SDS Case Number 87-312-A

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

VOLUME 92

Held: November 02, 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 92

ORAL SUBMISSIONS

INQUIRY RECONVENED AT 9:34 o'clock in the forenoon on Wednesday, the 2nd day of November, A. D., 1988, at Sydney, in the County of Cape Breton, Province of Nova Scotia.

MR. CHAIRMAN:

Mr. Pink.

MR. PINK:

Thank you, My Lord. Mr. Saunders and I will be dividing up our presentation this morning, and it's our intention to briefly speak to the highlights of the matters that are covered in our written submission and also to briefly respond to some of the matters that have been dealt with by other counsel, both in oral presentation and in written submissions.

At the outset, we want to state one disagreement that we take with the proposition put forward by commission counsel. They suggest that they are the only counsel who can be completely objective because they are your counsel and the rest of us are partisan and represent parties.

On behalf of the Attorney General and his Department, our role throughout these -- the life of this Commission has been to ensure that information contained in departmental files and known to departmental personnel has been made available to your counsel. It's been available for the review of commission counsel while at the same time our role has been to protect the unique interests of the Attorney General in the administration of justice, both inside and outside of these hearings. In fulfilling that role, we believe that we and the department we represent has give unprecedented access to the files and personnel so that the Commission can adequately, and has

adequately, thoroughly fulfilled its mandate.

As well, we have spent nearly two years of our professional lives immersed in the details of how our criminal justice system works. Excepting that system is not perfect and that it has made a serious mistake, our approach is to be objective, as objective as we can, and not simply to enunciate a partisan position.

We have endeavored to put forward constructive use, approaches, and recommendations. Having worked as closely as we have with commission counsel, its research staff, and other counsel, our role as counsel to the Attorney General would not be fulfilled if we did not approach the present task constructively and objectively.

Before outlining the nature of our oral submissions, there is one other preliminary matter. Counsel, in both written and oral submissions, have suggested that this Commission should recommend the laying of criminal charges, be they criminal charges against former employees of the Attorney General's Department or former members of the Sydney Police force.

We do not believe your Lordships are entitled to do so. We submit that the Province of Nova Scotia could not validly empower you to recommend the laying of criminal charges even if it wished to.

In a case with which I know your Lordships are familiar, Nelles and Grange, reported in 1984, 9 DLR (4th) at page 79, the Ontario Court of Appeal dealt specifically with this issue. Mr.

Justice Grange had stated a question for the Court's consideration. The question was, and I quote:

> Was I right in determining that I am entitled in my Report...to express my opinion upon whether the death of any child was a result of the actions, accidental or otherwise, of any... person...?

In answering that question in the negative, the Ontario Court of Appeal referred to the decision of the -- of itself in the Queen v Hoffman & La Roche, and I'm not reading and will read briefly from page 85 of the DLR Report.

In quoting from Hoffman and La Roche, the Ontario Court of Appeal stated as follows:

> Not withstanding the overlapping between s. 91(27) and s.92(14)...

Referring obviously to the B.N.A. Act.

> ...manifestly it would not be within provincial competence to enact legislation enabling a police officer to summon a suspect before an official and submit the suspect to compulsory examination under oath with respect to his involvement in a crime. Even though such legislation might be described as legislation in relation to the investigation of offenses and thus appear to fall within the category of the administration of justice, such legislation in pith and substance would be legislation in relation to criminal procedure and thus within the exclusive competence of Parliament.

In the Attorney General of Quebec and Keable, the Supreme

Court of Canada stated:

> On the other hand, it is not only the Province and its agencies which may be concerned with the enforcement of the criminal law. It is equally clear that s. 92(14) does not authorize the Province to legislate with respect to criminal procedure directly or indirectly. It is the Criminal Code which sets forth a procedure prescribed by the sovereign authority, the Parliament of Canada, and which is to be followed in the investigation of crime and in the prosecution of ensuing charges. The Province, in the discharge of its role under s. 92(14) of The British North American Act may be required, or it may find it convenient, to examine by the usual executive agencies or by a commission of enquiry, the operation of its policing facilities and personnel, and the prevalence of crime and its nature in the Province. Such was the case before the Court in Di Iorio. At the other end of the scale, the enforcement agencies of the Province may of course investigate allegations or suspicions of specific crime with the view to the enforcement of the criminal law by prosecution. This investigation must be in accordance with federally prescribed criminal procedure and not otherwise as, for example, by coercive enquiry under general enquiry legislation of the Province.

In answering the question that Justice Grange has posed specifically, the Ontario Court of Appeal stated at page 86:

> While the constitutional validly of the Order in Counsel is not in issue in this court, it may be that it would have been vulnerable to

> question had the limitation not been imposed on the commissioner that he not express any conclusions as to civil or criminal responsibility. This inquiry should not be permitted to become that which it could not legally have been constituted to be, an inquiry to determine who was civilly or criminally responsible for the death of (a child), or in the circumstances of this case, in lay language simply: who killed the children?

We do not disagree, My Lords, that you can recommend a certain and particular investigation or review be undertaken by the authorities. When counsel have urged you to recommend criminal charges, they have asked you to tread into an area where, in our view, you cannot go.

Let there be no doubt about one very important matter. The Attorney General and his department accept that Donald Marshall, Jr., was the victim of a miscarriage of justice. Our system, with its built-in safeguards, did not work as it should have. Ideally, the justice system would be fail-safe. It is not. It does make mistakes as anything built by humans is want to do. The task of this Commission is to minimize the risk of that ever happening again.

Having said that, we do not accept that the system was or is corrupt. We do not accept that the system was or is racist. We do not accept that the system was or is insensitive to its weaknesses. The mistakes of some may require improvements, but that is not equivalent to requiring a wholesale overhaul of the

criminal justice system in this province. Much of it works extremely well. The public must know that. It is only in the areas where some weaknesses have appeared that repairs are necessary.

My Lords, as you know from having looked at our written submission, we have covered a number of areas. I'd like to, before turning specifically to the areas, summarize our position on most of them. As we have articulated in our brief, let me repeat; one, we accept that in 1971, the Crown did not disclose the previous statements of Maynard Chant, Patricia Harriss, and John Pratico to the defence. However, our research as well as the evidence at these hearings indicates that there was no legal duty at that time requiring the Crown to do so.

Two, we accept the fact that when Jimmy MacNeil came forward in 1971, the Crown should have disclosed that to the defence. We would like to believe that had defence counsel been aware of that fact, they would've used it to their client's advantage. Unfortunately, though the Crown failed in its duty, we are not convinced that the defence would've adequately responded to the information and the conclusions presented in the R.C.M.P.'s report.

Three, though there were tactics used by the Crown at trial which some may question, we do not believe that a review of the entire transcript reveals any serious misconduct.

Four, there was an inadequate system in place in 1971, which

may continue to the present day for testing child witnesses before they're allowed to testify under oath.

Five, we believe the Royal Canadian Mounted Police review in 1971, was not adequate, and the results of that review were never formally communicated to the Attorney General's Department. We accept that the department did not follow up with the R.C.M.P. as it ought to have done.

