COMMISSIONER EVANS:

So if I have put you off, I regret --

MR. PINK:

As I said at the outset, we hope that our contribution on this is constructive because we believe that it's -- it was a significant contribution to the wrongful conviction of Donald Marshall, Jr.

COMMISSIONER EVANS:

Right.

MR. PINK:

And it's the one thing that we all can work towards improving so that that element never breaks down again.

MR. CHAIRMAN:

Thank you. We'll take a short recess.

INQUIRY RECESSED AT: 11:07 a.m., AND RECONVENED AT: 11:24 a.m.

MR. CHAIRMAN:

Mr. Saunders.

MR. SAUNDERS:

Thank you, My Lords.

If you could open the factum filed on behalf of the Attorney General, My Lords, the second white page gives the detailed table of contents, and I can indicate to the Commission that the matters with which I'll be dealing this morning are chapters three and ten through sixteen inclusive.

The obligations upon the lawyers who acted on behalf of Donald Marshall, Jr., My Lord, were based in the common law,

moral suasion and contract. Much has been said during the course of these many days and months of hearings about the Crown duty to disclose information and it's our respective submission that not enough has been said about a defence obligation to demand. It's a two-way process. As you've heard from my colleague, Mr. Pink, it's our submission that the law in 1971 did not require a disclosure upon the Crown. It's been the evidence by witnesses who have testified as to their practice and procedures in Sydney in those years that it was not the custom.

I refer Your Lordships to the evidence given by Arthur Mollon, a senior solicitor now with Nova Scotia Legal Aid, as to his experience in the practice as defence counsel and disclosure, and the requirement and onus upon defence lawyers to ask as a good primer for the way it was in Sydney in 1970 and following.

We recognize the long and very valuable public service given to this community by Messrs. Rosenblum and Khattar; and yet we believe that it is our duty to criticize their efforts on behalf of Donald Marshall, Jr., and to say to Your Lordships that in our respectful view, their efforts in that case fell short of the standard which Mr. Marshall ought to have expected based upon all of the evidence before this Commission.

You will recall that both Mr. Rosenblum and Mr. Khattar had served as crown prosecutors in the area. Indeed the evidence is that in early June, 1971, Mr. Rosenblum had a case with Mr. MacNeil where they were both on the same side as prosecutors.

One would have thought that surely Mr. Rosenblum could easily have asked Mr. MacNeil, "What have you got? What is the case against our client?". It's not enough we say with respect for Mr. Marshall's present lawyers to say, "Well, it doesn't matter what the practice was in 1971 because these defence counsel didn't get anything anyway." We maintain with the greatest of difference, the defence counsel had a duty to ask. There were numerous warning signals during the course of these proceedings that there were contradictory statements or different statements or a number of statements given by key, material, Crown witnesses.

In the statement of facts prepared by the Crown and filed with the Court, there's an indication that Maynard Chant spoke to the police on more than one occasion. At the preliminary inquiry, Patricia Harriss indicated that she had conferred with the police on more than one occasion. We say with respect that these ought to have been clear signals to defence counsel to have pursued those witnesses and extracted from those witnesses when they spoke to the police, under what circumstances they spoke to the police, and how many statements they gave and so forth.

It was a serious charge, none more serious really under the Criminal Code. The evidence discloses that there was no lack of money funding this defence. The evidence discloses that there were six months between the time of arrest and the time of trial. We submit that it was dangerous for Crown -- for defence counsel

to have adopted either at this time or any other time that there is some kind of property in a crown witness. We believe that that notion is completely groundless and very dangerous for any defence counsel to take.

The evidence is that it was the custom and practice of Donald C. MacNeil to give out statements if they were sought. As I've indicated to you, both Messrs. Khattar and Rosenblum were former Crowns. If they had made the demand and if it were refused by Mr. MacNeil, there would then have been a basis to make application to the presiding judge to have those statements produced. The evidence is that the defence counsel knew that Mr. MacIntyre, the chief investigator, was in the habit of acquiring statements from witnesses. The evidence is apparently that Mr. Marshall was only consulted on about two occasions between the time of his arrest and the time of his trial. The indication from his evidence is that he was not ever given a copy of his preliminary inquiry transcript to review. The evidence also, we say with respect, is that he was never quizzed or questioned almost mercilessly in an effort to find out what the truth was as to the circumstances in Wentworth Park. Defence counsel did not have statements of Mr. Chant in their file. The evidence is clear that they relied upon Mr. Marshall or his relatives and friends for everything. We question how it could have mattered or made any difference to Mr. Marshall's defence were Crown witnesses vigorously cross-examined and challenged at a

preliminary inquiry. If it is ever a wise tactic not to do so, we certainly question that tactic or strategy in this case. The evidence is that no Crown witnesses were interviewed. The evidence is that defence counsel did not know of the decision of the Supreme Court of Canada in the case of Patterson v The Queen, a case where the Supreme Court of Canada very clearly stated the discretion upon a trial judge when requested by defence counsel to have statements produced by the Crown. And the Supreme Court of Canada mentioned, in fact, the responsibility upon defence counsel to ask. And I'm quoting from the extract of the case which appears in Mr. Ruby's brief before this Commission at page 144, where Mr. Justice Hall for the Supreme Court of Canada said:

> ...a lesson to Defence counsel as to the importance of tenacity. If Defence counsel had made an attempt to elicit from the witness what the statements given by them contained or whether evidence then being given was adverse, he might well have made out a case for the immediate production of the previous statement.

That was the law at the time of Mr. Marshall's trial in Sydney in 1971.

By the end of the preliminary inquiry, they certainly knew that the key to the Crown's case lay in the mouths of Messrs. Chant and Pratico, purported to be the two eyewitnesses to the crime. We submit with deference that they ought to have spared no effort in finding everything available by which one could discredit, or impugn, or otherwise attack the judgment or

visibility, credibility, veracity, or other capabilities of these two material witnesses. They did, in fact, have from June to November to do that. There was no effort made to demand such production upon the Crown. We say that had they vigorously pursued these items and categories that I have enunciated for Your Lordships, they would have fulfilled their ethical, legal, and contractual obligations to their client.

The next item, My Lords, that I turn your attention to is chapter ten of our factum which is the Crown duty to the Court on an appeal. (It's at page 96 of our brief.)

The record will never show, My Lords, what attention, if any, the Nova Scotia Court of Appeal in 1972 paid to the various rulings given by Mr. Justice Dubinsky at the trial. The decision is silent as to those matters which were criticized by Professor Archibald when he appeared before the Commission last November. But Milton Veniot was a witness who argued on behalf of the Crown and he has testified before this Commission and he has said that the Court did consider the evidence of John Pratico and Chant and Mr. Marshall. The Crown's factum addressed the time spent, at least, by the trial judge in his charge to the jury, the amount of time spent by the trial judge on the inconsistencies in Mr. Pratico's evidence, and the necessity that the jury come to its own conclusion on the matter of credibility.

