starting to turn
20 around to say "Goodbye" and they noticed
21 something slip either from MacIntyre's
22 hand to the floor or from his desk to
23 the floor.

24 "Slip" -- there. There's nothing about conceal there, "slip."

25 They left his office. They spoke
to one another briefly indicating
that, "Maybe we should go back and
see what it is that fell on the
floor." They went back into his
office, asked him what it was that
fell on the floor. Wheaton advised
that MacIntyre was somewhat
embarrassed by it and gave them--
picked (them) up and gave them the
statement. And, subsequent to that
they felt that at point, he had not
been altogether cooperative and
that they were somewhat uncertain
now, because of the document
falling off the desk; did they
really have all the statements
given by all the witnesses and as
a result...

As a result...

...they made a request to the
Attorney General's Department or

1 reported it to the Attorney
2 General's Department and as a
result this letter was issued.

3 Question. (Mr. Orsborn).

4 Q. So, is it your evidence that Staff
5 Wheaton advised you that the letter of
demand was written at least partly
6 because of this incident of the
statement falling on the floor?

7 A. That's my understanding, yes.

8 Q. Do you have a recollection now of Staff
Wheaton telling you that?

9 A. The time when Staff Wheaton told me
10 that, he did not mention any letter. He
just indicated, I believe that there
11 was... that they had indicated their
request, and I'm not sure whether it
12 was Wheaton or Frank Edwards that
formally told me that there was an
13 actual letter written and when I
received a copy. So...

14 Q. Staff Wheaton, I'm sorry.

15 A. I'd be somewhat uncertain. I think it
16 was Frank Edwards, but as I say, my
recollection is that it was at least in
17 part because of the incident that they
made the request to the Attorney
18 General's Department. In other words,
that the letter came subsequent to the
19 incident that I've spoken of concerning
Chief MacIntyre.

20 Now that's what Aronson said.

21 You'll recall the evidence of Michael Harris. Michael
22 Harris said:

23 It's equivocal. I mean, equivocal
24 to the extent that I didn't even
bother talking to Herb Davies about
25 it, it was that wishy-washy.

1 Reference is made to Harris's evidence, in our brief and I'll
2 just find the appropriate pages. On page 295. About three
3 quarters of the way down the page.

> 4 Apparently the way Wheaton left it
> 5 with Michael Harris was that the
> incident could have involved an
> 6 accidental dropping or an attempted
> concealment. Wheaton did not see
> 7 it as an attempt at obstruction.
> The matter was so "interpretive"
> 8 that Harris did not even feel it
> worth while to bother trying to
> interview Herb Davies about it.

9 The evidence of Edwards is in our submission critical and
10 his evidence is found at page 293. Wheaton reported -- testified
11 that, "I knew I reported it to Frank." So there's no -- there's
12 no dispute about the fact that Wheaton and Edwards had a chat
13 about this. And Edwards' notes, and it's not just Edwards' notes
14 that he relies on, Edwards says that, you know, "I recall this."
15 He was definite about it and his notes are a matter of support.
16 But it's not as if he just relied upon his notes for what, in
17 fact, happened. He had a distinct recollection about this. And
18 unfortunately, one has to, sort of, go through the scenario as to
19 what happened on the 16th before you get to the point. Indeed,
20 you have to go back earlier in the week. If your Lordships could
21 turn to Volume 17, Frank Edwards' notes, at page 7. I think it
22 would be helpful to follow my argument if you could have this in
23 front of you.
24 COMMISSIONER EVANS:
25 The volume?

1 MR. PUGSLEY:

2 Volume 17, Frank Edwards' notes.

3 COMMISSIONER EVANS:

4 Right.

5

6 MR. PUGSLEY:

7 At page 7. 17. At page 7. The notes were made on Monday, April
8 the 19th as are indicated in the left hand column, beginning at
9 nine a.m., and they refer to Friday, April 16th, '82.

10 Called (Gordon) Gale in the a.m. to
11 ask him about Chief MacIntyre's visit.

12 MacIntyre had been to see Gordon Gale probably on the Wednesday, probably on the 17th.

13 I had been advised the day before
14 by Wheaton that MacIntyre had been to the Department. Gale advised,
15 Chief had been there with Marshall file. Two points struck Gale.

16 The first one about Mitchell Sarson; the second point is
17 important.

18 The Chief had produced statements
19 from Ebsary's wife, son and daughter...

20 The reference to daughter is obviously wrong. He did not have a
21 statement from the Donna Ebsary, the daughter. These were
22 statements taken on November 15th, 1971 by MacIntyre when Ebsary
23 and Mrs. Ebsary and Greg came to the Police station after Jimmy
24 MacNeil showed up.

25 The Chief had produced statements
from Ebsary's wife, son and

> daughter...

That's the November '71 statements.

> ... which were opposed to what they were saying now.

"Saying now", being the statements that Wheaton had taken within the last month.

> I said that if such was the case the probable explanation was that they were living in fear of Ebsary at the time. Told him I was concerned about the fact that Chief was producing statements now which neither I nor the R.C.M.P. had know about before.

