

1 bang on -- on day parole pretty well on the time that he was
2 eligible. And there is evidence that Jack Stewart at the Halfway
3 House in Halifax, I'd suggest, went out of his way to try and
4 help Mr. Marshall get back into society, and was perhaps one of
5 the people that early on did that as best as he could and that it
6 shows an attitude by people like Mr. Jack Stewart to go out of
7 their way a little bit perhaps to really recognize the problems
8 that this gentleman has as a result of that incarceration and try
9 and help.

10 Thank you.

11 MR. CHAIRMAN:

12 Thank you, Mr. Pringle.

13 On the list of counsel, next listed is Mr. Guy LaFosse who
14 is counsel for Sergeant Herb Davies but we're advised that he
15 does not -- he's not present and will not be making any
16 submission to the Commission, so if you're ready, Mr. Ross.

17 MR. ROSS:

18 May I have just one minute, My Lord.

19 MR. CHAIRMAN:

20 Oh, yes. Sure.

21 INQUIRY RECESSED AT: 3:35 p.m., AND RECONVENED AT: 3:45 p.m.

22 MR. SAUNDERS:

23 My Lords, before Mr. Ross begins, there is a correction that
24 I'd like to note for the record in something that we had recorded
25 in our brief with the Commission and last night I discovered it

1 and I intended to raise it and I just forgot. I got caught up in
2 things said this morning. And that is a statement at page 133 of
3 the factum submitted on behalf of our department where this
4 statement appears, quote:

5 It is important to recall that at
6 no time did Mr. Aronson oppose Mr.
7 Edward's efforts to proffer the
8 statement given by Mr. Marshall to
9 officers Wheaton and Carroll at
10 Dorchester Penitentiary.

11 Unquote. That's the first sentence in the second paragraph of
12 page 133 of our factum. Last evening in reviewing for the
13 umpteenth time evidence, I came across red volume three, page 67,
14 where Mr. Edwards for the Crown made application to have produced
15 the statement obtained by the R.C.M.P. officers at the
16 institution, and at page 69 of that record Mr. Aronson's
17 objection is noted. So the fact of the matter is, My Lords,
18 that Mr. Aronson did object and it's error for me to have stated
19 in the factum that he did not. Thank you.

20 MR. CHAIRMAN:

21 Thank you. Mr. Ross.

22 MR. ROSS:

23 My Lords, Oscar Seale would like on behalf of himself and
24 his family to thank this Commission with respect to the grant of
25 standing and he would extend to commission counsel the greatest
of appreciation for what has been done in an effort to bring the
truth before this Commission and not to further damage him or his
family through the unnecessary and further tarnishing of the name

1 of his son.

2 As it is well known, Oscar Seale is before this Commission
3 with one single purpose. He wanted at the end of the Inquiry, at
4 the end of the hearings, to be able to say, "I told you so," and
5 as far as he's concerned, he's accomplished his mission.

6 Reference must be made, My Lords, to the submissions of
7 commission counsel. Commission counsel left it open to you to
8 determine whether or not the robbery theory is anything more than
9 a convenient theory. Commission counsel very correctly indicated
10 that their function, the prime purpose for their work, was to
11 determine why Donald Marshall, Jr., was wrongfully convicted, and
12 to go further and to have tried to find out what, if anything,
13 should be done to prevent a re-occurrence of this type of
14 tragedy.

15 Of necessity, the name Sandy Seale had to be brought up.
16 But I will indicate, My Lords, that it was peripheral, peripheral
17 only to the main thrust of the Inquiry. I do not know that
18 there's any need to go over the facts again. You've heard them
19 over and over. I do not know that there is any need to trace the
20 steps of Sandy Seale between twenty minutes to twelve the night
21 that he was stabbed, up to the time of the arrival of the
22 ambulance. There's no need for that. The only thing that I
23 would hasten to draw to the attention of this Commission is that
24 Marvel Mattson, ex-R.C.M.P. officer, a very serious man, a
25 professional man, and a man who understands the importance of

1 timing, sets the time of his call to the Halifax Police
2 Department at ten minutes before twelve. There is further the
3 evidence of Brian Doucette that around twelve, he contacted the
4 Hali -- the Sydney Police. If I said Halifax, my error. He
5 contacted the Sydney Police and at that time he spoke to, as he
6 recalls, Len MacGillivary. Unfortunately, Len MacGillivary was
7 not -- could not be called to give evidence. However, the
8 Occurrence Report as written by Len MacGillivary indicates one
9 call having coming -- been taken and the call is listed at ten
10 minutes past twelve.

11 I would suggest to this Court that if one was to consider
12 the importance of the timing, the best evidence that's available
13 to this Commission is the evidence of Marvel Mattson that that
14 call was made at ten minutes to twelve. Sure, there is a police
15 record indicating that a call came in at ten minutes past twelve.
16 But we also know, having looked at the records ourselves, that we
17 found more than one error in the police records. That would be
18 an improper loading of the dice to conclude that a Marvel Mattson
19 call came in at ten minutes past twelve. Now there's some
20 importance to that.

21 The other thing is to recognize that Debbie MacPherson along
22 with Scott MacKay had left the dance early, and there was an
23 expressed purpose for leaving the park early. She wanted to
24 catch the bus. She wanted to catch the bus down on Kings Road.
25 And I would suggest that she would not saunter. Scott MacKay did

1 not saunter until ten minutes past twelve or thereabouts in an
2 effort to catch a bus which they knew would be passing around
3 twelve.