For our part, we only propose to address this morning the recommendation that we have made at the bottom of page 99 of our

brief and that is, "What onus is there upon crown counsel to identify and raise with the Court of Appeal, errors which it decides or determines having reviewed the record?".

We believe that the ultimate responsibility is upon defence counsel. They having been charged with the conduct of their client's case ought best to know what grounds they wish to address in the Court of Appeal. If, however, Crown counsel, having reviewed the record, notices an error which it believes might result or could result in an acquittal to the accused, we believe that there is a burden or a responsibility upon Crown counsel to bring that to the attention of the defence. We have stated at the bottom of page 99 that:

> If the Crown objectively feels a ruling or direction by the Trial Judge might be erroneous, and that error might reasonably result in the appeal being allowed, then the Crown should raise it.

We say as I have just indicated that the first responsibility to declaring that before the Court of Appeal ought to be the defence. We say that once Crown has disclosed its review to the defence, its views on what it considers to be an error, that defence counsel ought best decide whether they were going to raise it and if they were going to raise it, how they wish to handle it. If on the remote or rare case that the Crown were still persuaded that such an error would be determinative of the issue, then it may well be that the Crown would have an obligation to bring that error to the Appeal Court's attention

and argue that the appeal be allowed. And we have set forth that proposition at page 100 of our brief.

COMMISSIONER EVANS:

That's assuming the defence, having been notified, does not wish to raise it.

MR. SAUNDERS:

That's correct, My Lord.

My Lord, I now deal with chapter eleven of our brief which we've entitled, "The reinvestigation of the Donald Marshall, Jr., conviction by the R.C.M. Police in 1982".

We say at the outset that -- in our respectful submission that there was nothing to prevent the R.C.M.P. from investigating the Sydney Police Department. We say that they did not require any special permission or consent from the Attorney General's department to embark or continue on such an investigation. And we say that nothing was done by officials within the Attorney General's department to halt, thwart, or put off the rails forever that review or investigation of the conduct of certain members of the Sydney City Police.

Having said that, we recognize the conflict in evidence between senior officers of the R.C.M.P. and senior officials of the Attorney General's department. I say to you that liberty is much too important an item to be lost in the dance of words that we have sometimes seen in the hearings before this commission. And one of our recommendations is that there has to be clarity in

language between police who are serving the community in the Province and officials within the Attorney General's department who are expecting professional police services to be rendered. We say that the Crown could not restrict an R.C.M. Police investigation and at page 102 we have identified certain sources from the evidence for that proposition.

It was view of Mr. Gale, the Director of Criminal, that the R.C.M.P. could question, interview, investigate whomever or whatever they wished. Mr. Gale said that they had already been assigned with the file and given the conduct of the case, and Mr. Gale testified on several days before this Commission that he refused to accept the proposition that that police force required any kind of special consent, permission, or direction from him.

It seems as though officials with the R.C.M.P. treated their role in 1982 as being divided into three separate and distinct operations; first, obtaining the release of Mr. Marshall from penitentiary so that his case could be decided by the courts, secondly, the pursuit of Mr. Ebsary as the true assailant, and thirdly, an inquiry into the activities of Messrs. MacIntyre and Urquhart or other police officers in Sydney. Coincidentally officers within the Attorney General's department saw it as one case with various features, and once seized with the original matter, original file, it was entirely left to the R.C.M.P. to decide what they could do from there.

It has also been apparent in the evidence before this

Commission that there has been differing philosophies as to the ultimate responsibility as between an officer of the Crown and an investigating police officer on the prosecution of a matter. That is the institution of a prosecution. And we have urged that this Commission consider recommending that there be a clear statement that the ultimate responsibility of the police is to lay a charge, bring forth information. It is the ancillary and equally important principle that the Crown officer has the ultimate responsibility of deciding whether that prosecution will go forward. And if the Crown officer determines that it will not, it is the responsibility of the Crown officer to appear in open court and state before a judge that it is being withdrawn or stayed.

There has been confusion, considerable confusion we submit, when contrasting the evidence given by police officers on the one hand and certain officials within the department on the other as to where the delineation between these responsibilities is. And we submit that it ought to be a statement from this Commission that there are those two ultimate responsibilities, that there's nothing blurred about them, that the delineation is distinct and that it's in the public interest that they be recognized. A recommendation in that respect is contained at page 107 of the brief, My Lords.

MR. CHAIRMAN:

Mr. Saunders, accepting that for the moment that the police have

the ultimate responsibility to lay a charge, does that, in any way, impinge upon the obligation of the crown prosecutor with his or her legal training to offer advice during the course of an investigation to a police officer who's so investigating a suspected crime as to the kind of evidence that should be gathered and the procedures that should be followed in acquiring that evidence?

MR. SAUNDERS:

No, My Lord, it ought not to have any impact at all on that concurrent responsibility of Crown counsel to so inform, discuss and advise the investigating police officer. That is the ideal and I suggest it ought to be the reality, that it's incumbent upon police officers when it doubt or when they have questions to review those matters with the officer of the Crown. It is equally incumbent upon prosecuting officers to advise the police if they think the evidence is lacking or if they think that the facts determined by the police to that stage do not warrant putting an accused to trial. It's a very serious decision. There are discretions at play.

Former superintendent Feagan in Halifax testified as to the factors, the criteria which go to the exercise of a police officers discretion. Other witnesses have testified as to the criteria or factors that go to the exercise of a Crown's discretion and that there may be something beyond the identification of enough facts to establish a prima facie case. There may

be other factors spoken of, in particular, by Commission Simonds, former Deputy Commissioner Quintal, as to the proper, legitimate exercise of that police discretion in the public interest. And so I see them as going down the same track parallel but if there is a disagreement -- if at any stage in that process, (And we say that the decision of a police officer in the field, a third-class constable, or a corporal, or whoever it is who's the investigator in the field.) that his doubts, his investigation, his assessment ought to be reviewed by those senior to him. That's how it works as we understand the evidence given at these hearings.

But if after all of that vetting, or cross-checking or objective serious criticism, there is still a disagreement between the police and the Crown, we say it is the ultimate obligation upon a police officer, if he feels that it's in the public interest and that the evidence is warranted, to lay the information. And we say it is then equally the responsibility of the Crown, if they determine that they're not going to go forward, to stand up publicly and say why. We say we see no conflict at all in those fundamental responsibilities of those two important parts of the system, My Lord.

At page 107 of our brief, My Lords, I've turned to a sub-heading that we've entitled, "Reference to hold in abeyance". And we say vigorously that there was never any attempt by our client/department to delay or prevent an R.C.M. Police investigation of the Sydney police force or any other matter that

they thought pertinent or material to the Donald Marshall review.