Interesting that the Chief had not delivered the November '71 statements of Mary Ebsary and Roy Ebsary to Wheaton or Scott. They didn't have them up to this time. Reinvestigation did not have those November '71 statements. It's interesting for a couple of reasons. It's interesting because it just shows that MacIntyre did not give everything over, because he was never asked. And it's also interesting because those statements help demonstrate Roy Ebsary's innocence and hence Marshall's guilt. So if MacIntyre was "dealing a deck" to Wheaton that was one-sided, namely consistent with Marshall's guilt, MacIntyre didn't put everything in the deck that he could have or should have if he was just trying to deal this party line. Because Mary Ebsary's statement in November '71 in effect says: "I don't think my husband could have done this. I don't think Roy could have done this." So this evidence was consistent therefore with Roy

Ebsary's innocence that MacIntyre had not given it over to Wheaton.

So, I make the point that MacIntyre did not just give stuff to Wheaton that he thought was consistent with MacIntyre's theory of Marshall's guilt. However, the further point is that the investigation didn't have those statements at that time. And then near the bottom of the page:

> Significant that Chief left nothing with Gale.

So, the Chief did not leave the Mary Ebsary and the Roy Ebsary statements with Gale, he took them with him. So, if you turn to the next page, page 8, Edwards says:

> After call with Gale, phoned Wheaton who confirmed that they had known nothing about earlier statements by Ebsary's wife and family.

Wheaton says, "I don't know anything about those."

> Said that on the two occasions when they briefed MacIntyre they had asked him whether he had anything further which might help the investigation, he said no.

So he phoned Wheaton and says, "We don't have these statements." Well, what happened was that Wheaton went that afternoon, the afternoon of Friday, April 16th, to MacIntyre and among other things, he got copies of the Greg and Mary Ebsary and Roy Ebsary statements. And that is evident when one turns to page 9. At the top of page 9 in the -- about five lines from the top: While on the phone ...

1 That's Wheaton...

> 2 ...told me that he and Herb Davies
> 3 had gone down to see Chief
> MacIntyre late Friday p.m. and had
> 4 spent a couple of hours with him.
> After being pressed, Chief turned
> 5 over previous written statement by
> Patricia Harriss in which she
> 6 described someone matching Ebsary
> (Wheaton said Chief went scarlet
> 7 when pressed about this statement)
> - also turned over November '71
> statements of Mary and Greg Ebsary.

8 So the scenario is this then: that Frank Edwards phones Gordon
9 Gale on Friday morning and Gale says, "MacIntyre was down to see
10 me a couple of days ago and he started giving me information I
11 didn't know anything about. I didn't know about the Greg and the
12 Mary Ebsary statements." And Edwards says, "Gee, I didn't know
13 anything about them either." Edwards gets on the phone, phones
14 Wheaton and says "Harry, MacIntyre is now producing statements
15 that I haven't seen before." Wheaton says, "I haven't seen those
16 statements either." That afternoon, Friday afternoon, Harry
17 Wheaton goes down -- goes down to MacIntyre to get the statements
18 and gets them, on the Friday afternoon. Not only does he get
19 them, he gets Patricia Harriss, number one, on Friday, April
20 16th. Four days before the order of the A. G.. It's evident,
21 and I'm not going to bore you with it, but in our brief it's
22 evident that this was the first time that Wheaton had the Greg
23 and Mary Ebsary statements because he went to see them on Monday,
24 April 19th. Wheaton went to see Greg and Mary Ebsary on Monday,
25 April 19th, in the evening. If you examine the statements he

1 took at that time, they refer to the November, 15th '71
2 statements because that was the first opportunity Wheaton had to
3 present those statements to him -- to them. Because they only
4 got them on Friday afternoon from the Chief, he saw them Monday
5 night and in the statements taken Monday night he refers to the
6 statements in November '71 because he had just got them. He just
7 got them on the Friday.

8 So the note of Edwards, not only did Wheaton get -- it is
9 the reason for the meeting on Friday afternoon, April 16th. The
10 reason for the meeting was not to get Patricia Harriss, number
11 one, the reason for the meeting was to get Greg and Mary Ebsary.
12 In addition to that, he got Patricia Harriss, number one.

13 Also...

14 A third of the way down the page.

15 ...also told me that Herb Davies
16 had noticed Chief slip some of the
information on floor behind desk.

17 Slipped. Slipped some of the information.

18 Believes it was some information
19 with transcript attached relating
the threats by Christmas against
Pratico.

20 I mean, inconsequential stuff.

21 Believes (that) there was a charge
22 against Christmas at the time.

23 So the documents slipped on the floor, according to Frank Edwards
24 as to what he was told by Harry Wheaton, was not Patricia
25 Harriss, number one, it was inconsequential stuff. It was Thomas

1 Christmas and threats against Pratico. Nothing of critical
2 significance to the reinvestigation at all.
3 Now, that evidence in our submission is -- it's critical.
4 It's critical for several reasons. It's critical because it
5 shows that there's no substance to Wheaton's charge that
6 MacIntyre should be charged with perjury. It's critical because
7 it shows Wheaton's antipathy to MacIntyre and I'll develop that
8 further.
9 There's another reference in the statement as well, in the
10 diary of Frank Edwards where he talks with Scott, I believe.
11 Yes, on Monday, April 19th, on page 10, at the bottom of the
12 page -- again one thirty p.m.

13 > Wheaton arrived with statements of
> Ray, Greg and Mary Ebsary.

14 Now this is the first time that Frank Edwards saw them, because
15 Wheaton just got them Friday afternoon. So, on Monday, April
16 19th:

17 > Wheaton arrives with statements of
18 > Ray, Greg and Mary Ebsary dated
> November 15th, '71; Donna Ebsary,
19 > 17th April, '82; Patricia Harris,
> 17 June, '71. Note: Patricia
20 > Harriss not complete -- i.e. may
> have been a (page two).