4 We then can look for a minute at Herbie Desmond. The only
5 friend of Junior Marshall's -- Sorry, one of the friends of Sandy
6 Seale was called. Herbie Desmond indicated that he was at the
7 dance and that around twenty minutes to twelve Sandy Seale said
8 it's all right. He's going home. That's when he was put out for
9 the second or third time by Maloney. And what Herbie Desmond
10 indicated, that if Sandy was not ready to go, what his friends
11 would do is to post themselves between Maloney and Seale. Seale
12 could disappear and get back into the dance if he wanted to, but
13 he didn't. He was going home. And he stated his reason, given
14 to Herbie Desmond, his good friend, was that, "Remember tomorrow
15 morning, you've got to be at my house. We're going to be cutting
16 up some wood." He was leaving. He knew he had a curfew to
17 meet. And then he leaves. And who was with him? There's Keith
18 Beaver and there's Alana Dickson and Karen MacDonald. All three
19 put Sandy Seale with them at a quarter to twelve.

20 Now we have to recognize something about Wentworth Park. It
21 was not a lonely spot tucked away out of town. It's in the
22 centre of town, and it's a place where everybody crosses. The
23 dance is going to be over. People are going to be passing.
24 People are in the park, and there's going to be a robbery. It
25 would be the worst place to try to carry out such a robbery.

1 And then you look at the relationship between Junior
2 Marshall and Sandy Seale. The relationship was not one which
3 would suggest that Sandy Seale would have lent himself to the
4 opportunity to be involved in a robbery. Why embark on a life of
5 crime commencing after eleven forty-five one night when he's got
6 to catch a twelve o'clock bus?

7 Take the evidence of Junior Marshall. In his statements, he
8 indicated that Sandy Seale was going home. Reference could be
9 made to the statements of Junior Marshall, one of them which
10 appears as exhibit 101 and the other one as exhibit 112. Of
11 course, 101 was not completed, but there is no suggestion that
12 given opportunity, it would not have been signed by Junior
13 Marshall. This man had been sitting in gaol for a very long
14 time. He wanted to get out of gaol, and I would suggest that the
15 system, very unfortunately, left him very little alternative but
16 to take any opportunity that he could, true or false, right or
17 wrong, to get out. And to a large degree, it appears as though
18 he was handed Sandy Seale on a silver platter.

19 Take the evidence of Staff Sergeant Wheaton. Staff Sergeant
20 Wheaton is to be complimented for the work that he did on behalf
21 of Donald Marshall, Jr. However, we must also consider that in
22 my cross-examination of Staff Sergeant Wheaton, he was very
23 willing, extremely willing to admit that he had not thought of
24 the Sandy Seale problem. It was not part of his terms of
25 reference. He was there to address Junior Marshall and the

1 progression was here is the letter. (That is the letter from
2 Aronson.) Is there any merit to it? And when he found there was
3 some merit to it, it progressed from there forward. At no time
4 did anybody consider Sandy Seale as a major player in what
5 happened that night. However, he paid the ultimate price. He
6 didn't go to gaol for 11 years. He's gone, never to return. And
7 at this point, it must be recognized that this Inquiry is no more
8 relevant to Sandy Seale himself than the pardon was to Louis
9 Riel, because they cannot appreciate what's happening.

10 But at the same time, this Commission has got to be very
11 careful. This Commission has got to recognize that it's not
12 going to stand in place of a court in a trial environment. And
13 if a lesson is to be learned -- It's a strange irony that in the
14 application for funding, I referred this Commission to the
15 Grange Commission and I spoke about the similarities. I spoke
16 about the fact that death was involved, that somebody was
17 accused. I gave that person an opportunity to clear themselves.
18 But one thing I hadn't recognized until a couple years ago that
19 there's another similarity. The other similarity is that there
20 was Phyllis Trynon. That's not a nurse. She was not the focus
21 of the Inquiry, but after the Inquiry had been concluded, and
22 Susan Nelles had been cleared, what it did it put Phyllis Trynon
23 to live under a cloud. She'd never been charged. And I'm
24 saying the same thing is here with respect to the image, the
25 memory, of Sandy Seale.

1 As far as his parents are concerned, the interest that they
2 fought to protect was an emotional interest, an expectation that
3 they could live and occupy a place in their own society that to a
4 large extent they had cut for themselves. The evidence is that
5 as far as the immediate society is concerned, Oscar Seale
6 remained a hard working man, brought up a good family who's very,
7 very proud of Sandy. And as far as witnesses are concerned,
8 there were two kinds; those who knew Sandy and could only speak
9 of him in good terms as an athlete, and those who knew about
10 Sandy who could not speak of him in ill terms under any
11 circumstances.

12 As I reviewed the submissions, My Lords, of commission
13 counsel and all other counsel, it would appear as though it is
14 only of the office of the Attorney General which would find it
15 convenient that the so-called robbery theory becomes a real
16 robbery theory and then becomes a reality. Unfortunately, or
17 otherwise, that is not to be supported by the evidence.

18 In the Attorney General's brief and the submission of Mr.
19 Saunders, reference was made to the notes of Lawrence O'Neil. It
20 is a submission on behalf of Oscar Seale that if much was going
21 to turn on these notes, then something should've been done to pin
22 down these notes unequivocally. They're not pinned down. We
23 know what is in the document, but we do not know how it got
24 there. We do not know why it got there.