Six, the mechanisms and procedures contained in Section 617 of the Criminal Code were not adequate to deal with this case. Revisions are needed to ensure a fairer procedure.

Seven, the process for compensating Donald Marshall, Jr., though somewhat slow in starting, was fair to all interested in the process. It led to a result; namely, negotiations which were initiated by Donald Marshall, Jr.'s counsel. He had the opportunity to participate in those negotiations in every way. We believe the results of those negotiations should not be disturbed.

COMMISSIONER EVANS:

Mr. Pink, that would include payment of Mr. Marshall's fees?

MR. PINK:

That's correct, Mr. Lord.

COMMISSIONER EVANS:

Thank you.

MR. PINK:

Eight, the investigations into the alleged criminal

wrongdoing of Roland Thornhill and William Joseph MacLean were treated differently than others as a result of a lack of appreciation within the Attorney General's Department of certain fundamental roles and functions of her Majesty's law officers. Changes have already occurred which will guarantee a more appropriate approach to such cases in the future. Further changes may be required.

Nine, Donald Marshall, Jr., was convicted and incarcerated as a result of a major haemorrhage in the criminal justice system. Each part of the system failed to correct the errors of the preceding step. However, we believe that one contributing factor was the lack of candour and truthfulness of Donald Marshall, Jr., himself. We believe that the evidence does point to an attempted robbery in the park. Though every accused has the right to remain silent, we maintain that his or her counsel must be told the truth. If an accused person takes the witness stand, they must tell the whole truth. We say that had Donald Marshall, Jr., told the his lawyers of the true purpose for being in the park that night and the confrontation with Roy Ebsary and Jimmy MacNeil, however fleeting and temporal that purpose may have been, it might have made a difference in the conduct of the trial. It is only one factor among many.

We accept that the system failed Donald Marshall, Jr. What we do not accept is that he is without some responsibility for denying himself the advantage of counsel who were fully briefed

and able, as the Code of Professional Conduct says, "fearlessly to raise every issue, advance every argument, and ask every question which he thinks will help his client's case."

And finally, My Lords, number ten, we accept that the Crown is indivisible. The Attorney General is responsible for the actions and conducts -- conduct of his agents.

In turning to our submission, in substance, My Lords, I shall deal with three broad issues; first, the trial of Donald Marshall, Jr., second, Jimmy MacNeil and what occurred as a result of him coming forward and, third, Crown disclosure.

In turning to the first issue, we say that in examining the original trial of Donald Marshall, Jr., this Commission must keep in mind a basic tenant of the justice system: Trials are adversarial. Through the prosecutor -- Though the prosecutor must keep in mind his role as a Minister of Justice, that role is played out on an adversarial stage. The Crown is an advocate. The adversaries are defence counsel. The judge is the neutral arbiter. If the Crown oversteps its bounds, then there ought to be an objection or an intervention by the Trial Court. That is not -- That is how the action unfolds.

To expect some level of pristine purity by Crown counsel is to do a disservice to the Crown's function to present all the relevant evidence no matter how difficult it may be to elicit that evidence. The Crown is duty-bound to do all that is required within the bounds of the rules to get that evidence

before the jury. He may require that a witness be declared hostile as was the case with Maynard Chant. He may be required to prove continuity of evidence by calling witnesses that some may feel are called simply to elicit sympathy: Mr. and Mrs. Seale. He may be required to explain why witnesses say what they do, such as John Pratico and the threats. Whether the threats were from Mr. Christmas and Artie Paul and Mary Theresa Paul is not relevant or of major concern, but all of those issues are matters which the Crown may have to deal with.

We accept that Donald C. MacNeil may have committed some minor breaches, the reference to "I hate cops" tattoo or the failure to elicit in direct examination the amount that John Pratico had to drink, or perhaps even the failure to fully explain the disposition of the charges against Tom Christmas. They may have been minor faults. However, the defence have the ability to object and they did not. The judge did not admonish the Crown or did not specifically refer the jury to disregard specific evidence. Any trial which is subjected to a microscopic examination will reveal minor irregularities. We submit that on balance here that's all they were.

It has been suggested that a more serious irregularity was the use of John Pratico as a witness and the failure to disclose his psychiatric condition to the defence. Judge Matheson said that he did not know of the nature of John Pratico's condition. There is no evidence to suggest that anyone knew of the details

of Mr. Pratico's hospitalization in the summer of 1971. From the records produced in Exhibit 47, the psychiatric and hospital records relating to Mr. Pratico, it does appear that Mr. Pratico's condition would not have rendered him incompetent to testify.

We say that one must be mindful of the witness and the witness's condition as well as the rights of the accused. The accused has counsel, the witnesses do not. As far as can be done, it is the Crown's obligation to look out for witnesses, especially if they suffer from some type of disability.

In the absence of actual knowledge of possible incompetence to testify, the Crown in our submission has no obligation to raise the possibility of incompetence with the defence or the Court. However if the Crown knows facts which place the witness's competence in issue, he is obliged to advise the defence and to avail the Court of the evidence so the judge can rule on the witness's competence. We believe, My Lords, that that is a positive obligation.

Some suggestions have been made that the psychiatrists treating John Pratico, either at the Nova Scotia Hospital or the Cape Breton Hospital, had some obligation to come forward to appraise the authorities of his condition. We disagree with this proposition. We say that the psychiatrists treating Mr. Pratico were constrained by ethical obligations not to voluntarily advise anyone of the details of Mr. Pratico's condition in 1971. Had

they been called to testify, they would have been compellable. But in the absence of a subpoena, they were not in a position on their own volition to advise the Crown, defence, or Court of Mr. Pratico's condition at that time. In other words, even if he had been incompetent to testify, which does not appear to be the case, the psychiatrist could not have voluntarily come forward to offer that information. In our written submission we've provided some support for that and an excerpt from a recent work that deals with the issue of mental disability in Canada.

On this issue, My Lords, we make two recommendations and they're found at page 38 of our submission. In order to respond to what we consider is a position obligation on Crown Counsel to deal with disability, we believe that policies should be developed to define the responsibilities of Crown when dealing with the mentally disabled so as to ensure their fair treatment without undermining rights of an accused to a fair trial. Further, we urge that information be promulgated to psychiatrists regarding their rights and obligations when their patients come in contact with the criminal justice system.

MR. CHAIRMAN:

Your position is it's within our mandate?

MR. PINK:

I beg your pardon.

MR. CHAIRMAN:

That is within -- Your position is that our mandate would allow

us to make these recommendations?

MR. PINK:

That's correct. Well, I guess, somewhat on the issue of the psychiatrists, it's something that we felt compelled to raise only because the corollary of the question of what's the Crown's duty is, "How does the Crown get the information?". If the Crown is not possessed of the information, doesn't have the actual knowledge, we think it's important to note that psychiatrists are not obligated and should not, on our view of the law, voluntarily come forward with information regarding psychiatric condition. It is a problem and it is a paradox.

MR. CHAIRMAN:

I'm not quarrelling with you that it's a problem, but I am conscious of the earlier submission you made relying on the Keable case. That's -- This seems to be to go again to criminal procedure.