21 No question what statement that was. It was Patricia Harriss,
22 number one. It was the unsigned statement, it's not complete.
23 Three lines later.

24 > Note: This statement was taken
25 > before Harriss' second statement...

1 So there's no question what statement what we're talking about
2 on the 19th. And this note was made on Monday, April 19th and
3 Frank Edwards says he was given Patricia Harriss, number one, the
4 incomplete, unsigned statement on Monday, April 19th, one day
5 before the Attorney General's order was issued. Six days before
6 Harry Wheaton says he got it when it was slipped on the floor.
7 Page 11, the next page. Again, Monday, April 19th.

8 Inspector Scott called just as
9 Wheaton was leaving. Said he was
concerned about Harriss statement.

10 Scott called him. Scott knew about the Harriss statement on
11 Monday, April 19th.

12 Said he was concerned about Harriss
13 statement.

14 That can only be the first, unsigned, incomplete statement of
15 Patricia Harriss.

16 You will recall Wheaton's reports. Wheaton wrote reports in
17 the month of May, I believe two, and perhaps June of 1982 and
18 not in any of those reports does Wheaton refer to this incident.
19 He's asked to comment on MacIntyre -- well, what he says was: He
20 attended at MacIntyre's office and "as per instructions", he
21 received the file material from MacIntyre. That is, "per
22 instructions" of the A.G., in the letter of April 20th and
23 that's contained in our brief. But there's not a tittle about a
24 comment in Harry Wheaton's reports at any time, in any year, '82,
25 '83 or '86 about MacIntyre hiding things on the floor. He's

1 asked to comment on MacIntyre's activities as a Police officer,
2 etcetera, etcetera, and not once does he mention this. I invite
3 you to examine his responses to the questions: Why didn't he?
4 And in our submission, they're simply not acceptable at all.
5 Wheaton at one point said:

> 6 ...all I can say to you, sir, is I,
> 7 in so far as Patricia Harriss' statement, there is confusion
> 8 whether it was the 16th or the 26th, I believed. And I wished I
> could clarify it.

9 I wished I could clarify it.

> 10 I've tried with Mr. Orsborn, I can
> 11 try with you. But I can tell you I do not to the best of my own
> 12 personal recollection, I think it was the 26th and I base it on a
> 13 paper (trail). And I base it on the fact that I submitted a report
> 14 stating that.

15 There's no report that I'm aware of that Harry Wheaton says he
16 got the Patricia Harriss statement on the 26th.

> 17 However, I can't be clear in my own mind, sir.

18 Now that comment is found on page 310 of our brief and I contrast
19 that equivocal response to the very fierce allegation.

> 20 I'm not suggesting, I'm stating
> 21 this man perjured himself.

> 22 It would be easy to dismiss Wheaton's outburst on the ground
> 23 that he craved public recognition .

24 And that on the ground that he was a glory seeker because there's
25 all kinds of evidence to indicate that he was.

> He was familiar with the R.C.M.P. written guidelines concerning dealings with the media, yet he granted interviews with the press while Ebsary was still before the Courts. He confirms that he had no permission from any superior to speak with Heather Matheson, yet advises that: "I do recall I spoke fairly openly. I quite properly answered her to the best of my knowledge."

And I'm reading from page 311 of our brief.

> He testified that he spoke with Michael Harris on about eight occasions, had lunch a few times with him, drove down to Windsor to spend three or four hours with him over lunch with Harris. "Basically, I endeavoured to assist him in the writing of his book any way he wanted."

And you'll recall, that Harry Wheaton is one of the persons in the frontispiece who is thanked by Michael Harris for his cooperation, etcetera.

> One contrasts these (communications with the press) with a statement (to this Commission): "The general rule of thumb, yes, My Lord, is you do not speak of a case while it is before the Courts and I've always tried to adhere to that."
>
> His calculated comment...

And I say calculated.

> We were able to place Mr. MacLean at the front door of the restaurant in a blinding snow storm at approximately four to five o'clock in the morning when he knew the charges...

When Harry Wheaton knew the charges...

> ... had not been laid against MacLean. That the insurers had paid up and indeed that it was not four to five in the morning...

It was ten o'clock that he later acknowledged in cross examination. There, and as I say there, it's easy to explain and that's the explanation that jumps off the page when you look at Wheaton's evidence, as to why he said and why he did what he did. But I think there was a more fundamental and important explanation for Wheaton's evidence. And it is that Wheaton required a villain and -- he required a villain, he needed to put the blame on someone and MacIntyre was the easiest target. And this Commission has respectfully submitted, must not seduced by the same siren call that Harry Wheaton was seduced by. It's human nature to wish to resolve problems, to try to find solutions, to package things neatly. And that's the human condition. We all try and find solutions. As lawyers we're trained to find solutions. But our position is, and our submission to this Commission is, that there are no villains in this tragedy, but rather a number of completely unrelated events that happened to coalesce at a point in time and combine to send Donald Marshall to prison and keep him there. There's no villain. There's no villain in here. You can search for it but there's no villain. There's a number of incredible events that coalesced at one point in time and it's tragic. And I agree with my friend, Mr. Ruby, it is a tragedy of very significant