25 If one takes a look at the statement given by Sarson to

1 | Wheaton, which is in volume 34, page 45, it would be recognized
2 | that Sarson is telling Wheaton that it's around December of 1981
3 | that he communicated to Marshall what he had heard from Ebsary.
4 | If one recalls the testimony of Mrs. Ebsary, it was around 1979
5 | when Sarson -- when Ebsary, sorry, had taken up with Sarson that
6 | he was kicked out of the house. Now, those two on their own
7 | could suggest many things. However, what destroys the date from
8 | the Sarson statement reported in volume 35, page 44, is a
9 | comparison with the information given by Donald Marshall, Jr.,
10 | to his psychologist back in early 1981. I have played with some
11 | words. In my submission, I have isolated one paragraph, and
12 | I've switched some words. The important section would read, (And
13 | this is taken from volume 35.) says -- And Marshall at this
14 | point is speaking about the new information which came into his
15 | possession.

16 | He says this information came about in the following
17 | manner: His sister's boyfriend was drinking with a Black
18 | individual in Halifax. As they were drinking, the Black
19 | individual told his sister's boyfriend of an incident in which he
20 | had himself stabbed an individual some ten years ago and another
21 | individual, an Indian, had finished him off.

22 | I changed some words. I changed "girlfriend's brother" for
23 | "sister's boyfriend". I changed "White" for "Black," and I
24 | changed "Sydney" for "Halifax".

25 | Rewritten it would read: This information came about in the

1 following manner. His girlfriend's brother (And we got an
2 identification, Shelly Sarson's brother, Mitchell Blaine Sarson.)
3 was drinking with a White individual in Sydney. (The White
4 individual would have been Ebsary.) As they were drinking, the
5 White individual told his girlfriend's brother of an incident in
6 he himself had stabbed an individual some ten years and another
7 individual, an Indian, had finished him off.

8 You say, okay, fine, there is no evidence. There is
9 nothing on which -- There is nothing on which we can conclude
10 that my theory's correct, except for one thing. Marshall at this
11 time is in gaol. Marshall is suspicious of everybody. When
12 Frank Edwards had an opportunity to sit with Marshall years
13 later, he recognizes the suspicious nature of Marshall.

14 And then the other question comes, if, by transposing a
15 couple words, we can find out truth that we know from another
16 source, can we conclude that there were two stories, one with the
17 brother's girlfriend, and the other one with the sister's
18 boyfriend? I'll suggest that it is not so. I would suggest that
19 Marshall got the information quite early and was seeking the
20 appropriate opportunity to make the best use of the information.

21 It is also true, My Lords, that it was as far back as 1971,
22 that this so-called robbery theory appeared to have been hatched.
23 It came first during the Al Marshall investigation. And without
24 any proper basis, Al Marshall was very willing to accept that
25 Sandy Seale was involved in a robbery.

1 It is very interesting to note that during the re-
2 investigation of 1982, Wheaton and Carroll had access to that
3 information. It would appear that Wheaton and Carroll believed
4 that there was merit to that information and probably discussed
5 it with Marshall. In my examination of Wheaton, I asked him what
6 happened between the first attempt of a statement with Donald
7 Marshall, Jr., and a second statement. It was very clear that he
8 had discussions with Frank Edwards, that Frank Edwards had
9 discussions with Steve Aronson, and that between the three of
10 them, they had a theory. Steve Aronson was very, very plain on
11 the stand, sure, that he discussed this theory back with
12 Marshall. So that in the final analysis, when we are getting the
13 robbery theory from Marshall, it seems very obvious to the same
14 extent that his relationship with Sandy Seale and playing hockey
15 with him for three years, and the fight with Sandy Seale
16 involving some girlfriends, had been sent to him; and Marshall
17 quite property, quite naturally was using it to his own benefit.

18 It must be noted that Oscar Seale was not an individual who
19 wanted to see Marshall rot in gaol forever for something he
20 hadn't done. Oscar Seale became very, very indignant when the
21 innocence of Junior Marshall was linked absolutely with the
22 robbery theory which involved his son. And if the two of them
23 remained continually linked, I've got no doubt that Oscar Seale
24 would still be bitter today.

25 However, it is my view that he's satisfied that a close

1 examination of the evidence would reveal that there was little,
2 if any, opportunity for his son to meet Junior Marshall, to
3 develop so close a relationship that they're going to plan a
4 robbery, then they had opportunity to look for somebody, to find
5 a victim and to attempt the robbery, thereby getting stabbed
6 during such attempt. Because Marshall himself had been in close
7 contact with Patricia Harriss. She was in the immediate area.
8 There were other people in the park. Not only would it have been
9 foolhardy for Marshall or anybody else to be involved in a
10 robbery, it is grossly unlikely that Marshall had time to
11 conspire with Seale to go and perform a robbery.

12 It is not for me to determine if there was no robbery, why
13 was Sandy stabbed when the evidence in the case that Ebsary was
14 the type who could go off for no reason -- for no reason, and if
15 it is established, as I would suggest it has been, that Ebsary
16 had the capacity to explode without warning, do we need to go and
17 demonstrate that on this occasion, that something was required to
18 precipitate his action? I don't think so. And I do not know
19 that that is the function of this Inquiry, and I do not know
20 that the Inquiry can go that far. I think the Inquiry can say,
21 "Look, the robbery theory was raised. However, as we look at it,
22 it does not appear to be supported by any evidence." And I think
23 that's as far as the Inquiry can go.

24 Oscar Seale further recognizes that in any free and
25 democratic society, freedom of the press will be protected.

1 | However, he does not see that it was necessary for information
2 | about his son be leaked from time to time to the press so they
3 | could create an embarrassing situation for him. He has
4 | continually asked me the question, "Wasn't there another way?
5 | Wasn't there another way to bring out in public the fact that
6 | there was bad evidence and have it dealt with?"