MR. PINK:

I don't think, My Lord, that the issue of the obligations of crown counsel in dealing with psychiatric patients or mentally ill patients --

MR. CHAIRMAN:

No.

MR. PINK:

-- certainly doesn't deal with criminal procedure. So it's the second part you're having difficulty with?

MR. CHAIRMAN:

Yes.

MR. PINK:

Well in our view, that does not go to criminal procedures. It's really almost a statement of the civil law as it relates to the ethical and civil obligations of psychiatrists.

MR. CHAIRMAN:

Okay.

MR. PINK:

To repeat -- Are you comfortable with that, My Lords?

COMMISSIONER EVANS:

Well, I thought the case that you just cited to us earlier dealt with recommendations of either civil or criminal.

MR. PINK:

That's correct, My Lord, in terms of civil or criminal responsibility in a particular case.

COMMISSIONER EVANS:

Responsibility, okay.

MR. PINK:

To repeat, My Lords, that Donald Marshall, Jr., was convicted as a result of the perjured testimony of three young witnesses is not intended to be trite. In spite of their statements to the police, had the Court process been able to comfort them to a degree necessary that they would have told the truth, no miscarriage of justice would have occurred. Somehow, though they

were questioned by Judge MacDonald at the preliminary and Justice Dubinsky at the trial, they were not able to testify to a story which was different than what they had told the police. They did not tell the truth. Another check in the system failed.

If evidence of young witnesses is to be relied upon in criminal trials, and we all know that it is on a daily basis, there must be more comfortable and thorough assessments of their understanding of the oath, as well, that examination should appear on the record so if necessary an Appeal Court can assess it. The record in this case, My Lord, discloses that some of the testing of the witnesses was on the record, some was not.

We recommend...

And this is found at page 41 of our submission.

> ...an improvement of the swearing-in process by a judge to expand the type of questions asked of children, and that in the exercise of its discretion the court make the child at ease by possibly covering that segment of the trial i.e. the swearing in (and questioning) of a child, in a semi-private surrounding with only the judge, (the) accused, and counsel present.

In suggesting that, My Lord, we're mindful that the question of oaths is a matter of federal jurisdiction and covered by the Canada Evidence Act, and we're also mindful of the recent Supreme Court of Canada decision in Barrow out of this Province where the Court ruled that all of an accused's trial must take place in the presence of an accused, that case dealing with the

impanelling of a jury. However, --

COMMISSION EVANS:

Would that be excluding the Press in that situation?

MR. PINK:

Perhaps. And I appreciate the difficulties that that may have and it's a question of balancing. But it's clear from the evidence of John Pratico here and Maynard Chant here that they were terribly uncomfortable. And Your Lordships well know the law dealing with child witnesses and the cases that have dealt with the obligation -- the requirement for corroboration where youthful witnesses are the source of the Crown's proof. What we urge, though, is an improvement on that basic system, that the questions be more meaningful and that the Court better assess the ability of children to understand the nature of the oath they're taking.

COMMISSIONER EVANS:

Mr. Pink, you did indicate that the presiding magistrate and presiding judge did not make the witnesses feel sufficiently comfortable so they could tell the truth. But I don't think you made any reference to the Crown attorney who presumably would interview witnesses certainly in a case of this nature long before the trial had commenced in preparation for the trial. Is there not an obligation upon him to make him feel comfortable?

MR. PINK:

Absolutely, and I don't deny that for a second. We've had

conflicting evidence as to the extent of the pre-trial interviews with the three key witnesses and we've had evidence from Judge Matheson about Donald MacNeil's practice in preparing for trial. And I think it's fair to say that he was not a practitioner who spent extensive time with witnesses prior to the conduct of the Crown's case.

But not for a second, My Lord, do we think that there is not an obligation on crown counsel. What we're addressing our minds to here is another check in the system which hopefully will allow children who may have lied previously to come forward and feel comfortable enough to tell the truth without fear that something will happen because they changed their story.

We address briefly in our submission, My Lord, the question of parents. We don't think that Your Lordships can make any strong conclusions regarding the conduct of the parents of the young children here, but we addressed it solely because it was another factor. I think the system is entitled to believe that youthful witnesses will have the support of their parents through the process. It appears that in this case that support was not terribly helpful.

MR. CHAIRMAN:

How do you arrive at that conclusion? My recollection is that Patricia Harriss' mother was in the police station and on -- and for some time in the interviewing room when Patricia Harriss was being interviewed, subsequently took her young daughter to the

office of a practicing solicitor in Sydney who explained to both of them Patricia's obligation. Mr. and Mrs. Chant were at the Louisbourg Town Hall when Chant was interviewed.

MR. PINK:

Mrs. Chant.

MR. CHAIRMAN:

Mrs. Chant, rather. Not Mr., Mrs. Chant. My observation of Mrs. Pratico was, when she testified here, that's she an extremely shy lady who may have found it difficult to be present during some of these things. But I'm not aware of the evidence that you--you're basing that assumption on.

MR. PINK:

If one were to look at the three child witnesses, it's our view that Mrs. Harriss can not be faulted.

Mrs. Chant, although yet was certainly present at the interview at Louisbourg Town Hall, the evidence of her continuing involvement through the trial is not very clear. She says in--She said when she testified here that she was present for part of the trial but she couldn't remember which parts and the question was not specifically put to her whether she was present for the testimony of Maynard Chant but you'll recall that she said she was extremely nervous and was uncomfortable in court and left. She was also uncomfortable with whether or not Maynard was telling the truth as was Mr. Chant and this was the evidence of Maynard when his father came to pick him up at the police station

on the evening of May 28th, the early morning of May 29th. Maynard was in trouble with his parents. He knew he was in trouble or he felt he was in trouble with his parents and it's questionable the degree of parental support that they provided to him in the result.

The Pratico's are an -- It's really a major question mark. I accept Your Lordship's comment regarding Mrs. Pratico as she testified here. The psychiatric records of John Pratico are the only place where evidence regarding Mr. Pratico comes out. We know that there was a Mr. Pratico and we know that there was an important relationship between son and father. There's no evidence before you other than those documents regarding the support that he provided through this situation. It's clear, though, that Mrs. Pratico -- You might recall the evidence that Mrs. Pratico was sent home from the police station to look after John's sister. We make the comment not to apportion any blame or responsibility but just because parents have to be a party to the system. If you're dealing with children, and I'm going to momentarily address the issue of police interviews of children, parents have got to be part of that process.

MR. CHAIRMAN:

Okay. Thank you.

MR. PINK:

As I just indicated much has been said in these proceedings about police interviews of young people. It is sufficient simply to

note our recommendation which is contained at page 45 and 46 of our brief. We recommend that the Commission should comment upon techniques that ought to be used by police when interviewing children, be they witnesses or suspects. From minimal protection, such as the presence of a friendly adult, to video recording all interviews with children, the goal must be to insure the natural threat that an adult can be to a child is not allowed to become overbearing, while at the same time being cognizant of the risks of children not telling the truth for motives unrelated to the presence of an adult.