1 proportions. And I agree with my friend, Mr. MacDonald, but
2 there is no villain here. But that's what Wheaton tried to find.
3 He tried to find a villain.
4 And support for Wheaton's prejudice against MacIntyre is
5 found when one considers the points that I've raised on pages 312
6 to 315 of the brief. When asked why Maynard Chant gave his first
7 incorrect statement of May 30th to MacIntyre, Wheaton said "He
8 was pressured by the sydney City Police.", but that's not so. I
9 mean, no one said that. Wheaton was just ready to say, you know,
10 why did Chant give a wrong statement. Pressure. Pressured by
11 the Sydney City Police. Not true. Chant says he wasn't
12 pressured by MacIntyre at all on May 30th. The pressure, if any,
13 he felt was because of Donald Marshall, but not because of John
14 MacIntyre but Wheaton -- Wheaton was never told that by Maynard
15 Chant but that's what he was prepared to tell his superiors in
16 his first report. He mentioned the Sydney City Police should
17 have known Pratico was a patient at the Nova Scotia Hospital and
18 should have communicated that information to the Crown but
19 Wheaton acknowledged on cross-examination that if Pratico's
20 physicians knew he was going to be a key witness at a murder
21 trial, that that would have been a very relevant factor.
22 The third point is Patricia Harriss and her allegation that
23 Terry Gushue was browbeaten. In reviewing the statement from
24 Gushue by the police, there is no support for this allegation.
25 Yet Wheaton doesn't pursue that.

1 Wayne Magee advised Wheaton that MacIntyre did not exercise
2 any undue pressure on chant in taking the statement of May 30th.
3 Now this was a very, very key statement supporting MacIntyre,
4 that MacIntyre did not exercise any pressure on Chant but it's
5 not in the statement. I mean it's not -- Magee told Wheaton this
6 but Wheaton didn't put it down in Magee's statement which is an
7 extraordinary omission, I suggest, because it was a very
8 important statement by Wayne Magee.
9 And then perhaps the most bazaar of all where Wheaton
10 maintains that Wayne Magee was not present at the taking of the
11 second Chant statement in Louisbourg on June 4th. Wheaton states
12 that it was very important who was there. Of course it was
13 important. It was important to insure that there was no improper
14 pressure by MacIntyre but Wayne Magee was present and everyone
15 who was present at that taking says that Wayne Magee was present.
16 John MacIntyre says he was present. Urquhart, I think, impliedly
17 says that Wayne Magee was present. Wayne Magee says he was
18 present. More important Beudah Chant says that he was present
19 and the icing on the cake, Maynard Chant said that Wayne Magee
20 was present. So that everyone said that Wayne Magee was present
21 who was at the meeting except Harry Wheaton who wasn't at the
22 meeting but Harry Wheaton affirmed that he did not believe that
23 Wayne Magee was present. Why? Why in view of this evidence did
24 Wheaton maintain that? Why would he not put down in Wayne
25 Magee's statement that MacIntyre didn't pressure Chant? The

1 conclusion that Marshall was innocent that Wayne -- that Wheaton
2 arrived at on February 17th before he interviewed Marshall in
3 Dorchester, I suggest, is a -- is an example of tunnel vision.
4 Wheaton, too quickly, without sufficient evidence, without
5 sufficient investigation concluded that Marshall was innocent
6 because he'd only taken three statements at that time. He'd
7 interviewed a couple of others but he'd only taken three
8 statements. James MacNeil was one statement. Byron Sarson was
9 another, and Maynard Chant was the third. This was before he
10 interviewed Marshall. He concluded Marshall was innocent. He'd
11 taken three statements. James MacNeil, who Al Marshall, the
12 R.C.M.P re-investigator of 1971, described as "subnormal
13 intelligence, slightly mental; I have no doubt my mind he's not
14 telling the truth." and didn't even bother taking a statement
15 from him. Secondly, Byron Sarson, with whom Wheaton himself was
16 not impressed, -- Wheaton says he wasn't impressed with this
17 fellow. and thirdly Maynard Chant. That's all he had. Yet he
18 concluded that Marshall was innocent and I submit that that was
19 tunnel vision. That was -- He was guilty of the same thing that
20 he alleges MacIntyre was guilty of.
21 And there are other examples as set forth on page 314 and
22 315 containing instances and reports of Wheaton or evidence he
23 gave that not borne out by the facts all matters that cast
24 MacIntyre in a bad light. It's a one-sided assessment. If there
25 were two opportunities to conclude what was accurate and one of

1 them cast blame on MacIntyre, that's what Wheaton took because
2 and I'm not -- and I don't -- I'm not suggesting at all that
3 Wheaton was bad or evil or was corrupt or anything of those
4 things. I'm not. He was a diligent investigator and he worked
5 hard but he came to conclusions that were not supported by the
6 evidence; and like many people, he fell in to the trap of having
7 to try and find a solution. Perhaps this stuff went to his head.
8 It was heady wine he was drinking of. He was being courted by
9 the media across Canada. He was going to be quoted in books. He
10 was giving interviews to a guy who was writing a book on this
11 matter. Perhaps it was he was unused to that kind of limelight.
12 Whatever the reason, it doesn't really matter but he had to find
13 a solution and the solution was MacIntyre, the villain.
14 My Lords, if I could have five minutes I could finish very
15 quickly.
16 MR. CHAIRMAN:
17 Five minutes?
18 MR. PUGSLEY:
19 Please, a five minute break and I could finish very quickly.
20 INQUIRY RECESSED AT 3:10 p.m., AND RECONVENED AT: 3:32 p.m.
21 MR. CHAIRMAN:
22 Mr. Pugsley.
23 MR. PUGSLEY:
24 One final comment, My Lord. That is to thank the three of you
25 for the opportunity of appearing before you and for the manner in