7 | My Lords, I can only relate my own experience. Although
8 | this is not on the record, it's matters of cases which are
9 | reported and although I will not mention the names, I will give
10 | you the circumstances. There are two matters in which I'm
11 | involved which I consider similar. One in which a case had been
12 | completed absolutely and during the time to forward written
13 | submission, counsel for the other side and I recognized that
14 | there was bad evidence before the Court. It would have served
15 | his purpose well. However, we agreed that what we would do is
16 | make a joint application to the trial judge and say, "Look, we've
17 | got bad evidence. We don't want you to consider this bad
18 | evidence. And in the event of an appeal, we've got to be
19 | careful." The trial judge tested us to determine whether or not
20 | we were fully satisfied that this evidence was bad. It was
21 | resolved very simple. We prepared an Order striking that
22 | evidence from the record. We both consented to it, not as to
23 | form an absolute consent, filed it. The evidence was struck.
24 | The decision was appealed, and upon a review -- not to do with
25 | strike of the evidence. The findings of the judge on the merits

1 of the case was appealed and upon review, the Appeal Court
2 didn't have any opportunities to see the bad evidence because it
3 was no longer there.

4 It is suggested, My Lords, that to a large degree, something
5 of that nature could have occurred even after the 1982
6 investigation, to the extent that Edwards and Wheaton and Aronson
7 were satisfied that Marshall was not guilty. What would've
8 happened if an application was made to the Appeal Court to call
9 evidence to prove perjury and make an application thereafter to
10 strike the perjured testimony from the trial record. A review
11 of what was left was not enough to convict Marshall. And under
12 those circumstances, it would not be necessary for Marshall
13 really to have to ride the back of Seale, because the unfortunate
14 truth is that it is not just the down trodden that got to be
15 concerned about the system.

16 Edwards, he was sufficiently concerned about the system and
17 its capacity to self-correct that he did not believe that unless
18 he made it palatable that the Appeal Court would respond
19 properly to the pleas of Donald Marshall, Jr. And in making it
20 palatable, he had to be convinced himself of the robbery theory
21 as he probably still is today in spite of the evidence.

22 But I'm saying that our system is not supposed to function
23 like that. Our system's supposed to be able to bring common
24 sense to bear and not always look for the solutions in law. And
25 if that had happened, very likely, Mr. Seale would not have had

1 to apply for standing because like any other citizen, he might've
2 been interested in the outcome of any Inquiry, but not from so
3 personal a viewpoint.

4 The submission of the -- The submission of commission
5 counsel is to the effect that there should not be a recurrence of
6 this incident. The submissions of counsel for Donald Marshall,
7 Jr., is to the effect that this is not an isolated incident. The
8 submissions of counsel for the Attorney General is again to the
9 effect that is probably an isolated incident.

10 My Lords, on that question, I will say that the jury is
11 still out because until the reports have been received from the
12 researchers retained by Commission and the Black United Front has
13 had an opportunity to review these, along with other information
14 which it proposes to advance to Commission -- to the Commission,
15 that no firm position could be taken as to whether or not this is
16 an isolated incident. As far as Oscar Seale himself is
17 concerned, I don't think it really matters to him. His concern
18 was a very single purpose.

19 In general, My Lords, I do not know that I've got to go very
20 far on behalf of Oscar Seale. He was here for one thing, to
21 determine whether or not there is any evidence upon which the
22 reputation of his son could've been castigated. He has full
23 confidence that this Inquiry will consider the evidence before
24 it, and he's quite sure of what will be the end result.

25 My other client, My Lords, the Black United Front, also

1 sends greetings but not to the same degree as the greeting that
2 were sent by Oscar Seale because the Black United Front is of
3 the view that having been granted standing that it was
4 substantially restricted as far as its expectations were
5 concerned. In its application for standing, it wanted to explore
6 with this Inquiry the consideration of race as a major variable
7 as far as the Inquiry process here is concerned and it wanted to
8 address certain matters in a public forum from a minority
9 perspective. It wanted in a public forum to be given an
10 opportunity to make the Commission aware of the lack of
11 confidence of the Black -- which the Black communities have as
12 far as the functioning of the legal system is concerned. It
13 wanted to be granted the opportunity to identify how racial
14 attitudes, prevalent in Nova Scotian society, prevent Blacks from
15 being fairly and equitably treated by the justice system. It
16 wanted to show -- do a comparative analysis on sentencing. It
17 wanted to have the opportunity to demonstrate the extent to its
18 race was a determining factor for the outcome of an accused.

19 To a large extent, the Black United Front have been short-
20 circuited. We do not say for a minute that it has been short-
21 circuited in any way which reflects improperly on this Commission
22 or indeed on commission counsel. The Black United Front, as
23 distasteful that it might be, had to accept that this is your
24 Inquiry. You set the rules. And to recognize that if it was not
25 for the fact that you had -- you set your own rules, they would

1 not have had standing in the first place. So the setting of the
2 rules must rest with the Commission.

3 And when the Commission elected to deal with the questions
4 of racism by way of studies, the Black United Front did not
5 protest. As a matter of fact, the Black United Front co-operated
6 fully with the Commission even to the extent of identifying the
7 individual to the studies on behalf of the Black community.

8 However, it expresses the view that a great opportunity has been
9 lost by not exposing in public view some of the cases involving
10 minorities and the administration of justice.

11 The Black United Front is aware of the position of this
12 Commission as given in its decision when an application was made
13 to call witnesses but thinks it's still important that it be
14 stressed that by denying the Black United Front the opportunity
15 to expose problems, in public in the full view of the eye of the
16 public of Canada, that this Commission might very well be taking
17 on the responsibility to identify these problems to the extent
18 that the Black United Front could anticipate in attempting
19 solutions on your own.