The next issue I'd like to address, My Lords, is what happened when Jimmy MacNeil came forward on November 15th, 1971. The facts are certainly well known. Jimmy MacNeil and his brothers came to the Sydney Police Department and Jimmy MacNeil gave a statement that Roy Ebsary stabbed Sandy Seale. Lewis Matheson was called. He came to the police station. He interviewed Mr. MacNeil. Lew Matheson contacted Robert Anderson and requested that the R.C.M.P. be invited to interview -- to intervene in the matter. On November 16th, Robert Anderson contacted the R.C.M.P. and in his evidence, said he wanted to find out whether the person who was making the submission was telling the truth. (That's at volume 50 page 7040.) He asked that a polygraph be performed.

COMMISSIONER EVANS:

I was under the impression that it was MacIntyre who suggested

the R.C.M.P. investigate.

MR. PINK:

Yes, I don't deny that. It -- But I'm only dealing with the -- I am not going through all the information that I've outlined in great detail in our submission. It was MacIntyre who suggested the R.C.M.P. come in but it was Mr. Matheson who actually made the contact with Mr. Anderson.

COMMISSIONER EVANS:

Right.

MR. PINK:

And Mr. Anderson who made the contact with the police.

As for the subsequent R.C.M.P. investigation, the initial important question is, must be: What was their mandate? The R.C.M.P. in their submission have dealt with this fairly extensively. They will suggest that the mandate was to conduct a review as opposed to a re-investigation. We reject the validity of these bureaucratic niceties. If Mr. Anderson's request to the R.C.M.P. could reasonably be construed as imposing some limitation on their task, we fail to see how that could have occurred. For example if the R.C.M.P. were requested to attend the scene of an accident, one would not expect them to simply give assistance to the victim and then go home without carrying out an appropriate investigation. If the R.C.M.P. were asked to determine if documents were forged, one would not expect them to simply look at the signatures on the documents without doing

anything more. We submit that any limitation which is imposed on the R.C.M.P.'s 1971 involvement is an ex post facto rationalization. It is not for the Attorney General's Department to tell the R.C.M.P. what they are to do when they become involved in possible criminal activity. The police are the experts.

When Superintendent Wardrop testified here, he denied that any limitation was imposed on the investigation and I refer Your Lordships to volume 37, page 6793, where he said that Inspector Marshall should have gone into the whole thing and talked to everyone that was involved.

The Attorney General must rely on the police to do what is necessary; and if they feel the need for additional authority, they should come to the department to get it. As Your Lordships know, this is a recurring theme in our submission.

We believe that the R.C.M.P.'s involvement in 1971 was wanting because Inspector Marshall put too much faith in the polygraph to the exclusion of his considerable experience as an investigator. If the polygraph is no more than an aid in an investigation, as so many witnesses told us it was, then it's worth in 1971 was elevated to much higher heights. With an almost naive reliance on the infallibility of the polygraph, Inspector Marshall proceeded with his assignment. He merely met with Detective MacIntyre and reviewed the portions of testimony which were provided to him. Inspector Marshall neither read nor sought the Sydney Police Department complete file. Based on his

experience and his friendship with Mr. MacIntyre, Inspector Marshall was content to rely upon the thoroughness, objectivity, and accuracy of the Sydney Police Force's investigation.

By looking at the information available to the R.C.M.P. and by asking whether it was utilized effectively or at all, constructive criticism can be made and recommendations put forward to assist law enforcement officers in the future.

MR. CHAIRMAN:

Before you leave that point, Mr. Pink, it's my recollection that after the polygraph test or tests had been administered to Ebsary and Jimmy MacNeil that Inspector Marshall met with the crown prosecutor in a motel room?

MR. PINK:

That's correct.

MR. CHAIRMAN:

And the Crown Prosecutor, Donald MacNeil, contacted in their presence someone in the department of the Attorney General. We haven't any evidence that maybe fixes the person who was contacted beyond some doubt. What is your position -- One, are we entitled to assume that Inspector Marshall disclosed to the crown prosecutor, Donald MacNeil, the nature of the re-investigation that had been carried out by him?

MR. PINK:

To that point?

MR. CHAIRMAN:

Yes.

MR. PINK:

I would certainly be prepared to make that assumption.

MR. CHAIRMAN:

All right. And that's a reasonable assumption?

MR. PINK:

I would say so.

MR. CHAIRMAN:

Such being the case, in your view, does -- would Mr. Donald MacNeil then have a duty as crown prosecutor to advise the R.C.M.P. that was not an adequate re-investigation?

MR. PINK:

I guess the question becomes, My Lord, what's the purpose of the Crown's involvement at that point? The facts, simply stated as I understand them, are as follows: On November 15th, I told you what happened. On November 16th, the R.C.M.P. were requested to come in. On November 17th, Marshall came to Sydney and spent one day here. He returned on the 23rd of November, one week later, with Corporal Smith, the polygraph examiner. So to that point, he had spent one day on the investigation. On the 23rd, there were some interviews conducted of Jimmy MacNeil and Roy Ebsary and the polygraph examination conducted. On the evening of the 23rd, the evidence is that there was a meeting at the Wandyln Motel with, I believe from Mr. Matheson's testimony, both Messrs.

Matheson and MacNeil. The evidence of Inspector Marshall is that the sole reason for advising the Crown at that stage of what had occurred was a courtesy. The crown counsel, the crown prosecutor, had no detailed involvement in the matter. I submit that there's a distinction between the crown's involvement at that point and what the Crown would be doing if there was a case ongoing and the police brought their file to the Crown and the Crown had to prosecute it and say, "Wait, there's more evidence required here, here, and here for us to be able to prove the case." In that situation the Crown would be, in my view, duty bound to ask the police to carry out further investigation in order to prove the case that he has to prove to put it before the court.

MR. CHAIRMAN:

So your position is that there's a heavier duty on crown counsel in preparing for a criminal case than there is a -- upon a crown counsel who initiated a request for the re-investigation of, in this case, a conviction by the R.C.M.P.

MR. PINK:

I would submit that the nature of the re-investigation was solely within the authority of the R.C.M.P.; and the important point that I wanted to add, My Lord, is that there's no indication that Marshall told MacNeil on November 23rd that his investigation was complete. He indicated to us, as I recall his testimony, that his reason for meeting with Mr. MacNeil and Mr. Matheson was to

advise them of the results of the polygraph. It wasn't to say that their investigation was wrapped up; and, in fact, we know from Mr. Marshall that when he returned to Halifax and he began to write his report, he had documents with him, some that Mr. MacIntyre had provided him, and he reviewed those in preparing his report. The report, you'll recall, was not dated until the 21st of December, almost a month later.

MR. CHAIRMAN:

I'm not -- You know, I'm very mindful of the evidence of Inspector Marshall and -- so I'm not quarrelling with your review of his evidence and the preparation of the report. I'm having some difficulty with your apparent position, or at least as I interpret it, that when Donald MacNeil and Mr. Matheson, if he was there as well at that meeting, was simply told the results of the polygraph test, that their duty was only to communicate that information to someone in head office in the Attorney General's department and not to advise the investigating police officer that more would be required than a polygraph test, if indeed, that was all that had been carried out up to that point.