No one could have expected that the various cases and appeals involving Roy Newman Ebsary would take practically four years. You've heard the evidence of former Attorneys General and in particular the evidence of the Honourable Mr. Giffin who said that he had very little precedent to rely upon, but he was ever cognizant of the fact that Mr. Ebsary was facing trial. He didn't want to do anything which would trespass upon the legitimate interests and rights of Mr. Ebsary. He wanted to proceed with as much dispatch as he could in the hearing of the Donald Marshall Reference but he had to keep in mind a reality that another accused was before the courts. He even testified that he went so far as to call defence counsel, Mr. Wintermans, who was acting on behalf of Mr. Ebsary, to find out whether he was serious in proceeding to the Supreme Court of Canada. I believe the evidence is that he contacted Mr. Wintermans while the latter was on vacation. And Mr. Wintermans confirmed that that was his intention. Mr. Giffin made the decision as he testified that he could not then go forward with the ultimate resolution of the Marshall case until that had been completed. And when all of the trials, all of the appeals involving Mr. Ebsary were concluded, this Commission was set up. So we vigorously reject the notion that there was any dilatory conduct on the part of this department or that this department did anything to prevent or thwart a proper and full police

investigation by the R.C.M.P.

We say that there was never one iota of suggestion by the writers of police reports in the field which would indicate to officials sitting in an office tower in Halifax in the Attorney General's department, that members of the Sydney Police force ought to be prosecuted for criminal offenses. Had senior officers of this police force felt that way, then we say they ought to have expressed themselves deliberately and coherently in their reports to the Government. No senior officer had complained to Mr. Gale that they thought he had thwarted their investigation. In none of the Thursday or Friday meetings between Mr. Christen and Mr. Gale did Mr. Christen ever suggest to Mr. Gale that they were annoyed, perturbed, or frustrated with the action taken by the Attorney General's department. Not one person complained and I suggest and submit with respect that had the senior officials, Inspector Scott, Superintendent Christen, Superintendent Feagan felt that that had occurred, that there was some kind of action taken by the Attorney General's department to stand in the way of that kind of police investigation, then surely they would have told Mr. Gale.

In fact when Mr. Vaughan came on the scene, Superintendent Vaughan, some years later you'll recall -- (And I'll get into this in a little more detail later.) You'll recall his consternation upon reading the memorandum from Staff Sergeant Wheaton in the file, that he would cause some embarrassment to

the department were he to accede to a request for an interview by the C.B.C. Mr. Vaughan thoroughly reviewed the file, could find nothing in it to suggest anything like what Mr. Wheaton was suggesting and so what did he do? He went to the sources. He interviewed Staff Wheaton and he interviewed Mr. Gale. And you have the evidence of Superintendent Vaughan that he was well satisfied with the explanation given by Mr. Gale and wrote him accordingly.

We say that if people in office towers in a city who are acting on behalf of a government department are expected to make decisions based on reports received from investigators in the field, then those investigative reports better detail what the investigators have in mind. At page 113, I raise the topic, "The Importance of Speaking Your Mind".

It has been, we submit, the clear evidence of officials up to and including the Attorneys General who have appeared before Your Lordships, that their first priority was to get Mr. Marshall's case before the Nova Scotia Court of Appeal, and their second priority was to make sure that in the doing of that, they did not trespass on any of the actions against Mr. Ebsary. It would be unfair to Mr. Ebsary to have an inquiry before his avenues of appeal were exhausted.

We say that there was never a peep from Staff Sergeant Wheaton in his several reports to his senior officers, which he and they knew were going to the Attorney General's department,

calling for sanction of former Chief MacIntyre or Inspector Urquhart. At page 117 of our brief, I have set forth the numerous reports prepared by Staff Sergeant Wheaton, the so-called C-237's which he, Inspector Scott, Superintendent Christen and other officers have all confirmed were deliberately, in their para-military structure, sent up the line so that if the system worked they could be vetted and checked, criticized, perused, by more experienced superior officers. In none of those eight, which I've identified at the bottom of page 117 of our brief, is there one word from the chief investigator in the field urging that the Sydney Police officers who were involved in Mr. Marshall's case in 1971 be pursued in any way on matters of criminal conduct; nor, if I can draw Your Lordships attention to page 118 of our brief, is there any report from Mr. Wheaton in his next report, which is exhibit 20, at page 8, and that is his report to his C.I.B. officer dated the 5th month of '83. In none of that is there any mention that Messrs. MacIntyre and Urquhart ought to be investigated or prosecuted for any criminal action. Indeed -- and this is a critical memorandum and Your Lordships will recall the amount of time spent by ourselves and other counsel with Staff Wheaton on it. It's critical because this contains the reference to the paper on the floor; that is to say, it contains the reference that Staff Sergeant Wheaton made to the Patricia Harriss unsigned, first statement, the June 17th statement, and that's in red book 20, exhibit 20, page 11,

which is the 3rd page of Staff Sergeant Wheaton's report. Your Lordships don't need to turn to it, but I highlight this sentence from it. Under the heading, number fourteen, Patricia Harriss, quote:

> In reviewing the Sydney City Police file after the order had been made by the Attorney General that they turn over all documentation, I found a partially completed statement dated 17 June, 1971, 8:15 p.m.

At no time in this report or any other does the chief investigator, Staff Sergeant Wheaton, describe an incident of any paper being dropped on the floor by Chief MacIntyre. He allowed under cross-examination that it was a reasonable interpretation to anyone reviewing that report that it was in an innocent review of the file that he happened to stumble across this first statement. And we submit with respect that that's very telling evidence and ought to be given very careful consideration by this Commission.

The next step was when Superintendent Vaughan came upon the file and did that thorough assessment that I've already described, and called upon Staff Sergeant Wheaton to identify what it was that he was having trouble with. Why would he cause embarrassment to the department if he were to go through with the interview? Why was he now calling upon there to be an investigation of the actions of the Sydney Police when he hadn't said anything about it in 1983? A logical question, I submit,

for a superior officer like Superintendent Vaughan to make. The answer, according to Superintendent Vaughan's evidence, was that there was nothing in the files of the R.C.M.P., nothing in the reports which were sent to Attorney General's department, which would indicate any such thing to the officials of this Government. Put simply, officials were left in the dark if that was in fact the view of Staff Sergeant Wheaton. In fact, it's been the evidence of Staff -- Superintendent Vaughan and I believe Superintendent Christen that the very first time that they heard the suggestion of Patricia Harriss' June 17th statement being dropped on the floor was during these proceedings before this Royal Commission.

Mr. Gale at transcript page 13,381 denies that he was ever told by Mr. Edwards or any R.C.M.P. officer of this incident, denies that he was ever urged or had it suggested to him that the Sydney Police be investigated.

Mr. Edwards at transcript page 12,225 says that he was never told and had he been told, he would have urged that a charge be laid particularly if one were to accept the view that all of this was done after the order of the Attorney General. On direct evidence Staff Sergeant Wheaton left the impression that he had had such discussion with Mr. Edwards. On cross-examination he said he could not remember telling Mr. Edwards that. The fact is the evidence before this Commission is that he never told Mr. Christen. The evidence before this Commission is

that Superintendent Vaughan never knew and you'll recall that Superintendent Vaughan interviewed Staff Sergeant Wheaton.