1 which this Inquiry has been conducted. It's been a very distinct
2 pleasure to appear before you.
3 Thank you.
4 MR. CHAIRMAN:
5 Mr. Murray?
6 MR. MURRAY:
7 My Lords, I appear before you for the last time on behalf of
8 William Urquhart.
9 In his career as a police officer, Bill Urquhart endeavored
10 to be fair and I suggest he endeavored to do his duty and it's
11 respectfully suggested that the public of Nova Scotia and this
12 Commission can hold no one to any higher standard of human
13 conduct and William Urquhart is prepared to have his record
14 tested on that basis.
15 There are a number of allegations about William Urquhart at
16 the commencement of these hearings that suggested that he was a
17 major player in these events. I am here today to suggest to Your
18 Lordships that what the evidence has shown is that he, in fact,
19 was not a main player. Although Commission Counsel in their
20 brief and in their submissions yesterday regarded him as a main
21 player, I suggest, that a review of what happened in the
22 investigation shows that he was not.
23 In exhibit 16, which is the red volume 16, we know that 29
24 statements were taken from the 30th of May until the 15th of
25 November by the Sydney City Police Force. On only four of those

1 statements were -- was William Urquhart together with John
2 MacIntyre. On three more, it's been suggested that William
3 Urquhart was present because his name is on the typed form of the
4 statement but not on the handwritten. William Urquhart took four
5 statements himself between June 2nd and November 15th. So that's
6 a maximum total of 11 statements and yet Commission Counsel
7 asserts that William Urquhart was present with Mr. MacIntyre
8 during the course of most of the investigation. I suggest that
9 Mr. Urquhart can not be held to be a main player in this. He had
10 nothing to do with securing exhibits before the trial. He has
11 never testified in any court and never been required to testify
12 in any court with respect to the Marshall matter.
13 In the written brief submitted on behalf of William
14 Urquhart, we have taken pains to go at length through a narrative
15 analysis of the evidence as it relates to William Urquhart from
16 1971 to 1982, and I do not propose this afternoon to go through
17 the various parts of that narrative and deal with the criticisms
18 which have been made about Mr. Urquhart at each particular
19 juncture. However, I trust that Your Lordships will weigh the
20 submissions in the written submission which I do not refer to
21 orally today.
22 This afternoon I wish to concentrate primarily on the
23 submission of Commission Counsel yesterday that when it comes to
24 a prima facie case of criminal liability, Bill Urquhart has to
25 sink or swim with other individuals. As Commission Counsel

1 appropriately noted yesterday, an allegation of criminal
2 wrongdoing is not to be made lightly and I would strongly support
3 that position and as a result respectfully suggest that you will
4 need more and indeed that you will do more than conclude that
5 William Urquhart stands or falls on the basis of conclusions
6 about other individuals.

7 My friends have spoken a great deal about fairness and
8 indeed Commission Counsel in opening remarks to this Commission
9 in September of 1987 commented at some length on the doctrine of
10 reasonable doubt and the presumption of innocence in criminal
11 matters. We in this forum today are not finding guilt or
12 innocence. William Urquhart must therefore be entitled to the
13 presumption of innocence at this point.

14 When a suggestion of criminal responsibility is made
15 particularly outside a forum that's been established by
16 Parliament in the Criminal Code, I submit we should be very
17 exact, very sure of our facts, and very sure of the basis of
18 liability that is being proposed.

19 Section 21 of the Criminal Code clearly establishes that you
20 commit an offense when you do it yourself, if you knowingly, and
21 that is important, encourage or assist someone else in committing
22 it, or if you were -- embark on some common unlawful purpose with
23 another person when you knew or ought to have known that some
24 other offense is likely to be committed along the way. I dealt
25 with Section 21 of the Criminal Code at page 22 to 24 of the

1 brief and I submit to this Commission that if you conclude that
2 there is some basis to recommend criminal charges be laid or
3 considered against William Urquhart, a necessary step will have
4 to be the basis upon which liability would be imposed.
5 John Pratico told you there was no significance to William
6 Urquhart's presence at the taking of the June 4th statement and
7 that William Urquhart made no act or gesture or said anything
8 which affected what Pratico told John MacIntyre that day. That
9 appears in transcript volume 12 pages 2217 to 2219. I suggest,
10 respectfully, that unless Your Lordships find some hint in the
11 evidence that William Urquhart knew John Pratico was going to lie
12 on June 4th and attended to insure that John Pratico did lie,
13 there is nothing, I suggest, on which to base criminal liability
14 on William Urquhart in relation to the Pratico statement. And
15 indeed Commission Counsel has not suggested so but other counsel
16 have. And other counsel have, on the basis that Mr. Urquhart
17 even though he may have done nothing, by his presence, and as I
18 understood the statement this morning, quote, "I am making sure
19 the authorities will not respond by being there." Well, that's
20 not what Mr. Pratico said. It may have been what Mr. Chant
21 hinted at but it certainly was not what Mr. Pratico stated. And
22 so on the basis of the evidence, I suggest, that there's no basis
23 to criticize William Urquhart in relation to the John Pratico
24 statement.
25 On Chant, Commission Counsel's brief did indicate on the

1 basis of Urquhart's presence and the assumption that Chant's
2 statement was largely put into Chant's mouth by John MacIntyre on
3 June 4th, quote, and this is from page 67 of the Commissions
4 brief:

5 > Urquhart would have to share
6 > equally in any blame to be
> attached to that conduct.