MR. PINK:

We don't deny that they could have done it, that nothing would have prohibited them from doing it but what we say is that at that point, and throughout, that it's not for the Crown to determine what the nature of the police investigation should be. It is for the police to determine what they have to do in order

to answer the question which they're asked to answer. In this case, Was Jimmy MacNeil telling the truth?

MR. CHAIRMAN:

Okay. Thank you.

MR. PINK:

The conclusions of the polygraph operator were that the test of JImmy MacNeil was inconclusive and Corporal Smith could, quote, "render no opinion on whether or not MacNeil was telling the truth." (That's in the polygraph report itself in exhibit 16 at page 202.) Yet when Mr. Marshall translated that into his final report, he said that MacNeil was not telling the truth; and when he testified here in answers to questions from the Chairman, he said well, in his view that meant there was a fifty, fifty possibility that MacNeil was telling the truth or lying.

Marshall's investigation report itself was never sent to Corporal Smith. It was never critically assessed or reviewed by others in the R.C.M.P. which, in our view, it ought to have been done. Most regrettably, there is no conclusive evidence that the report was ever sent to the Attorney General's department. The evidence of Superintendent Wardrop was that he gave it to either Mr. Anderson or Mr. Gale, but he could be sure which one. Well as we've outlined in a fair amount of detail in our submission, he certainly couldn't have given it to Mr. Anderson who had gone to the Bench. You'll recall his appointment to the Bench was on December 16th and the report is only dated December 21st, and

Wardrop could not assist us at all as to when that supposed delivery took place.

COMMISSIONER EVANS:

Mr. Pink, is it realistic to believe that the report did not arrive at the A.G.'s office?

MR. PINK:

Well, My Lord, all I can -- I believe, yes, it is realistic. I believe that a report prepared in those circumstances, completed in the Christmas season (And I only add that because that's the date.) may somehow not have made it to the Attorney General's Department.

COMMISSIONER EVANS:

But the A.G.'s office would have to pay an additional sum to bring -- of money to bring Mr. Smith to Halifax or Sydney to make that polygraph test.

MR. PINK:

Well, my recollection of the evidence on that point, My Lord, is that under the policing contract, the police would -- the R.C.M. Police would provide the polygraph service as part of their basic costs. Now if there was an addition charge that would be levied through some cashier at some point, --

COMMISSIONER EVANS:

Yeh, somebody would have to authorize the charge and it wouldn't be the janitor in the A.G.'s Office.

MR. PINK:

Absolutely not.

COMMISSIONER EVANS:

It would have to be somebody who is an official of the -- you know, who has that authority. And surely they're not going to sign for things without knowing that there is a report outstanding when they were aware that a report was being requested.

MR. PINK:

My recollection of the evidence is that they -- there was no additional charge from the R.C.M.P. for the use of the polygraph, and therefore there would be nobody in the Attorney General's Department who would be required to specifically turn his or her mind to it. But I guess most importantly, everybody who was there, Gale, Veniot, MacLeod, all deny that they had seen it. It's not the kind of report -- And we've all read it. This is not the kind of thing that one would easily forget. We don't deny that there was an obligation on the Attorney General's department to follow up and request the report. We accept categorically that there was an organizational lapse in the Department when Mr. Anderson was elevated to the bench. Somehow his information did not get transmitted to a successor or to his superior. We accept that. A request should have been made for the report. What we believe, though, is that the evidence pretty much conclusively shows that the report itself was never

received.

COMMISSIONER EVANS:

And there's one other point I wanted to discuss with you at this stage. You have said that when -- As I understood the evidence all the way along is that if a police office comes to the crown prosecutor and lays certain information before him, that the officer -- the prosecutor may say, "Go back and get further information before we proceed with the laying of the charge." But here you say there was no responsibility upon the Crown to tell Inspector Marshall, "Go back and get more information."?

MR. PINK:

I guess -- I'm sure all of us have tried to put ourselves in the position of what was happening on November 23rd. They had a witness come forward who was questionable in reliability. Jimmy MacNeil had been drinking heavily, was taking some drugs. You'll recall that Mr. Matheson said when he interviewed him, he just didn't think he was believable. He just -- So he's the person who talked to him. The R.C.M.P. are brought in, do their report -- do their investigation, whatever they do, and they conduct the polygraph. The polygraph is the new technology. It's the panacea. I believe that the police felt that, and I don't see any reason why the Crown would feel any differently. We're all somewhat seduced by technology. And I think that's what really happened is they said, "We did the polygraph. It's inconclusive. It's conclusive for Ebsary. He didn't stab Seale. And that's

the end of it." And I believe rightly or wrongly that the Crown would not logically have felt that anything more was required. They would be told by their investigating force, "We've done what we were asked to do and that's the end of it."

COMMISSIONER EVANS:

But now they complain that that investigation by Inspector Marshall was inadequate. We know from the results it was inadequate.

MR. PINK:

Only as a result of examining microscopically the report that Inspector Marshall presented and the investigation that he carried out. I mean -- I guess no one more than Inspector Marshall went on the witness stand here and accepted responsibility for a very poor investigation. And he was -- I don't levy blame in any area where he didn't levy it himself.

With respect, My Lord, it would have been nice if the Crown had done it, but I don't think it's logical to conclude that the Crown ought to have told the police that they should have done more. We acknowledged earlier, My Lords, that the fact that Mr. MacNeil came forward was not disclosed to the defence. It ought to have been done. The Attorney General was responsible for that failure.

A final comment about the polygraph is in order here. It's a machine which endeavours to determine truthfulness by forcing someone to tell a lie, and then measuring the readings from the

critical questions to see if they equate with the known lie questions. In my simple -- To my simple mind, it tests if someone is telling the truth by forcing them to lie. In our submission we quote, just because I came upon it recently, a recent review of the Supreme Court of Canada decision dealing with the polygraph and some comments about the polygraph and the problems with the technology today. Our only point in putting that in is to say with hindsight if those comments are applicable today, how much more they were applicable in 1971.

My Lords, we have made a number of recommendations in this area, and rather than going through page by page, perhaps I could just direct you to page 173 where we have summarized all the recommendations we make throughout our submission, and I'm specifically referring to recommendations five through to and including ten. And I won't bother to repeat those recommendations here other than to say that we believe that better transmission proceedings for a change of authority in the Attorney General's Department are required and better accountable -- accounting and recording procedures are required in the R.C.M.P. when they are liaising and communicating with the Attorney General's Department.

The final area that I want to deal with, My Lords, in the overall matter is the question of disclosure. As noted earlier, we acknowledge that the Crown did not disclose the previous statements of Maynard Chant, John Pratico, and Patricia Harriss

to the defence. It is clear there was no request for that -- for those statements by the defence or for any statements, even that of Mr. Marshall which from the evidence it appears was produced for the first time at the Preliminary Inquiry. Commission counsel suggested that the law in 1971 required that the Crown disclose statements to the defence and they rely upon the memorandum of Mr. Jones -- of Malachi Jones, which was Exhibit 81 in these proceedings. We have copied Exhibit 81 at page 210 of our submission. We strongly disagree that the law in 1971 required the Crown to disclose statements.