So having regard to all of that evidence, My Lords, we have set forth recommendations at page 123 of our brief as to the clarity of language that must be employed, both in contracts between the R.C.M. Police and this Province, the methods of transmittal and record-keeping between law enforcement agencies and government officials, and finally the third point as I've already stated, the ultimate right to lay an Information rests with the investigating police, subject only to the right of the Crown in the exercise of its discretion to withdraw the charge.

COMMISSIONER EVANS:

It says "director", but I take it you meant discretion?

MR. SAUNDERS:

Yes, My Lord.

The next chapter I turn to, My Lords, is 12 of our brief dealing with the reference under section 617 of the Criminal Code. And in this discussion, My Lords, I will spend some time on what we consider the responsibility to have been upon Donald Marshall, Jr., to speak the truth.

Your work and ours and that of other counsel over the past year and a half has been to consider the administration of justice in Nova Scotia. I don't think it's trite to say that the people of Canada are watching. It's not possible to examine the administration of justice without spending time on the concept of

truth. These are not platitudes or whims that I am casting off lightly. I say that they are the fundamental tenets of our system of justice, the very foundation upon which our system is built.

We are not saying that Donald Marshall, Jr., was to blame for his wrongful conviction to the extent that everyone and everything else is an innocent. We don't embark on an exercise of quantifying or weight or apportioning fault as one might in some kind of motor vehicle liability case. But we do say that anyone who is confronted or entangled in our system of justice ought to have a healthy respect for the truth. And we ought to submit a clear signal to all persons, whose system this after all is, that blame and risk and adverse consequences will befall those who are untruthful and that if you take liberties with the truth, your own freedom may be adversely affected. It would be grossly unfair to the sensibilities of any reasonable citizen to hear that anyone can withhold the truth, or only impart some of it and then be heard to complain when actions were taken as a consequence go awry.

I would refer Your Lordships to the following facts: Learned counsel for the Commission in his address Monday of this week referred to the length of time that Frank Edwards, the prosecutor, had spent with Donald Marshall Jr., and that in the last trial he preferred the evidence given by Donald Marshall Jr., to that of Jimmy MacNeil. At page 16,018 of this

transcript, (That's this Monday's transcript.) my learned friend, Mr. MacDonald, referred to the evidence given by Mr. Edwards on that point. And Mr. Edwards testified before this Commission, "something was going on in the park". You have heard Mr. Edwards testify on several days of hearings. I submit that considerable weight ought to be given to Mr. Edwards' testimony on these and countless other features of the case, given the six years that he has spent in living it. And Mr. Edwards still believes that some degree of responsibility rests with Donald Marshall, Jr.

When Bernie Francis first heard the story given by his friend, Mr. Marshall, in the gaol when they spoke in MicMac, he was doubtful and unimpressed. He went back a second time to have a private talk with Mr. Marshall. Is it any wonder, then, that the police or his lawyers or other people who later came to review his evidence were skeptical. I ask the question: would it have made any difference to the police investigation had Mr. Marshall said what he was about in the park, if it were true that he was intent on in some fashion, however brief, of unlawfully depriving some person of money? The answer to that question may depend on your ultimate conclusions as to the perseverance, objectivity, resources, commitment and efforts of the Sydney Police and that is for you. But it is legitimate for us to ask if it would have assisted in pursuing the real culprit?

Mr. Khattar testified that it would have made a fundamental

difference to him had he known the truth. He says he would have pressed the police with the true story and urged that they get on in the knowledge that there had been some intent to deprive, whether it was a rolling or a robbery. He testified before this Commission that he would have disclosed that to the police and urged them to investigate it anew. Would it have made any difference to the defense team of Messrs. Rosenblum and Khattar? We reject the idea that it wouldn't have mattered in the slightest because they wouldn't do anything anyway, and that would seem to be the suggestion made by counsel for the Commission and counsel for Mr. Marshall, Jr. To follow that logic would mean that they wouldn't do anything had they been told about Jimmy MacNeil coming forward in November of '71, or about the polygraph examinations being administered to Messrs. Ebsary and MacNeil. We submit that as absurd, and that it's not idle speculation to think that it could have made a difference; made a difference in the sense of believing in your client, believing in the story that he tells as being more plausible, asserting to the police your theory of the case, asserting to the Crown your theory of the case.

MR. CHAIRMAN:

Didn't Mr. Khattar testify that when Mr. Marshall told him of the alleged behaviour of these two individuals in the park, who were posing as priests and were inquiring about women and liquor and cigarettes, that from then on he had doubt as to whether Mr.

Marshall was giving him the truth?

MR. SAUNDERS:

Yes, he did. And I say that he laboured at a distinct disadvantage in not knowing the full story from his client. It was not plausible to Mr. Khattar when he heard that story. It was not plausible to most who heard it, I submit, that suddenly and without warning, two people dressed like priests having had some kind of discussion about women and liquor, one of those two hauls out a knife and stabs one person on the spot. What is the motive for that? We say it might have well made a difference to defense counsel had they been told the whole truth by their client as to what he was about in the park. They could have used it to plan for the cross-examination at the preliminary inquiry or at the trial of key Crown witnesses. They could have pursued Maynard Chant or John Pratico as to their observations, whether had they been told by Mr. Marshall that there was a calling back of people, that someone said "dig man, dig", that there was physical contact between Marshall and MacNeil. These witnesses could have been challenged by those lawyers with that information at hand. We say that they could have more diligently pursued or may well have diligent -- more diligently pursued the search for the culprit had their client levelled with them. They may have seen fit to interview Messrs. Chant and Pratico between preliminary and trial to see if they could be challenged or impugned or discredited on what their client was telling them.

MR. CHAIRMAN:

But surely that's one of the tasks now facing this commission, to decide as to whether or not Donald Marshall, Jr., failed to tell the truth.

MR. SAUNDERS:

Indeed so, My Lord, and I am merely asking these questions to put before this Commission our submission that it may well have made a difference to either the police investigation or his own counsel's strategy and tactics and handling of the case, or finally and equally as importantly, the deliberations of the jury. And I'll say more about that in just a moment. But they made --

MR. CHAIRMAN:

But our first task is to decide whether or not he did tell the truth.

MR. SAUNDERS:

Yes.

MR. CHAIRMAN:

Because he says that he did indeed tell the truth to his counsel.

MR. SAUNDERS:

Yes. That is a task for Your Lordships. There is no question about it, but --

MR. CHAIRMAN:

If we conclude that, then your argument is somewhat weakened.

MR. SAUNDERS:

Yes, it is. No question, My Lord, but we submit that there have been variations on stories given over the years, and it will be a quandary that this Commission has to face as to what is in fact the truth.