20 Passing comment, My Lords, must be made under
21 recommendations of counsel for Donald Marshall, Jr. The Black
22 United Front does not, at this point, embrace in full any of the
23 recommendations, although the Black United Front would like to
24 put this Commission on notice that it expects that having had an
25 opportunity to review the final reports from the researchers on

1 discrimination, on policing, and the role of the Attorney
2 General, that they will at that time be in a position to address
3 fully the recommendations of Commission for Donald Marshall, Jr.,
4 as well as the very positive recommendations as given by
5 commission counsel and indeed all other counsel who participated
6 in these hearings.

7 My time is up, My Lords. I thank you.

8 MR. CHAIRMAN:

9 Thank you, Mr. Ross. Mr. Wildsmith.

10 MR. WILDSMITH:

11 I should say at the outset, My Lords, that I anticipate being
12 something in the order of an hour. I'm quite amenable to any
13 suggestion that it be carried over until tomorrow. On the other
14 hand, I am fully prepared, I believe, to go ahead at the moment.

15 MR. CHAIRMAN:

16 Fine. Take as much time as you require, Mr. Wildsmith.

17 MR. WILDSMITH:

18 Thank you.

19 At the outset, we wish to, as many counsel have, commend
20 commission counsel for the quality of its submission, and I would
21 particularly like to commend commission counsel for calling
22 attention to the three major conclusions which are set out at the
23 outset and which, in their impact and in their inter-relation
24 between the three points, make the point that brought the Union
25 of Nova Scotia Indians before this Commission; that is, that

1 | what happened to Mr. Marshall could've happened to another member
2 | of the Indian community in Nova Scotia.

3 | We also agree with commission counsel's statement in the
4 | organization of their brief, that an issue with which your
5 | Lordships must come to grips is the influence of racism in the
6 | treatment of Donald Marshall, Jr. We would put that particular
7 | issue this way. Was Donald Marshall, Jr.,'s race a factor that
8 | influenced the events that surrounded his wrongful prosecution
9 | conviction and the 11 years needed to secure his eventual
10 | acquittal and meager compensation?

11 | The consequence of the answer as "yes" as the Union of Nova
12 | Scotia Indians would submit is that a common tie exists between
13 | Mr. Marshall's case and that of all other Indians facing the same
14 | justice system in Nova Scotia. And it means that this
15 | Commission, in casting its mind to recommendations in the future,
16 | need be concerned about the situation of all Indians and not just
17 | the position of Mr. Marshall. Mr. Marshall influenced the
18 | events that surrounded his wrongful prosecution, conviction and
19 | the 11 years needed to secure his eventual acquittal and meager
20 | compensation.

21 | The consequence of the answer as yes, as the Union of Nova
22 | Scotia Indians would submit, is that a common tie exists between
23 | Mr. Marshall's case and that of all other Indians facing the same
24 | justice system in Nova Scotia and it means that this Commission
25 | in casting its mind to recommendations and the future, need be

1 concerned about the situation of all Indians and not just the
2 position of Mr. Marshall. Mr. Marshall is one case but in our
3 submission only one variation on a common theme. The common
4 theme being the influence of race. The challenge for the
5 Commission then is how to insure such an insidious factor as race
6 does not influence the administration of justice.

7 We agree with Commission counsel in their conclusion stated
8 in their submission at page 151:

9 ...that it would be naive and
10 unrealistic to think that the fact
11 that (Junior Marshall)... was a
12 poor native was not a factor which
contributed to his wrongful
(commission) -- wrongful
conviction.

13 Perhaps put a little inelegantly but, I think, clearly makes the
14 point that Commission counsels' view is that race was a factor
15 that lead to his wrongful conviction. I would also take it in
16 parenthesis that they were not intending to restrict their
17 remarks to only the fact of his conviction but also to the events
18 that were subsequent to conviction and if not, then I would urge
19 upon your Commission to think of that statement in its broader
20 context; that is, following the events all the way through to the
21 final resolution of the issue on compensation.

22 However, having agreed with that much of the submission by
23 Commission counsel, it would be remiss not pointing out that we
24 do not agree with all that is said in arriving at that
25 conclusion. In particular and with respect to Commission

1 counsel, we would not agree that, and this is sort of a
2 paraphrasing what I take from their submission, -- would not
3 agree that there is not much in the viva voce evidence to help
4 answer the question of whether race was a factor and would, in
5 particular, disagree with the suggestion that the conclusion of
6 whether race was a factor is really a matter of "feeling".

7 Our submission is that there is testimony before this
8 Commission which, by the application of logic and inference
9 coupled with your common sense and human experience, leads to the
10 conclusion, logical conclusion, that racism operated. It is not
11 purely a matter of feeling or intuition.

12 Now, I've organized the balance of the submissions that we'd
13 like to make orally into seven points. The first point is: What
14 is it that we, and meaning the Commission as well, should be
15 looking for when we look at an issue like racism? Our submission
16 is that what we ought not to be looking for is a "smoking gun".
17 If we had such a "smoking gun", obviously the case would be made,
18 but the fact that there isn't a clear "smoking gun" in this case
19 does not answer the question of whether race was a factor in the
20 Junior Marshall events. In the Junior Marshall situation the
21 "smoking gun", if I can continue to use that expression, would be
22 direct evidence of motivation, intention, animus, malafides or
23 out and out prejudice and bias.

24 We do have some testimony about those kinds of matters and
25 I'll just list several areas in which we have some testimony

1 without going into it. We have some testimony suggesting this
2 kind of thing in relation to John MacIntyre; suggesting it in
3 relation to Donald MacNeil; suggesting it in relation to Lou
4 Matheson; suggesting it in relation to Moe Rosenblum; suggesting
5 it in relation to Robert Anderson, and some much less compelling
6 evidence in relation to the jury.