7 I have reviewed the evidence of Maynard Chant, as I am sure Your
8 Lordships will, specifically in relation to the most specific
9 point and the most material point from Maynard Chant's June 4th
10 statement, and that's, of course, the identification of Donald
11 Marshall, Jr., as the person that does the stabbing. At the
12 preliminary and the trial and before this Commission nowhere--
13 and indeed in any of the other times he's testified, nowhere does
14 Chant state that the police told him on June 4th or at any other
15 time that Donald Marshall stabbed Sandy Seale. Indeed he was
16 specifically asked in 1971 by Mr. Rosenblum and at the trial
17 transcript, page 36, (That's in volume one.) Maynard Chant denied
18 that as he denied it to this Commission at transcript volume 6,
19 page 934.

20 Without some prior knowledge on Mr. Urquhart's part or some
21 encouragement by William Urquhart, I respectfully suggest there's
22 no basis, no basis to consider criminal liability on his part in
23 relation to the Chant statement. The Commission Counsel did
24 suggest yesterday and I noted his exact words, "If he..."
25 meaning Urquhart, "...thought something improper was happening,

1 he should have reacted." With respect, that's not a basis for
2 criminal liability and again I refer to pages 22 and 24 of my
3 brief. If what occurred happened as Commission Counsel suggests,
4 it might be morally reprehensible but it is not criminal, not the
5 basis for a criminal charge.

6 I suggest with respect to the Chant statement that even the
7 idea that William Urquhart was morally reprehensible is
8 untenable, but I detailed my reasons for that in the brief and
9 will not go through them this afternoon. Those would be detailed
10 at page 27 to 58 of the written brief.

11 Patricia Harriss. This was the only instance of positive
12 wrongdoing alleged to have been committed by William Urquhart
13 himself. It's my submission, detailed in the brief and in
14 questioning and Patricia and Eunice Harriss at these hearings,
15 two facts. One, William Urquhart wrote down everything Patricia
16 had to say at 8:15 p.m. which was her first statement, and two;
17 William Urquhart did not participate in any further interview of
18 Patricia Harriss that night. If these facts are considered to be
19 possible there would be no basis, I would suggest, upon which to
20 consider that William Urquhart has any criminal liability here
21 either.

22 I would like to highlight for you this afternoon, as I have
23 attempted to do in questioning various witnesses, the facts
24 which make this position not only possible but probable in any
25 determination of the facts. The original 8:15 statement is

1 exhibit 55 at these hearings and it's -- as you can see it's a
2 long statement form on legal size paper that has been folded.
3 These are not the kind of sheets that Eunice Harriss says she saw
4 being crumpled up at the police station. She says that they were
5 smaller than that, and that's at transcript volume 16 pages 2959
6 to 2960. The other interesting fact about exhibit 55 is that it
7 is in William Urquhart's handwriting. If this Commission is to
8 accept the evidence of Eunice Harriss and perhaps Patricia
9 Harriss, that she was interviewed exclusively by John MacIntyre
10 and William Urquhart, then this is the only statement in the
11 course of the whole investigation or at any time where John
12 MacIntyre allows William Urquhart to actually transcribe the
13 statement. It's inconsistent with every other statement that
14 William Urquhart and John MacIntyre took together. It is
15 consistent with the statements that William Urquhart took with
16 Red Michael MacDonald, and I ask you to look at the Barbara
17 Veniot statement in volume 16, page 74, or rather page 83.
18 There's also William Urquhart's habit, I suggest, to
19 transcribe the statement when he was in the presence of Michael
20 J. MacDonald as happened with John Joseph MacNeil's statement
21 which is the first statement taken in the reinvestigation and
22 that's at page 172 of exhibit 16.
23 The other interesting fact about exhibit 55 is that it
24 exists. It hasn't been crumpled up. It hasn't been thrown away.
25 It hasn't been ripped up. It describes two men. It says--

1 talks about two men and then one is described. The statement
2 then continues with further questions. The statement, unlike the
3 evidence of Patricia Harriss, unlike the evidence of Eunice
4 Harriss, continues after mention of the two men is made and the
5 matter goes on to other subjects. It's not a point of getting to
6 the two men and at that point the statement gets crumpled up and
7 thrown away and there's a starting again.

8 My friend, this morning, suggested that clear evidence that
9 this statement was designed to be suppressed from the beginning
10 is evident, in fact, that it wasn't signed and it's incomplete.
11 No signatures appear at the bottom of exhibit 55 but I suggest
12 that that fact is not conclusive of anything. William Urquhart
13 did not sign the bottom of the statement he took from Mr. French
14 at page 29 of exhibit 16. Mr. French did. The comparison we
15 have for an unsigned statement unfortunately is only one page
16 long and that's in exhibit 48, which is red volume 22, page 8.
17 But that leaves open the possibility, I suggest, that if indeed
18 this was the first of two pages and they got to a second page and
19 Patricia Harriss choose not to sign that statement that Bill
20 Urquhart's notation to that effect may only appear on the second
21 page. The last line on exhibit 55 is not used. The last line of
22 no page on which a statement is taken in this investigation is
23 used to start a question except one and that's Jimmy MacNeil's
24 statement taken by John MacIntyre that William Urquhart has
25 nothing to do with.