If it were the truth that Mr. Marshall were intent on unlawfully depriving some person in the park of money, and if that had been disclosed to his lawyers, it may well have accounted for a strategy of not putting the client on the stand. Either you spend five months intervening, getting him ready to take the stand, admitting to what in one story he said he was about to do in the park, saying that that's what occurred, this is what was going down, trying to leave the impression with the jury that your man is believable and that it was somehow during the course of this altercation that a knife was hauled out, perhaps in self defense, that that therefore gives a motive for the altercation and makes the jury or at least does something to persuade the jury that your client is telling the truth, had a reason for being there, illicit as it was or may have been. Or if that story were true, it may have persuaded Messrs. Rosenblum and Khattar never to put their client on the stand at all, never to have put him before the jury so that the disadvantages of which many of complained since would not have occurred, so that the jury would not have seen the tattoo that said, "I hate cops" or some phrase like that, so that he would not have been

discredited by other witnesses, and so that he would not have been admonished fifteen times by various counsel and the Court to speak up or otherwise give a good account of himself.

And I say with the greatest deference that any one of us who has defended a non-capital murder case knows the stress we place on hearing the truth from our client. We ought to demand it. I suggest we mercilessly question our clients to find it and we test it. And without it, we defend precariously and at the peril of our client.

I'd like to turn to what happened in 1982 and what happened to the story of the park -- or what happened in the park in 1988, and deal with the statement made by my learned friend, Mr. Ruby, yesterday that -- casting all sorts of blame, the entire blame upon Donald Marshall, Jr., and we're not adopting or accepting any ourselves. I say with deference to him that that indicates -- must indicate he hadn't considered the brief file before this Commission. We have been critical of our client/department and officials within it. We have been critical of others. We have made 48 recommendations for change. But we say that one ought not to forget the role that Mr. Marshall played in his own predicament. As I said earlier, I don't attempt to quantify it, I don't attempt to say it was more or lesser important than something else but I don't shrink from it and I make no apology for dealing with it.

On March 9, 1982, Mr. Marshall gave a statement to

Investigators Wheaton and Carroll at Dorchester Penitentiary. For the record, the statements he gave to those police officers is at exhibit 34, page 52. And at the bottom of that page, My Lords, the first page of the statement, and you don't need to get it but I will quote as follows -- Mr. Marshall says this, quote:

> I asked Sandy if he wanted to make some money. He asked how and I explained to him we would roll someone. I had done this before myself a few times.

Closed quotes. Mr. Marshall is released from Dorchester Penitentiary. In 1982 while testifying at the Reference before the Nova Scotia Court of Appeal, he admits that this is what he was about in the park. He did that under direct examination, questions put to him by his own lawyer, Stephen Aronson. It was not elicited by surprise or by any kind of ambush by Crown prosecutor Edwards. If that were true in March of 1982, did he lead his counsel astray by telling him that upon his release from the penitentiary? He told a story under oath which he now says was false. Yet the story that he gave in the presence of the judges of the Court of Appeal was eight months after being released from Dorchester Penitentiary and we submit no pressure on him to maintain a story if one were to believe that he concocted it in the first place to secure his release.

Through the course of two trials against Mr. Ebsary, Mr. Marshall continued to stay with the story and it was only on the last Ebsary trial that he indicated that he concocted the story

of the robbery or rolling so that it would concur or coincide with what he says he then knew to be the story that Roy Ebsary was espousing. And when Mr. Marshall appeared before this Royal Commission in June of this year, he maintained that same version, that the robbery theory was a concoction and it was invented by him so that he could make his way out of the penitentiary. When he said that before this Commission, I was interested in the timing of it because one knows from the evidence that it wasn't until early 1982 that Wheaton and Carroll went to Dorchester in the first place. And yet we know from the notes that were prepared by Lawrence O'Neil, assistant to Melinda MacLean, that in 1980 he interview Mr. Marshall at Dorchester and Mr. Marshall spoke of a Mr. Flynn and of a robbery in the park. And so one is forced to ask: How could it be that Mr. O'Neil has such an reference in his notes if it is the truth, that it was only in March of 1982 that Mr. Marshall concocted a story to arrange for his own release?

My friend, Mr. Ruby's rationalization, in his submission before this Commission, is that Donald Marshall, Jr., had little else to think about in the 11 years that he was incarcerated. He must have thought, "How could these men confront us and suddenly and without warning, attack both of us?", and that he must have then concluded that the only thing in the mind of Mr. Ebsary was that a robbery or unlawful deprivation was taking place. I say, with deference to Mr. Ruby, that that explanation is not sound

because Mr. Marshall did not advance it to Mr. O'Neil when they spoke in 1980. Mr. Marshall did not advance it in the third Ebsary trial, nor did he give me that explanation when he spoke before this Commission in June of 1988. So Your Lordships have many stories and have heard many versions.

The Court of Appeal that heard the Reference in 1982, saw Mr. Marshall as a witness, they listened to the questioning put by direct -- on direct and cross-examination by his lawyer and Mr. Edwards, and they were unimpressed with his credibility and they said so. And the Government, having solicited the decision of the Court of Appeal, the Minister of Justice having requisitioned their opinion, we say with respect that the department could hardly have ignored the decision.

We don't for a moment say that Donald Marshall, Jr., gave up his right to silence but we say that once he decided to speak, it was his responsibility to take some consequences for his own defence. Mr. Marshall was not a neophyte to the system of justice either in 1971, or in 1982. Only the heartless would say that they can understand the reasons for lying, if that's what he did or what he intended to do in securing his release at Dorchester. If that is the truth, if those were his reasons, I don't challenge the reasons. I don't question the 11 years of anguish and despair that he surely felt, but that does not mean, My Lords, that we ought to excuse it, or condone it, or pardon it.

I turn now to the conduct of the case during the Reference. We reject any submission that the conduct of this case came about as a consequence of some kind of cold and dispassionate decision made in offices in Halifax. The decision to take the Reference under Section 617 was the result of meetings between and among Federal/Provincial officials and with Stephen Aronson. We say that the best of intention was applied. They endeavored to have the matter dealt with speedily, with fairness and balancing the rights of Mr. Marshall on the one hand as contrasted with Mr. Ebsary on the other. That is the evidence of Attorney General, Ronald Giffin, and others, and we reject any suggestion that this was a sham.

I refer to my friend, Mr. Ruby's brief at page 149, wherein speaking of the miscarriage of justice, he says that it wasn't a theory that originated with the judiciary but that it was, quote:

> ...nudged into existence by Mr. Gordon Gale, who asserted, with a comforting arm thrown over the shoulders of John MacIntyre, that as far as he was concerned Marshall was the "author or his own misfortune".

Closed quotes. We reject that absolutely and draw Your Lordships' attention to the evidence of Mr. Gale, Volume 75, page 13,357, where Mr. Gale denies such an encounter with Chief MacIntyre, and he and other witnesses have said that it would never be his style to put his arm around anybody's shoulders or embark in a dialogue like that.

The Court was asked to decide whether there was sufficient evidence to confirm Mr. Marshall's conviction, or whether he ought to be acquitted, or the third option, the worst in the eyes of Federal and Provincial justice officials, that it might be sent on for a new trial. That's what no one wanted. We have conceded in our written brief that Mr. Edwards ought to have had guidance and supervision from his superior officers in the Attorney General's department. Not to minimize to any extent the very considerable talents of Mr. Edwards throughout all of these proceedings, one must recognize that he did not have Appeal Court experience, that this by any account had to be the biggest case of his career, and it was not right for officials in the department to have not provided the degree of supervision and guidance which we say ought to have been attached to a case of that importance.