7 I don't propose to go into the evidence in relation to each
8 of those individuals. There is evidence there. The case
9 against those individuals, in terms of their motivation or
10 malafides or prejudice or bias, is not conclusive but our point
11 is: that to focus only on the evidence on the motivation, as far
12 as these individuals go, is to miss the mark. We say that to
13 find racism here, the focus should be on the context in which the
14 Marshall case is set and on the impacts, effects and results of
15 the actions taken. The Supreme Court of Canada has said that
16 this type of focus; that is the focus on impacts or effects, is
17 what is all that is necessary to make the legal case for
18 discrimination.

19 Doctor Clark, in the research study and I'm sure in the form
20 in which it will finally be presented, provides analysis of this
21 notion, provides much insight in his report, goes over the
22 historical evolution of the concept of discrimination and traces
23 it through various countries, the United States, Britain as well
24 as Canada, and into the recent Supreme Court of Canada decisions.

25 So we would submit that to find racism in the 90 volumes of

1 evidence, which Your Lordships have, requires a focus to be
2 taken on impact and effect and not solely on the question of
3 motivation or obvious intent. We have attempted to provide a lot
4 of that material in the written submissions.

5 The second point (the second of those seven) is to clarify
6 the role that Doctor Scott Clark's study plays. Commission
7 counsel references it, in a way -- on page 150, I believe, in
8 their submission, in a way to suggest, I think, that it is there
9 to answer the question of racism.

10 Well I think we should be absolutely and unequivocally
11 clear that this research study carried out by the Commission,
12 with the full support of the Union of Nova Scotia Indians, is not
13 intended to answer directly the question of whether racism
14 influenced the treatment of Donald Marshall. It is directed to
15 present day Nova Scotia and not a historical inquiry into either
16 Sydney, circa 1971 or the Donald Marshall events. It is a bridge
17 from the Marshall case and the past to the future by looking at
18 the present treatment of Indians and makes suggestions for future
19 changes.

20 The study has not been released by the Commission and I
21 don't intend to go into details about it. It's been provided to
22 me on a confidential basis and so I'm only referencing it because
23 Commission counsel do in their study, and I wish to make the
24 distinction, that that study is not to answer the question that
25 Commission counsel posed. Although, I would submit that it does

1 help answer that question by helping us understand the context in
2 which the Marshall case is set. So, indirectly, what we find in
3 the Clark study -- let's take it on this assumption, that the
4 Clark study finds that discrimination exists today in Nova
5 Scotia. Well, what we would say is the fact that discrimination
6 and racism might exist today supports the inference that racism
7 existed and operated in the past and in particular operated in
8 1971. After all, we hope that our society today is more tolerant
9 and more understanding of other cultures and that this trend is
10 an improving one and as civilization "advances", we do become
11 more tolerant. And so we -- If so, we should expect racism to be
12 a larger problem in the past than it is today, and therefore
13 indirectly the fact that racism exists today is part of a context
14 that assists us in reflecting on the events around Junior
15 Marshall.

16 The third point is about the racial context in Sydney in
17 1971 and our point is that by looking at the racial context in
18 1971, it helps us reflect on one particular case or event, the
19 events surrounding Donald Marshall. We submit that the oral
20 testimony heard by this Commission builds up a conclusion that
21 racism existed and operated in Sydney in 1971, builds it up
22 brick by brick, incident by incident, and experience by
23 experience. Our written submissions attempt to provide those
24 bricks pulled out of the oral testimony heard by Your Lordships.
25 It places the Marshall case in a context of racism in Sydney and

1 Nova Scotia in general in 1971 and this not just from the mouths
2 of Micmac witnesses.

3 Commission counsel, in their submission, more or less
4 suggested that that was what they would expect to hear from
5 Native witnesses and they, in fact, did hear that from Native
6 witnesses. But it also was the kind of view that was expressed
7 by Staff Sergeant Wheaton, by Steve Aronson who had wide
8 experience in working on behalf of the Native community as well
9 as on behalf as Junior Marshall, Dave Ratchford, who grew up in
10 Sydney, a variety of white girls who were living and growing up
11 in Sydney and, indeed, even some of the Sydney Police officers
12 themselves.

13 There is further evidence in there to show that racism crept
14 into the justice system itself with the conduct of the Sydney
15 Police, the episode involving Donald MacNeil and the Human Rights
16 Commission censure, and the view that John MacIntyre, in general,
17 didn't treat Indians well. Those kinds of things are to be found
18 in the evidence. And, indeed, the evidence of Eva Bernard, court
19 worker for the Union of Nova Scotia Indians, was to the effect
20 that that treatment carried over to the treatment of her as a
21 Native court worker.

22 All of this context, we're suggesting, puts the Marshall
23 case in perspective. The Marshall case is part of a larger
24 pattern. The Marshall case is consistent with this larger
25 pattern. The larger pattern provides an explanatory force to

1 understanding what happened to Mr. Marshall.

2 The fourth point then, to move from the general context in
3 which the Marshall case is set, is to the treatment of Mr.
4 Marshall himself and I won't go into all of the detail. A lot of
5 the detail is contained in our written submission and in the
6 submission of counsel on behalf of Mr. Marshall but, for
7 example, we find, and I know Mr. Ruby made reference to this:

8 The ease with which Mr. Marshall became a suspect the very
9 morning after the stabbing.

10 The ease with which false testimony was proffered and then
11 accepted by all concerned.

12 The failure of anyone to believe Mr. Marshall.

13 The poor investigative techniques in 1971.

14 Mr. Chant's obsessive fear of Indians.

15 The exaggeration of the incident between Tom Christmas and
16 John Pratico and Mr. MacNeil's use of that incident in his
17 address to the jury.