1 Often when William Urquhart took statements, as can be seen
2 by comparison with the ones he took in this investigation, he
3 would not use the last line whether he was in the middle of an
4 answer or not. He'd skip the last line and go to a new page.
5 John MacIntyre had the same habit and the references for Your
6 Lordship to consider and compare exhibit 55 with would be exhibit
7 16 at pages 20, 32, 57, 67, 72, 76, 80, 183, 184, 189, 193, all
8 examples of statements that were continued but the last line on
9 the previous page was not used.
10 Patricia Harriss does say that William Urquhart was present
11 and Patricia Harriss did say that William Urquhart was one of the
12 people who was mainly questioning her. We do have Patricia
13 Harriss' evidence from the preliminary inquiry in 1971. My
14 friend dealt with that earlier and I will not detail that for you
15 but it does suggest and the conclusion, I suggest, that the
16 preliminary inquiry evidence gives is that having the opportunity
17 to see Red Michael MacDonald, having the opportunity to see John
18 MacIntyre in the courtroom, Patricia Harriss knows, "Yes, those
19 are the two officers that I gave the last statement to and I--
20 one of the officer's I gave the statement to the first time."
21 And the one officer she gave the statement to on both occasions
22 is Michael MacDonald. She also says there was a third officer
23 and I suggest that we know that that third officer was William
24 Urquhart because he, in fact, took the first statement at 8:15
25 but that was his only contact.

1 I would not want it to be suggested that I am simply
2 shifting blame from Urquhart to Red MacDonald because being
3 unrepresented here as he is, Red MacDonald's a convenient
4 repository for blame. Please make no mistake. I am not
5 assigning blame and it would be inappropriate for me to do so.
6 Similarly though, it would be irresponsible for me to allow
7 William Urquhart to be presumed or inferred to have berated
8 Patricia Harriss throughout the evening of June 17th, 1971, if
9 that is not what the evidence shows. No one can change or indeed
10 change the fact that Patricia Harriss identified two detectives
11 by sight in 1971, within three weeks of being interviewed by
12 them, and the officer not identified even by name is William
13 Urquhart. It would be an absurd suggestion, I suggest, that
14 William Urquhart must take responsibility for things that may
15 have happened in 1971 because he's been represented here but Red
16 MacDonald has not.
17 In 1982, Patricia Harriss did not mention William Urquhart
18 specifically to Harry Wheaton according to her evidence and
19 that's at volume 16 -- transcript volume 16 at page 2916. The
20 same day, she spoke to Frank Edwards and Frank Edwards'
21 recollection and his notes in exhibit 17 are that Harriss
22 remembered Urquhart's name from 1971 but couldn't associate him
23 particularly with that statement and Frank Edwards thought that
24 was a fair characterization of his note, transcript volume 69,
25 pages 12245 - 12246.

1 Eunice Harriss only met William Urquhart once and that was
2 back in 1971. Eunice Harriss doesn't even recall ever meeting Red
3 Michael MacDonald, and that's at transcript volume 16, page 3000.
4 Why is the name Urquhart then the one that endures since 1982?
5 Eunice and Patricia Harriss have discussed this matter, as I
6 understand the evidence, and the events of June 17th to 18th
7 several times. The convenient name hook was probably Urquhart
8 because Patricia Harriss said that she had had other dealings
9 with him and remembered the name from the 1971 era.

10 The courts have indicated how suspicious we must be of self
11 re-enforcing identifications. I refer Your Lordships to the
12 Queen v Sophonow (No.2) and that's 25 C.C.C. (3d), 415, and
13 particularly -- and this is the Manitoba Court of Appeal
14 decision, particularly at pages 439 to 440 and with your
15 indulgence I will read a brief passage.

16 > The warning given to the jury as to
17 > the frailties of visual
> identification, was in the
> following terms:

18 and then there is a quoted portion. The Manitoba Court of Appeal
19 then went on.

20 > The learned trial judge at no time
21 > pointed out the reason for the
> danger of mistaken identification
22 > which, to use the language of Mr.
> Justice Belzil in R. v. Atfield, at
23 > p. 98, ...lies in the fact that the
> identification comes from witnesses
24 > who are honest and convinced,
> absolutely sure of their
25 > identification and getting surer
> with time, but nonetheless

1 mistaken.

2 The Manitoba Court of Appeal explained why this kind of direction
3 was necessary.

> 4 The need for giving the reasons for
> 5 the warning as to the dangers of
> 6 mistaken identification is a matter
> 7 of elementary psychology. A
> 8 warning of danger will often be
> 9 disregarded unless the reason for
> 10 it is explained. If a climber is
> 11 told simply that a cliff is
> 12 dangerous, it surely will allure
> 13 his spirit of adventrue and will
> 14 to climb it regardless of the risk,
> 15 but, if he is told also that it is
> 16 dangerous because the rock face is
> 17 crumbling, he will exercise greater
> 18 discretion before deciding to make
> 19 the climb and even if he decides to
> 20 do so, he will search for secure
> 21 foot holds at ever stage of the
> 22 ascent.

23 And I suggest that this Commission should look for secure foot
24 holds also with respect to the identification of William
25 Urquhart.