At page 137, we have recommended that in cases of this kind when the Director so determines, there ought to be a sharing of responsibility. There ought to be a co-counsel arrangement as between the lawyer who conducted the original trial and counsel within the department experienced in matters of appeal.

At page 137, Mr. Lords, or our brief, we have canvassed the advantages and disadvantages of the proceedings whether taken under sub-section B or sub-section C of section 617 of the Criminal Code. You've heard witnesses testify as to what was contemplated and what in fact resulted. Conflicting philosophies

were espoused as to the role of Crown counsel on a Reference as unique as References are. Should the Crown contend that the Court acquit? Should the Crown espouse a "no position", or as Mr. Gale said, should the Crown advance, "If you accept this, Mr. Lords, then the conclusion ought to be this."? Should there be a balancing or a choice enunciated and indicated by Crown counsel?

At page 140, we have suggested either a revision to section 617 of the Code or perhaps a new sub-section which may be attractive to your Lordships to clarify the situation, to indicate whose role it will be to conduct a Reference, to indicate whose resources will be counted upon to take the lead, to indicate in clear terms whether an opinion being sought from the Court will permit that Court to receive and deal with new fresh evidence.

Turning to the question of compensation set forth in Chapter 13 of our brief, Mr. Lords, we say that it is the process of compensation, the procedures, with which this Commission must deal and that has been recognized by all counsel present from the very beginning. That is why we spent several days of hearing from His Honour Judge Cacchione and Mr. Endres, in particular, on their style and strategy and the process of negotiating the process of compensation. But we have never admitted or the view acquiesced to the view that it was within the mandate of this or any other Commission to deal with amount of quantum.

Counsel present will well recall, and this is minuted in

Minutes of Meetings among Counsel, that we, for our department, made it very clear a year ago that we were content to deal with process and procedures but not content to deal with quantum. The matter was never waived in the Court of Appeal in September of 1988. To say that the issue of compensation is within the mandate of this Commission was only to say that the process and procedures and the evidence that we have all heard in the countless days of testimony was properly before the Commission, as advance by commission counsel at the very beginning, to learn what happened, what scheme or methodology there was to deal with it. That is within the mandate of this Commission. And Mr. Ruby for Donald Marshall, Jr., omits the full and final release executed by his client, by his client's counsel, with respect to the damages paid to him by the Federal and Provincial Governments.

As to how the matter of compensation was determined, My Lords, I say this: While accepting and recognizing that Judge Cacchione acted diligently and with compassion and resolve in the best professional tradition on behalf of his client, that does not mean that I much retire from matters which, in my respectful view, may show poor tactics or strategy on his part. For me to do so would not be to present a balanced or fair account. The whole discussion between Mr. Cacchione and our department got off to a wrong foot when Attorney General Giffin felt betrayed by the disclosure that there discussions were publicly known. It

was in the mind of Mr. Giffin that he would have one-on-one dealings with Mr. Cacchione; that in the course of these private discussions, they might come to some quick resolution of Mr. Marshall's plight. And yet on a radio broadcast, according to the evidence of Mr. Giffin, he learned that those discussions were known, in fact, reported on the media.

We reject the suggestion made by learned counsel for Mr. Marshall that it's unfair or pickish or peckish for Mr. Giffin to have adopted that attitude of annoyance. We say that that was the reality. He thought they were dealing in confidence. He felt betrayed. Rightly or wrongly, the fact is that discussions did not go smoothly from that point forward.

The Campbell Commission was set up in March of 1984. We dismiss as nonsense the suggestion that the department was dilatory in its conduct of the compensation discussions between Mr. Marshall's lawyer and the department. It was Mr. Cacchione who put forth the idea to negotiate. Mr. Marshall was represented throughout by able counsel. He and Mr. Endres worked solidly on it. They dealt with one another for several weeks. In cross-examination, His Honour Judge Cacchione, admitted that he didn't expect a blank cheque for his client. He admitted that the first figures advanced by his client were unreasonable. And so isn't it obvious, then, that there has to be some play, some discussion, some inter-negotiating between counsel for both sides. If Mr. Cacchione felt disadvantaged

because of a lack of skills in civil negotiating, then we say he ought to have asked his partner, Mr. Lambert, to assist, or he ought to have considered asking some other counsel to give him a week or two of assistance in negotiating with Government officials on the other side. We question why he did not maintain and keep up the threat of his client to go to a full public inquiry. We would've considered that to be an ultimate trump card or very close to it, and we question the strategy in disclosing that to the other side. We also question the strategy of disclosing that the client had not will to persevere.

These were negotiations. Negotiations are between lawyers. Lawyers are supposed to be adversarial when acting on behalf of their respective client's interests. Mr. Endres was there acting on behalf of the public interest. By September, the deal was complete. In his brief, my learned friend, Mr. Ruby, says that there was delay between March and May 16th, that the Government did nothing between the calling for the Commission on march the 4th, 1984, and the first active step which he says was taken on May 16th, by the convening of a meeting by His Lordship, Justice Campbell, with the lawyers on all sides. We remind this Commission that Mr. Justice Campbell left the Country for five or six weeks in that intervening span. (The evidence is before you on that. I refer you to the cross-examination of His Honour Judge Cacchione, on that point.) The Government made the interim payment to Mr. Marshall of $25,000.00 just as soon as that was

urged upon them by Mr. Justice Campbell. Meetings unfolded on May 16th as soon as His Lordship returned. Negotiations ensued between Mr. Marshall's lawyer and Mr. Endres for the Government, and the arrangement was concluded in August and finalized, as I recall the evidence, by a release signed in September.

On the matter of Determining Guidelines for Compensation, My Lords, we have referred for your consideration for the paper presented (And I know your Lordships have this.) of Professor Kaiser, and we say that that is a helpful and useful analysis. And we have recommendations that we have set forth as numbers 25 and 26 at page 178 of our brief on the question of compensation.

I now turn, My Lords, to the sessions in September of this year in Halifax which dealt with the two other files of Mr. Thornhill and Mr. MacLean. We concede that officials in this department tried to handle those cases differently, but not from favoritism. Rather the notoriety of the case cast upon them the desire to see that it was beyond attack for political bias or motivation. In an effort to avoid that, ironically, they may have made it worse.

In our submission, we have admitted to instances of poor judgment, poor communication, lack of tact in dealing with officials of the R.C.M. Police, a lack of independent, critical analysis by members of the department, an undue (I say it with respect.) deference to authority, such that it caused a lack of necessary independent objective analysis by senior officials.