18 Mr. MacNeil's use of the innuendo against Donald Marshall,
19 Sr., in relation to the court house confession in his address to
20 the jury.

21 The rumors that several police officers, including the
22 Deputy Chief at the time, Mr. MacAskill, testified to about
23 racial or rumors of racial reprisals between the Black and Indian
24 community which seemed to be fueled by the Sydney Police Force.

25 The refusal by the Sydney Police of R.C.M.P. assistance in
the investigation.

The missing photographs that were apparently taken and
either turned over to Mr. MacIntyre or Mr. MacNeil by the
R.C.M.P. and not used at trial.

The disastrous review by Al Marshall in 1971 after Jimmy
MacNeil came forward.

The failure of Pratico and Chant to ever own up the grievous

1 error that they were party to until 1982.

2 The apparently cavalier attitude of Mr. Rosenblum about Mr.
3 Marshall being guilty anyway.

4 The lack of follow-up in the Attorney General's department
5 in the change or transition of command between Mr. Robert
6 Anderson and Mr. Gordon Gale.

7 The kind of witness that Donald Marshall made in his own
8 defense.

9 The fact that during the investigation of the Marshall case
10 the Indian community was blamed within the police department for
11 letting go a dam that was held back to drain the creek without
12 any evidence whatsoever and no charges being laid.

13 The conviction of Mr. Marshall against the expectation of
14 his defense counsel, Mr. Khattar. Mr. Khattar went to some
15 descriptive lengths to tell the Commission what he thought must
16 have gone through the mind of the jury as to why they eventually
17 convicted Mr. Marshall and that was essentially that Mr. Marshall
18 was an Indian and a bad Indian and therefore he must have been
19 guilty. That kind of testimony was presented to you by Mr.
20 Khattar as his only explanation as to why, against his
21 expectations at the end of the case, the jury came in with the
22 guilty verdict.

23 The "blame the victim" attitude taken by both the Appeal
24 Court and the Attorney General's department with reference to
25 being "author of your own misfortune."

The hard-ball attitude displayed by the Attorney General's
department in dealing with the issue of compensation.

The failure to advise Mr. Marshall or his lawyers after
Jimmy MacNeil came forward in 1971 and the Al Marshall
investigation took place.

The attitude of the Sydney Police with respect to Mr.
Marshall returning on temporary leaves to his Reserve community
or the Sydney area and the litany goes on.

Other counsel have gone into it in more depth than that. In
addition to all of those specific events that I suggest that are
linked to Mr. Marshall as an Indian, we have testimony from Staff
Sergeant Wheaton, from George Khattar, from Felix Cacchione and

1 from Steve Aronson; from all four individuals who had a lot to do
2 with the Marshall case who all say that Marshall's race was a
3 factor. They all testified before this Commission to the effect
4 that, in their opinion, race was a factor.

5 So if you look at those events and the obvious impact they
6 had on Mr. Marshall, we say that all of that contributes to the
7 inference that it happened in part because Mr. Marshall was an
8 Indian.

9 The fifth point, and I might call this the unifying theme--
10 the fifth point is that if you look at Commission counsel's
11 three major conclusions, they are supportive, in our submission,
12 of the points that I've just been making. Mr. Marshall was not,
13 their first conclusion is, responsible for his own wrongful
14 conviction, not the "author of his own misfortune". In other
15 words, no blame should be attached to Mr. Marshall. What ever
16 happened to him was not his fault as an individual. There was
17 nothing about him as a person that should lead to this result.
18 Number two, that virtually all of the institutions in the
19 administration of justice and their representatives, etcetera,
20 that touched Donald Marshall failed him. Nothing worked and
21 thirdly, that individuals are not treated fairly in the justice
22 system in Nova Scotia.

23 If you go on from there to focus on other things that
24 Commission counsel suggest to you, they suggest that this is a
25 case where none of the "checks and balances" in the justice

1 system worked because, as they say, individuals took deliberate
2 steps or that there were deliberate acts which ultimately were
3 exercises of discretion or decision-making powers that were
4 detrimental to Mr. Marshall's interests; or, as Commission
5 counsel say, they acted with "negligence, inattention or just
6 lack of caring.", or as they said about the Attorney General's
7 department, "They consistently refused to treat his case with
8 understanding and compassion."

9 So at its most basic and fundamental level, the fact that
10 Mr. Marshall was an Indian, the fact that his case was treated
11 with indifference and incompetence, the fact that nothing worked
12 and that he paid a terrible price for all of this, means that
13 racism was at work. To say otherwise, to say that it wasn't
14 racism is to admit that indifference and incompetence and lack
15 of caring and lack of understanding and compassion and
16 insensitivity is the norm.

17 And I think the point is doubly made when contrasted, as
18 Commission counsel do, with the treatment in the Thornhill and
19 MacLean matters. Commission counsel concluded the system did not
20 operate fairly and, of course, we submit that that is right, but
21 there is a reason why the system did not operate fairly in Mr.
22 Marshall's case and that is the fact that no one really cared
23 about Junior Marshall.

24 So the context of Sydney in 1971, the events that surrounded
25 Mr. Marshall's -- the handling of Mr. Marshall's case, the impact

1 on Mr. Marshall of all of these decisions is enough to support
2 the conclusion of racism; and in addition, that this conclusion
3 of racism has a powerful force in explaining what happened. As
4 Commission counsel state it is "unbelievable". It is
5 "unbelievable" that nothing worked.