COMMISSIONER EVANS:

Are you talking about witnesses now?

MR. PINK:

Witnesses. In our brief we have summarized the authorities as we read them and have attempted to cover all the authorities in Appendix "A" to our submission. It's our view that in 1971, the law required the Crown to exercise discretion, and it was the Crown's discretion as to what evidence would be disclosed in advance to the defence.

COMMISSIONER EVANS:

Mr. Pink, doesn't basic, fundamental fairness require that the Crown and the defence are on equal footing when it comes to Court.

MR. PINK:

Yes.

COMMISSIONER EVANS:

Does that not mean then that the defence should have some information with respect to some knowledge of the information which is in the possession of the Crown?

MR. PINK:

Yes.

COMMISSIONER EVANS:

How else are they going to get it if the Crown does not reveal it?

MR. PINK:

I certainly -- I'm sure your question is not intended to suggest that the defence has -- shouldn't do anything itself.

COMMISSIONER EVANS:

Oh, no. Far from it.

MR. PINK:

That's right.

COMMISSIONER EVANS:

But if the defence does not do anything, is there still not an over-riding responsibility upon the Crown to make that information available to an incompetent defence, if you wish. In the interest of fairness, you can't have an equal battle if the ground isn't level.

MR. PINK:

I guess --

COMMISSIONER EVANS:

We're talking about an adversary system.

MR. PINK:

That's right. What I've tried to do, (And it's difficult. This is very difficult.) is to try and turn the clock back 18 years and say, "What was the situation then as the law stood?". As unfortunate as it may be, I submit that the law today does not require disclosure. Policy and a number of other things may become involved. But the courts have not created and the Legislature, Parliament in particular, has not created a mandatory duty on the Crown to disclose a whole string of information to the accused. In 1971, it's our view that the Crown's basic obligation, as stated in Bouche, was to be fair.

COMMISSIONER EVANS:

That's what I'm getting at.

MR. PINK:

And part of the obligation to be fair was to call and present all the witnesses who had relevant evidence to give to this case. And the Crown in our view did exactly that, put those witnesses on the stand who may or may not have been helpful the Crown's case. You'll recall at the preliminary, they called, I think it was 20 witnesses; maybe it was 16, but I think it was 20 witnesses. They put everybody on and gave the defense an opportunity to question anybody about anything. They didn't simply go for the minimal threshold, they gave their whole case,

opened up their whole case to the defense.

COMMISSIONER EVANS:

Yes, Mr. Pink, they put 20 or 16 or 20 witnesses before the Court. But the defense counsel, even if he had been busy, would not have known what those people are going to say. And to cross examine them without some prior information is a pretty risky business.

MR. PINK:

Well, you'll recall that Mr. Khattar said in his testimony when asked why they only questioned three or four of the witnesses said that they didn't want to give away their defense. Well, with the greatest of respect, their defense was an absolute denial and it's pretty hard to conceive of how questioning any of those witnesses about what they saw would tip their hand when their defense was the defense it was.

CHAIRMAN HICKMAN:

If it had been made -- if counsel for the accused had been aware -- made aware in advance of the preliminary inquiry, of the existence of the contradictory statements by these three juvenile witnesses, or young witnesses, would one be entitled to assume that they would have failed to avail of the opportunity afforded them at the preliminary inquiry to cross-examine these witnesses in particular, and maybe the police officers who took these statements concerning the method and procedure followed in the interviews, and an explanation from the -- these witnesses as to

why they changed their minds.

MR. PINK:

My Lord, --

CHAIRMAN HICKMAN:

It seems to me that would be a temptation that would be hard to resist by responsible defense counsel.

MR. PINK:

Logic certainly dictates that conclusion. The problem I have with it is that they knew that Patricia Harriss and Maynard Chant had given previous statements to the police and even knowing that, even having that evidence from the preliminary, didn't ask for the statements, didn't do anything with it, didn't even-- If the law was anything in 1971, it certainly was for the trial court -- perhaps not the court of preliminary, but the trial court to order production of previous statements. And they didn't even avail themselves of that procedure.

COMMISSIONER EVANS:

Mr. Pink, let's suppose that the accused was there without counsel. Is there any difference then? The accused is not going to know enough to ask the defense. Is the Crown not going to provide it in that situation?

MR. PINK:

I certainly say that today there is an obligation for absolutely unfettered disclosure to the accused, either personally or through the court, an accused without counsel.

COMMISSIONER EVANS:

But surely the principle of fundamental justice didn't just arise after 1971?

MR. PINK:

I accept that, and I guess what I'm -- and I don't mean to be pedantic here, but if you look at the cases.

COMMISSIONER EVANS:

I agree.

MR. PINK:

If you look at Justice Haines decision in LaLonde where there was a specific request for statements from the Crown, the Court said, "No, they don't have to provide them." And that's a case very similar to this where there were previous inconsistent statements, and Justice Haines -- and I noted up that case last week and it's been referred to -- LaLonde's been referred to and approved, in my view though it may be somewhat illogical-- approved a number of times by higher courts right across this country. And there, he put the principle, the paramount principle, to be the sanctity or protection of the investigation process so that witnesses were not unduly hassled and harassed as a result of their statements.

My Lord, I find the state of the law in 1971 unacceptable, but with the greatest respect to those who have a different view, I think that's what the law was. There was no positive duty on the Crown to disclose statements. The best that could be said is

that it was within the Crown's discretion to be fair, and the way that fairness was articulated is that the Crown had to call and present to the Court all the relevant evidence and allow the defense to get it.

COMMISSIONER EVANS:

And that was going to be a subjective, not objective standard?

MR. PINK:

Right. Correct.

COMMISSIONER EVANS:

Thank you.

MR. PINK:

Yesterday, Mr. Ruby -- and I will deal -- I'll deal specifically with what I consider to be his very positive recommendations in a couple of moments. But he talked about how Crown offices and defense counsel across the country are awaiting some recommendations from this Commission on disclosure. It's my view that if you look at the law today, you find as confused and muddled a situation as perhaps you did in 1971. As recently as 1984 in the Cunliff case, and the law society of British Columbia, the B.C. Court of Appeal dealt with the issue of disclosure. And although they found that it may have constituted professional misconduct for a prosecutor not to disclose, they did not say that there was a positive legal duty for disclosure. So, the law is --

COMMISSIONER EVANS:

Maybe we can clear up all the confusion with this.

MR. PINK:

I among many, My Lords. You may not be able to clarify the law but you certainly, hopefully, will be able to assist with a more effective procedure.

As well, my Lords, the brief of the Canadian Bar Association, which deals specifically with the issue of disclosure, reviews the cases and reviews the policies across the country as a result of a survey and again, one has to conclude that there certainly is no unanimity as to what the present situation is, and even ought to be.