And in Appendix F, a comparison between the system in Manitoba, which is an area similar in size and population to that in Nova Scotia, and contrasting the resources within that department as compared to ours, we urge upon this Commission to remember the very sizeable increase in numbers of Crowns in the field between 1971 and today and yet a continuance of the numbers of management over that same seventeen or eighteen-year period. That is to say, that even though numbers swelled from some seven prosecutors in the early 70's to number in excess of fifty, the management level stayed at numbers close to three and four. We do not excuse errors in judgment or lack of communication or improper tact or no tact at all, but we set the background for this Commission by reminding you of the lack of resources, the swelling numbers, and that were there more personnel around, it's not speculative to think that better judgment would've been exercised.

I wish to deal explicitly with propositions put by Mr. Ruby in his factum concerning the conduct of former Deputy Attorney General, Mr. Coles. He did not say anything about this last day in oral argument, but he certainly has in his written brief and it's incumbent upon me to reply. The accusations cast by Mr. Ruby begin at page 6 of his factum, My Lords, and continue through page 8, and this is a document that Mr. Ruby has filed with the Commission and clearly publicly.

The first accusation brought against Mr. Coles is that the

press release that he issued with respect to the Thornhill case was deliberately misleading. We reject that. We remind the Commission that Mr. Coles was out West at a conference in Victoria at the time, had no file materials with him. He prepared a release on the west coast which was issued in Nova Scotia. That release drew the objection of David Thomas who testified before this Commission. Mr. Thomas complained; a new release was prepared. Nothing deliberately misleading in the conduct of Mr. Coles, we submit.

The second accusation brought by Mr. Ruby against Mr. Coles at the bottom of page 7 of his brief where he says that with respect to the MacLean matter that Mr. Coles' actions deserve censure, that he misrepresented the views expressed by Mr. Gale in a memorandum that Mr. Gale had prepared. I remind this Commission that Mr. Coles, in his memorandum to the Attorney General, enclosed a copy of Mr. Gale's memorandum. Both documents were before the Attorney General. Surely someone bent on misinterpreting deliberately someone else's memoranda would not have taken the time to enclose both.

Mr. Ruby says at the top of page 8 that there be a consideration given to a charge of obstructing justice. I don't understand that fully. I'm not sure who would have been obstructed. Is he saying that the Attorney General was obstructed? Well, we've already indicated that the Attorney General had both memoranda. Is he saying that the R.C.M. Police

were somehow obstructed in their review or investigation? We say, as we have always said, the R.C.M.P. could do whatever it saw fit to do in the investigation. Mr. Coles exercised his judgment. If one faults his judgment, one can fault his judgment, but no criminality attaches, we submit, to the judgment exercised and rendered by Mr. Coles. Mr. Ruby says that Mr. Coles should be cited for describing the infractions as being, quote, "more accounting irregularities." Unquote. We submit that upon the evidence, (And I refer Your Lordships to exhibit 173 at page 33.) that it could well have been Mr. Coles' opinion that there were accounting irregularities. Clearly, there was a lack of communication between Messrs. Gale and Coles. Mr. Coles assumed that Gale was dealing with it, and he said that repeatedly on direct examination and cross-examination. (I refer as an example to Transcript Volume 88, page 15,639 and 41.) Mr. Coles said repeatedly that he did not read anything in Mr. Gale's memorandum to say that Mr. Gale had concluded that he did not accept Billy Joe MacLean's explanation. Mr. Gale was neutral, I suggest. He said that if one wished to test the explanation, that the only way to do it would be to pursue a police investigation.

In any event, we say that Mr. Coles felt and testified to his assumption that Mr. Gale was dealing with the matter and that is where it rests. The evidence given at the bottom of page 8 of Mr. Ruby's brief as to the dialogue and the questions asked

of Mr. Coles and the answers confirm again, quote:

> ...I saw nothing in his opinion that suggested to me that he did not accept the explanation...

And we say that that has been confirmed in several other passages, the citations which I gave you. So in summary, My Lords, we say that Mr. Marshall's counsels' assertions as against Mr. Coles ought to be rejected soundly as being unfounded.

We repeat as we have said at the outset and confirmed by my learned friends, Messrs. Bissell and Pringle, in the brief that they have filed before this Commission that the ultimate responsibility of deciding whether they wish to proceed with the charge against Mr. Thornhill was for them.

Independent of anyone within the Attorney General's Department, the most high-ranking R.C.M. Police officials in the Country considered the case. The sessions in Ottawa were never known to people in the Attorney General's Department in Halifax. No suggestion of interference or even any connection between people in Halifax with my client/department and the R.C.M.P. We are content to rely upon the extracts of testimony raised by Mr. Bissell in his written brief before this Commission from the testimony of Superintendent Feagan, former Deputy Commission Quintal, and Commissioner Simonds on the independence and judgment recorded by those officers in the assessment that they made. It was their decision not to proceed. They said as emphatically as any senior police officer could that had they

felt differently, they would've had no compunction about proceeding with it.

In turning quickly to the treatment of the Billy Joe MacLean case, My Lords, we say that the conduct of the Crown in that case was proper and appropriate. The Crown assigned Mr. Norman Clare to conduct it, and we say that his handling of the matter leaves no basis for criticism. The disposition of sentence was for the trial judge. Mr. Clare in acting on behalf of the Crown, reviewed with the informant in the case, Nigel Green, as he testified in Halifax, the propositions that he was going to advance for a proper penalty to be imposed upon Mr. MacLean. And a senior officer of the R.C.M.P., Nigel Green, the informant, agreed with the approach to be taken by the Crown. We say that the conduct of that case by Mr. Clare is exactly as it ought to have been, handed to a crown prosecutor to deal with so that there could be proper and complete consultation between the prosecutor in the field and the lead investigator in the field and the Crown could then make its submissions, could deal with plea negotiation with defence counsel, could advice the Court on discussions had among all counsel in the ultimate recognition that the disposition of penalty lay with the Court.

Turning quickly to Chapter 15, My Lords, on the Sanctity of the Oath, we say only briefly here that the wisdom of the oath lies in its brevity, that by that clear message that one gets when one is sworn in, that it's the whole truth, nothing but the

truth. And so people are informed that nothing can be withheld and that there has to be full disclosure. The witnesses who have appeared in the various cases against Donald Marshall, Jr., from the beginning have undertaken by submitting to an oath to answer honestly and fairly, and we resoundingly condemn those people who lied. We also condemn people who maintained stony silence for so many years in the face of knowledge that those witnesses committed perjury. We criticize those who may have been consulted and yet decided to do little or nothing about it. And we condemn the person whose name has really not been mentioned enough this week, and this is Roy Newman Ebsary, as the man responsible for both tragedies who caused such irreparable harm and heartache to the families of the Seales and the Marshalls.

The importance to our system of justice of the truth is canvassed by His Honour, Judge Cacchione, in the Crawford case, remarks cited with approval by Chief Justice Clarke when the case went on appeal. And at page 171 our brief, I quote from the remarks of Judge Cacchione:

> Not only is perjury a crime but it is, by its very nature, an insidious and subversive offence against the judicial process and the judicial process is what our society relies upon for protection.