26 To conclude that issue of Patricia Harriss. Her evidence
27 was that she did not know and could not give this Commission a
28 personal recollection today of who was present at the final
29 statement that was taken on June 18th. The original
30 documentation which is Exhibit 56, contains no signature or other
31 writing indicating that William Urquhart was present. Only two
32 people have written -- appear to have written on this document
33 and that would be Sergeant John MacIntyre and Patricia Harriss.
34 William Urquhart's name does appear on the typewritten version,

1 but as commission counsel quite clearly points out, we don't know
2 why and we don't know for what reason. Therefore, I suggest
3 there is no basis to conclude certainly that William Urquhart was
4 there at the end.

5 There are two specific points in the brief of the Union of
6 Nova Scotia Indians which I feel compelled to comment on behalf
7 of William Urquhart. At page 26 the assertion is made that
8 William Urquhart must have known of MacIntyre's fabrication of
9 evidence and the weaknesses of the case. I object to that
10 assertion on behalf of William Urquhart and challenge counsel to
11 demonstrate to this Commission that Urquhart must have known.
12 Where is the reliable and compelling evidence of knowledge on the
13 part of William Urquhart.

14 The second point is in relation to the Dan Paul information.
15 And that's dealt with at pages 37 to 38 of the Union of Nova
16 Scotia Indians brief. All it says is the information was passed
17 along but Dan Paul came back pretty disgusted. There is no
18 reference to the fact that the same witnesses referred to, know
19 that Mr. Urquhart requested further information. There's no
20 reference to the fact that it would have been simplicity itself
21 for Dan Paul or Roy Gould or even Donald Marshall himself as he
22 did on another occasion by sending a letter to John Maloney, to
23 give the source of this new information to Bill Urquhart for
24 forwarding to the Crown. And the insinuations about William
25 Urquhart's involvement here are not supportable I suggest, nor

are the broad brush criticisms of counsel from Donald Marshall, Jr., supportable in relation to William Urquhart. I will not go into detail, but I suggest that their reference this morning to the fact that, well, we should consider criminal breach of trust in relation to William Urquhart was an admission that they know and they can appreciate that under Section 21 of the Criminal Code you're not going to have a basis of liability against William Urquhart.

Now, finally commission counsel during the hearings and in its final submissions here have attached the credibility of William Urquhart. Referring to one claimed recollection yesterday as non-sensical. Well, all that Bill Urquhart can tell this Commission is what he remembers. His memory isn't self-protective. There may well have been more evidence about the June 4 statement from Pratico or the June 17th statement of Patricia Harriss. You know, I suggest that William Urquhart is not prone at all to overstatement. We know that he answered certain questions or had certain knowledge attributed to him at a July meeting with Frank Edwards in 1982. And that appears at pages 12 to 14 of Exhibit 17. An affidavit was prepared. That affidavit appears in Exhibit 134 at pages 96 and 97, and the following pages were exhibits. We know at the time that the affidavit was prepared at the time of the meeting with Frank Edwards, that there had been no file form to review at the Sydney City Police station. He had the opportunity to review many

1 materials before testifying here, but his evidence remained
2 essentially unchanged. There was nothing memorable about
3 Pratico. Chant, he did remember and Harriss he did not remember
4 for the quite proper reason that with Harriss, he was scarcely
5 with her.

6 Now commission counsel used Bill Urquhart's 1982 affidavit
7 to cross-examine him as to his memory. And two points of
8 difference with his recollection, before the affidavit and since,
9 were put to him. Frank Edwards acknowledged in evidence before
10 this Commission that he perhaps overstated one of Mr. Urquhart's
11 positions. And that's at transcript Volume 67, page 11903. And
12 that was with respect to the -- Pratico's statement. William
13 Urquhart had no recollection and the -- what appeared in the
14 affidavit was:

15 > At no time did anyone in my
16 > presence or to the best of my knowledge make any threats or
17 > promises or offer any inducements to Mr. Pratico.

18 The second alleged inconsistency was an obvious error based
19 on the type-written rather than the handwritten version of the
20 second Patricia Harriss statement. There's a reference in
21 paragraph nine of the affidavit to the fact that:

22 > ...on the 18th day of June at
23 > approximately one-twenty a.m. I took a second written statement.

24 On page 105 of Exhibit 134 we see the Exhibit to that affidavit
25 and it's the type-written version of the June 18th statement. If

1 Mr. Urquhart had had Exhibit 56, the handwritten version to
2 consider, he would have appreciated that it's not in his
3 handwriting. He would have appreciated that it wasn't one-twenty
4 in the morning but rather twelve zero seven a.m. And he also
5 would have appreciated that his name appeared nowhere on that
6 statement.
7 I suggest that as a result Mr. Urquhart's credibility and
8 his integrity have not been undermined by counsel for any party
9 or by commission counsel. I suggest that despite the unfortunate
10 events of May 28th, 1971, which lead to Donald Marshall, Jr.'s,
11 imprisonment, this Commission has little basis upon which
12 attribute culpable blame to William Urquhart. William Urquhart
13 is not happy to have been involved in this long series of events,
14 but I suggest that he assisted this Commission to the best of his
15 ability. He's humble enough not to take any pride in the fact
16 that numerous suspicions and allegations against him have not
17 been made out, but he should end his involvement here, I suggest,
18 with a clear conscience. And this Commission should support
19 that.
20 I have no further submissions.
21 MR. CHAIRMAN:
22 Mr. Barrett, if you would give us five minutes before you start.
23
24 INQUIRY RECESSED AT: 3:51 p.m., AND RECONVENED AT: 4:11 p.m.
25

MR. BARRETT:

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

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

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

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

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

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?

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

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

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

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

Judge Matheson testified that if he had in his possession 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.

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

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

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