I've referred to LaLonde and the comments of Mr. Justice Haines and I just note them again at page 89 and 92 of our submission, and I won't take the time to read them again. I know that your Lordships will. We conclude on that point that the law in 1971 did not require disclosure of statements, and accept that a far more importance than an historic analysis is the present situation.

The Attorney General's present disclosure policy in this Province was promulgated on July 18th of this year, and it's found on page 207 of our submission as Appendix "C". That disclosure policy resulted directly from the work of this Commission and its research staff, and the consultation that has taken place with regard to the work of Professor Archibald. We

do not say that that disclosure policy is perfect, but it's an important and vast improvement from the disclosure policies that were introduced as exhibits here and therefore, it's a good intermediate step on the road to a conclusive and final view as to what disclosure should take place.

My Lords, you've had presented -- you've had presented to you two views as to how disclosure should occur. The current law or the current state of thinking in the country has really devolved into two camps. There is the one form of disclosure which is advocated by the model of the Uniform Law Conference which is the one which is dealt with in detail in the Canadian Barr Association brief. The touch stone of that proposal is that there are guidelines and it results in disclosure being discretionary. The other model is the one that Mr. Ruby outlines in his brief, which is the model advocated by the Law Reform Commission which is a statutory model. And I only say that to attempt to bring all together in one place the material that you're going to have on disclosure.

At the outset on disclosure I think it's important that everybody accepts one fundamental principle: disclosure is for the benefit of the accused, not for the benefit of accused counsel. It's not for the lawyers. It's for the accused himself. But before looking at the models and providing our views, I just want to quickly touch on a number of the issues that any model has to address.

The first one is who has to initiate disclosure. It's practically impossible for a Crown to initiate disclosure in every case. Often the Crown will not know who defense counsel is or whether defense counsel is to be retained. Without that information, the Crown cannot make disclosure. If the accused is to represent himself or herself, the Crown must make disclosure to the Court or through some means to the accused directly. But that should not occur if the Crown is certain counsel will be retained. If the accused, for example, appears initially at court and says, "I don't have a lawyer today but I'm going to get one and I'll have one when I come back.", then the Crown would be improper in making disclosure directly to the accused person and having a communication directly with the accused person. If the accused brings one counsel and we all know of situations where there's duty counsel, for example, with legal aid. (And I'm speaking specifically of Halifax.) There will be legal aid lawyers at the court on a day in and day out basis. They may not be the lawyer who ultimately represents the accused, though they may represent the accused at an arraignment even if it's only for the reading of the charge. They may represent the accused for the taking of a plea or the election on an indictable matter. But they may not be the final lawyer. And we all know, rightly or wrongly, that that arraignment or that election will take place prior to that defense lawyer's having had access to all information in the Crown file. Sometimes it won't. Sometimes as

a result of a summons, a lawyer will know that the case is coming up and review the file prior to arraignment. But sometimes that arraignment will occur and an election or a plea will be entered without disclosure.

It's our view that practically disclosure must be initiated by the defense. That's not to take away from the positive obligation on the Crown to make full and complete disclosure; but from a practical purpose, it's got to be initiated by the defense. We say that the safeguard that's got to be built in is if disclosure has not occurred by the time of the first taking of evidence, be it the preliminary inquiry in an indictable offense or the trial on a summary offense, then the Crown must advise the Court that disclosure has not occurred. It's our view, my Lords, that that's a practical solution.

Another question that's been raised is can there be any restrictions on disclosure. In making disclosure, the Crown has to balance the need to prevent the endangering of life or safety of witnesses, or interference with the administration of justice. The Crown must fairly and dispassionately exercise its discretion to deny information for the protection of witnesses while at the same time providing the accused with sufficient information to allow for a full and fair answer in defense. In exercising that discretion, the Crown must be mindful of any reasonable grounds for believing there will be destruction of evidence, intimidation of witnesses, threats, etcetera; any of these which would result

from disclosure of witness statements or particular information in the Crown's file. In that instance if the Crown in its discretion concludes that there is a problem, they should allow the defense to know what the evidence will be while at the same time ensuring the protection of witnesses.

What we advocate ultimately, my Lords, is not a black and white disclosure policy. We say ultimately that to take away discretion from the Crown is dangerous because it imposes a set of strict and firm guidelines -- or strict and firm controls where shades may sometime be necessary. The ultimate model that we think is appropriate is mandatory, complete, and full disclosure with an over-riding right in the Court to intercede if requested to do so.

There's been a question here, and we've discussed it at great length in this Commission, about police reports. Should police reports be made available to the defense? Well police reports, I think we now know, having looked at any number of them, mean different things to different people. And what's contained in one police report may not be contained in another officer's report on exactly the same incident. We believe that there has to be a system in place which requires the police to make full disclosure to the Crown and the police should be encouraged to do that. In our submission, we have recommended that the Attorney General's department and the Solicitor General's department should create guidelines for what the police

must disclose to the Crown and those guidelines -- and there must be sanctions in place for failure by police departments or police officers to comply with those guidelines. There are two sides to this coin and we do not think the police side should be ignored.

I note in looking at the C.B.A. material, and specifically I'm referring to volume 2, their compendium of disclosure materials across North America. The C.B.A. -- In British Columbia, they have a form for report to Crown counsel and the form, as I look at the guidelines that they have in B.C., is broken down. One part of it is factual, another part of it is for opinions. And they clearly encourage the police -- And I don't know that it works, but I just look at the paper. They clearly encourage the police to separate out factual matters from their opinions or advice.

I don't think anybody advocates that police opinion or advice should be given to defense counsel. What the defense require are the facts. And something like that may be appropriate. In our submission, and I -- our submission was written prior to having the benefit of the C.B.A. material, we recommended a similar type of structure where police reports and the nature of police reports are better defined.

Ultimately however, if in the factual matter -- factual part of the report, opinions creep in or other material which should not be disclosed creeps in, then we think that the Crown again must have residual discretion to keep some of that -- that

information, not the facts, but that information from the defense.

We have heard that some lawyers either don't get disclosure or get disclosure with strings attached. We urge that disclosure must be without restrictions, no strings attached, and that you cannot have disclosure if the basis of the disclosure is "You can have this so long as you promise you won't do x, y, or z with it." We also believe that defense counsel would be duty bound not to accept material with those strings attached, but setting that aside, that there should not be restrictions placed on the use of material provided to defense counsel.

In terms of timing of disclosure, we accept that the obligation to disclose is continuous. The current policy makes it continuous and it's continuous for all that information that comes into the Crown's possession.

A more difficult question, and one on which we're not able to come up with a definite conclusion, is how continuous is the obligation on the police. And I think of only two situations in which cause me some difficulties. Let us assume that the Crown is finished its case and the defense is in the middle of their case, and the Crown says to the investigating officer, "Gee, I didn't know that fact. Can you go out and get me some more information?" We're talking about the middle of a trial. A new witness is brought in or new information is brought in which the Crown intends to use as part of its case in replying. A new

matter that would properly be the subject of a rebuttal evidence. Should that evidence be turned over to the defense as soon as it's procured? In our view, the adversary system still would dictate that that information would not be turned over. What it is is information that's specifically being used to respond to the defense case.