And these words were added by Chief Justice Clarke, quote:

> The integrity of our system depends upon the honesty of those who are involved in it and the truthfulness of those who testify in its proceedings. (And not) only the

> appellant but the general public must be deterred from committing the offence of perjury.

At the conclusion of our brief, My Lords, I have set out the recommendations that Mr. Pink and I place before you for your consideration. I will not repeat them. They are there for your deliberations.

Before concluding, there are two other important matters that I must raise with this Commission. I carry no brief for the Court of Appeal of this province, but it is my duty as a Barrister of the Supreme Court of Nova Scotia to speak out when the Court or a member thereof is held to ridicule or contempt. I need not refer Your Lordships to provisions of the Code of Ethics to which we all ascribe on those points. The Court and members thereof must often bear stings without recourse, but we as officers of the Court and counsel cannot countenance aspersions cast without foundation. And I consider it our duty to speak out and inform the public of the record. Seldom do I comment on media reports, but I will now.

There was a report which appeared in the Sunday Daily News, dated Sunday, October 30th, 1980, which bears the title, "An Open Letter to the Marshall Inquiry," and appears to have been written by Parker Barss Donham. And I refer Your Lordships to this portion of this so-described open letter, quote:

> Take the 1983 decision of the Nova Scotia Supreme Court Appeals Division -- in some ways the most disgraceful episode in the entire

> Marshall saga. Struggling for a way to reverse Marshall's wrongful conviction, federal Justice Department officials had asked the court for an advisory opinion. Instead, in an extraordinary intervention, Chief Justice Ian MacKeigan bullied the Justice Department into using a different procedure, one that would leave the final decision with his court, while at the same time narrowing the scope of the inquiry.
>
> Having thus hijacked the case, MacKeigan's court refused to explore evidence of malfeasance by the Sydney Police Department and the 1971 Crown prosecutor.

Closed quotes.

I say for the record and before this Commission that the evidence heard completely rejects such a preposterous and, in my view, contemptuous allegation, and I refer Your Lordships to the testimony of Douglas Rutherford who testified before these proceedings on March the 8th, 1988. I draw Your Lordships' attention to his lengthy answers at page 9,704 through 9,708, inclusive and also 9,718 through 19. For my purposes this morning, I merely wish to extract what I consider to be the key features of Mr. Rutherford's testimony, and I'm quoting page 9,704:

> It was and the best of my recollection is that it was the executive assistant of the Minister at that time suggested to me that it might be appropriate, as a courtesy, to inform the Chief Justice of Nova Scotia, to whom this case in all its public

> ramifications was about to be referred, presumably later that afternoon, in advance by telephone. In fact, the executive assistant, to the best of my recollection, said to me, "Wouldn't it be a good idea as a courtesy to advise the Chief Justice of what's coming?"

Page 9,706:

> ...but as an off-the-cuff or an immediate reaction, an unstudied reaction, he...

Chief Justice MacKeigan.

> ...wondered whether the Court of Appeal had the power to hear fresh evidence or call witnesses to be examined in front of it under Subsection C of (Section) 617...

And later on the same page:

> "I'm not sure it will work. I'm not sure I can do what you people are asking without those powers and I don't think I have those powers sitting as a Court of Appeal Judge...

Page 9,707, having been referred to the Gorecki case by Mr. Rutherford's assistant, quote:

> ...and his view at that time that he still was concerned. He said, "I'm not making any decision, don't get me wrong, I'm not making any rulings, you can do whatever you want, but I'm just raising this observation,"...

Unquote. And at page 9,718, quote:

> And I think that was Chief Justice MacKeigan's point that he knew what he could do under (Section) 617 (b) and the proposition that he was

> going to get a 617(c) caused him to make that observation, albeit, and I say this to be quite clear on the point, his conversation with me made it very, very clear that he was not threatening, he wasn't deciding, he wasn't ruling, he made what I considered at the time to be a very helpful and timely suggestion... But he made a suggestion that avoided a possible problem and we avoided it. We took his advice, or took the advice of his observation.

Closed quotes.

The second matter that I wish to address this Commission on, My Lords, is with respect to the content of the written brief filed by my learned friend, Mr. Ruby, and my position is as an Officer of the Court.

Yesterday, I sought out Mr. Ruby so that I could indicate to him personally my objections before he heard them for the first time when I intended to make them known to this Commission. I sought him out, was advised that he was leaving for Toronto, and I told him what I intended to say, and he indicated that I could repeat what I am about to say. And he indicated that he has no reply and that I was to advise the Commission that he has no reply.

At Mr. Ruby's written submission to this Commission, Tab 8, Mr. Ruby authors statements which I told him yesterday I consider to be intemperate, offensive, and conduct unbecoming a Barrister. Mr. Ruby practices before this Commission by a special certificate, which is a privilege accorded to him by the

Barrister's Society of this Province, and I felt it my responsibility to inform him personally and privately first what I intended to say and I consider it my duty as counsel to express my objection.

The second paragraph at page 149 of Mr. Ruby's brief speaks of the Court of Appeal and says, quote:

> The Court that uttered the phrase is a disgrace to justice.

Unquote. And I say as an Officer and a Barrister what I said to Mr. Ruby, that in my view those comments are intemperate, offensive, and conduct unbecoming. And having said that to Mr. Ruby yesterday and repeated it before Your Lordships as I feel I'm obliged to do, I repeat his response that he has no reply to this Commission.

In conclusion, My Lords, the opportunity given to this Commission and counsel who have appeared before it to appear at the administration of justice is really unique in the history of our Country. We've had the luxury of more than 90 days of testimony where every detailed action, reaction, or inaction has been explored, where hard fact, simple recollection, mere conjecture, or simple hearsay has been received and probed. Perhaps never before in the history of Canada has such an exhaustive and penetrating analysis of the system been conducted. And through the time and resources and skill of all counsel engaged for every party, each issue was relentlessly and purposefully considered. And we say that Nova Scotia need feel

no regret or embarrassment with the intention, attention, or result. By convening the Commission and providing it with the resources to complete its work, this ought to serve as an example and a lesson from which all jurisdictions can benefit.

From our vantage point as counsel typically engaged in private practice, it's given Mr. Pink and myself a unique opportunity to look into and really become a part of, for a while, a bureaucracy at work. We have criticized where we felt it was our duty to do so, and we have accepted criticism where we think it's fair and supported by the evidence. To do less would hardly be responsible nor a professional advocacy to something which we have give almost two years of our commitment and professional lives.

It's been a privilege to serve and to appear before Your Lordships on this Commission and to work with other counsel who have extended us their dedication and their courtesy.

The truth is elusive. People must be prepared to speak it. They must be committed to searching for it, and they must be wise and fair in accepting it. And Mr. Pink and I hope that our efforts will have assisted Your Lordships in affirming the truth, and that our recommendations will be useful in attaining those exemplary standards to which was all ascribe.

Thank you, My Lords.

MR. CHAIRMAN:

Thank you, Mr. Saunders. We will rise until 2:15.