The other type of situation is if the police continue their investigation after the charge is laid and decide that there is nothing that they have to give to the Crown. They get some other information but there's nothing they turn over to the Crown. Quite frankly, I'm not able to conclude in my own mind, and Mr. Saunders and I are unable to conclude, whether that information -- what should be done with that, because we don't see that a disclosure policy that requires a complete opening of the Crown's file is what's required or should occur. There's some limit that has to be imposed on what access they have to the Crown file.

The American's have dealt with the concept of the open file problem in terms of constitutional law and they've not been able to conclude that even with an open file policy, even if it's dictated by the Supreme Court, that it resulted in full and fair disclosure because if people want to subvert it, they will. And we conclude that the disclosure policy ultimately has to encourage the participants in the system, the police officers, and the prosecutors to comply with it. And therefore they've got

to have discretion, they've got to be treated as professionals with the right of an appeal.

COMMISSIONER EVANS:

Well when you come exercise that discretion, that's where the problem arises sometimes.

MR. PINK:

Absolutely.

COMMISSIONER EVANS:

Some people have very little discretion when it comes to the defense counsel. Why can you not bring that problem before a judicial officer, a judge, or a provincial court judge; one or the other.

MR. PINK:

Where we differ from the Law Reform Commission model, my Lord, is quite simple. The Law Reform Commission model would require that prior to a denial of disclosure, there's an application made. We conclude that the Crown should be able to exercise -- and the test remains the same. Intimidation of witnesses, interfering with the administration of justice, that line of cases. We conclude that if -- that the initial decision can and should be made by the defense -- by the Crown, pardon me. The Crown should advise the defense that they are denying disclosure for -- of particular types of information for particular reasons. And then the defense has the obligation to apply to the court. That putting in a system, and I think this has been the basis of

criticism of the Law Reform model, is putting in a system that requires daily application to court, or frequent application to court, just won't work. It creates a bureaucratic problem that doesn't make sense and therefore we concur that there should be the right for judicial intervention. But that judicial intervention should be by way of an appeal as opposed to an initial application where a judge approves the denial of disclosure. We also think that's a more comfortable position for the Court to be in because if the Court is deciding at the outset what should or should not be disclosed, even if they have to give reasons, it seems that they are becoming too much part of that initial process.

COMMISSIONER EVANS:

It doesn't have to be the same judge who hears the case?

MR. PINK:

No. But it's akin to the problem that you have with the issuance of search warrants, and of wire taps, where one becomes really questioning whether the judges -- how much independence do they really exercise? That's been the criticism of those type of procedures. So we say that it should be an appellate or review-type procedure as opposed to an initial application.

COMMISSIONER EVANS:

That requires the Crown to state what they do not wish to divulge.

MR. PINK:

And the reasons for it.

Through this discussion, My Lords, we've dealt with the essence of the two models, and I again wanted to just say that the -- we take little disagreement with the proposal that Mr. Ruby put forward yesterday, other than the issue that we just addressed. We do not think that much of what he said is inappropriate and his improvements on the Law Reform Commission model probably are -- are that.

The one other question, though, and this is perhaps a picky point but I'll only raise it briefly, is whether criminal records of all witnesses should be disclosed. The Law Reform model itself doesn't call for that. The Uniform Law Commission model does not call for that nor does the current disclosure policy. It only requires disclosure of the accused's criminal record. And there the issue is the Crown's obligation to witnesses, the Crown's duty to be fair to witnesses. They are not on trial. And we don't think that a guideline or an obligation which requires disclosure of all witnesses, so that every time a witness takes the stand a previous record could be put to them, is necessary. There may be cases, for example, if a witness has a conviction for perjury, where that is clearly relevant. But if a witness simply has been in court on a break and enter or a robbery or whatever the case may be, there's got to again be some discretion there that that information shouldn't

always be available for the fodder of defence counsel.

COMMISSIONER EVANS:

You have to balance the issue of fairness to the witness against fairness to the accused.

MR. PINK:

That's right.

My Lord, I've -- we've outlined in our submission our final conclusions on disclosure and I'm going much longer than I had originally intended so I won't repeat them.

But let me just deal with two other matters that really fall out of the rubric of our written submission and they are matters that have come up in other counsel's submissions before I ask-- before Mr. Saunders carries on.

Mr. Ruby yesterday proposed a review-type agency where people in prison allege that they have been wrongfully incarcerated. We do not disagree that such an agency may provide a degree of comfort to those who feel they have been wrongfully done by. Maybe there's a requirement for some type of ombudsman model with an investigating capacity. We do not share Mr. Ruby's view that there are many Donald Marshall, Jr.'s out there, that our prisons have lots of them. The numbers given to us by Mr. Rutherford as to the cases that they see on an annual basis wouldn't indicate that there are. However, we do support a proposal which would call for an improved mechanism for allegedly wrongfully convicted persons to bring their claims

forward. Mr. Ruby was not able -- I don't know whether he was able or he did not in his submission suggest that there is such an agency or model in another jurisdiction, although I am aware of the model in Britain which, I believe, is by means of a private agency as opposed to a publicly-funded one with the type of authority and powers that Mr. Ruby would advocate. However, it's a matter worth considering and we commend counsel for making that proposal.

Finally, and not by any way of the least importance of all, is the matters raised in the brief of the Union of Nova Scotia Indians. They have recommended that things should be changed as far as the Native community is concerned on a number of levels and have provided a number of alternate models including a tribal justice system for Nova Scotia. We do not disagree with many of the latter proposals they make at the very conclusion of their brief which call for the amelioration of disadvantages which Natives feel they have in the criminal justice system, Native court workers, better assistance for Natives as they come before the courts, and that whole range of support.

The suggestion that Provincial Courts should sit on Reserves is perhaps worthy of consideration. We're not sure that it's practical in every Reserve in the Province of Nova Scotia but maybe for some of the larger major ones, it is worth considering.

A tribal justice system, which is referred to in their submission and is dealt with extensively in Doctor Clarke's

research work, is one means of recognizing the aspirations of Canada's aboriginal peoples for the re-establishment of a degree of self-government. However, the concept is fraught with difficulties and is not universally accepted, either within or outside the Native community. As I said, Doctor Clarke deals with this extensively and I don't want to say that we ascribed to all of his views, but his views are certainly worth careful and detailed consideration. We don't believe, however, that the Native community in this Province has reached the level where a tribal justice system is a practical means of solving the difficulties that they have articulated.

We do encourage, however, the Commission to bring forward proposals which will assist that particular community in dealing with what they consider to be the poor treatment that they've had at the hands of the criminal justice system.

My Lords, as I said, I went much longer than I had originally intended.

COMMISSIONER EVANS:

I think, Mr. Pink, I contributed to the extent of your presentation, but I hope I did not throw you off the track. I believe that a disclosure is a very important aspect of the criminal justice system and that's why I was interested in finding the views of the Attorney General's Office.

MR. PINK:

Well, as I said at the outset --