6 But I'm not aware that anyone has put forward a suggestion
7 (I didn't read it in the Commission counsel's submission, in any
8 event.) of any unifying theme that explains why nothing worked.
9 No unifying theme that links up everything from the original of
10 John MacIntyre right through to the final decisions on
11 compensation in the Attorney General's department and in the
12 Cabinet in Nova Scotia.

13 So I'm submitting to you that a unifying theme that links up
14 all of these events from start to finish, the one inalterable
15 fact is: that Mr. Marshall was an Indian. So when viewed in the
16 light of what racism is all about and building up this case or
17 this house, brick by brick, we submit that the case is
18 compelling, that there is a unifying theme for all of this
19 incompetence and indifference and the unifying theme must be
20 racism. Otherwise it must mean that the norm in Nova Scotia is
21 incompetence, insensitivity, lack of caring, lack of
22 responsiveness.

23 The sixth point (Moving on from the particulars of Mr.
24 Marshall's case now.) are the special problems that Indians face
25 in coming to court. You've had some evidence about this through

1 witnesses like Bernie Francis, Eva Bernard, to some extent from
2 Doctor Mian, the psychiatrist, to some extent from
3 representatives of the National Parole Board, Diahann McConkey,
4 Jack Stewart. It's not unfair to also submit to Your Lordships
5 that racism can take the form of the imposition of one culture on
6 another; and while we don't like to use these kinds of words, it
7 really is an example of cultural imperialism to force people of
8 one culture into a different mold. I'm simply calling attention
9 to Your Lordships that there is evidence about the difference in
10 the culture of the Micmac people. Evidence of a difference in
11 the language of Micmac people.

12 You've heard evidence that Micmacs and Indian witnesses in
13 general tend to be withdrawn, aloof, detached, quiet, soft-
14 spoken, less assertive, less emotional or motive, less
15 articulate, use one word answers.

16 You've heard evidence about a different perception of time
17 on the part of Indians; for example, being more concerned about
18 today than tomorrow, being willing to plead guilty today in court
19 to get it over without being so concerned about what the long
20 term consequences of that plea may be; different concepts of time
21 with respect to answering questions on the witness stand about
22 when did something happen.

23 You've had evidence of the importance of family, extended
24 family and community relations within the Indian community, that
25 this leads to different norms of conduct in situations such as

1 requirements in probation orders that people respect a curfew by
2 being home at a certain hour. Within the Indian community, the
3 suggestion is that being on the Reserve or being with uncles or
4 relatives is the same or regarded as the same as actually being
5 in your own home.

6 You have, perhaps, limited evidence on this but I'll throw
7 it out anyway, that the Indian community tends to resolve
8 disputes in a consensual way or less authoritarian in the way
9 that they try to settle problems and impose solutions.

10 So, all in all, I'm making the point that there are
11 different norms of conduct in the native community. There are
12 problems related to culture, problems related to language and in
13 the final analysis to force a resolution to these problems by
14 requiring the Indian community to be the same as the rest of us
15 is to attack and ultimately break an existing culture.

16 Which leads me to the seventh point now, the last point,
17 which is the question of solutions. I guess we can take
18 different approaches to the question of solutions to these
19 problems and obviously if you read some of the material that has
20 been presented to the Commission, different solutions have been
21 proposed. I guess, with all respect, I would characterize some
22 of them as being simply tinkering on the fringes of the problem
23 and not really cutting to the core.

24 We submit that your recommendations should cut to the core
25 of the problem. The resolution ought not to be one of further

1 integration or merging or melting of the Indian communities into
2 the dominant culture. That kind of solution might be okay for
3 the Black community. It hasn't been proposed on anything that's
4 come up, (And I'm not speaking for the Black community, Mr. Ross,
5 you'll be happy to know.) but I'm simply saying that a contrast
6 between the Black and Indian communities, I would submit, is that
7 by and large the Black community would maintain its culture and
8 at the same time attempt to integrate, be treated openly and
9 fairly by the rest of the community.

10 The Indian vision of Indian communities across Canada is not
11 to integrate and to absorb. There was a strong reaction in 1969,
12 to a White Paper put forward by the Federal Government which was
13 essentially directed to this notion of integration. The Indian
14 communities wish to be kept apart and to live apart and indeed
15 the current trend, both in terms of constitutional amendments and
16 in terms of Federal Government policies, is towards self-
17 government.

18 It was very kind of former Attorney General, Mr. Giffin, in
19 his testimony in front of the Commission to indicate his own
20 experience and the fact that as more and more he worked on these
21 questions of dealing with Indian problems, trying to get an
22 amendment on self-government in the constitution, he became more
23 and more aware that the solution was one of increased Indian
24 control over their own affairs; that is, increased self-
25 government.

1 So I would put it to you that the Indian vision is one of
2 partnership, but it's partnership based on mutual respect between
3 relatively equal partners. We can never be fully equal, I'm
4 sure, and still live under the present constitution. But it's
5 based on more control, by Indians being masters in their own
6 house and not being subjected to the dominant society, which then
7 directs us to the kinds of recommendations which we put forward
8 in our written submissions.

9 You'll note that we indicate at the outset that these are
10 tentative recommendations and that they're put forward for
11 further discussion. They're not intended to be final submissions
12 because the work of this Commission on those kinds of issues is
13 not completed; and so we would hope to see the final version of
14 Doctor Clarke's report and be able to comment on or possibly
15 adopt portions of that. There are, as I understand it, some
16 consultations proposed and this kind of issue is included in
17 that.

18 However, attacking the recommendations that we have put
19 forward, we might think about them as addressing two kinds of
20 issues. One is the relevance of non-Indian systems of justice
21 to the Micmac communities. The bottom line on that is to
22 suggest, although decisions eventually will have to be made on a
23 community-by-community basis, and as Mr. Ross has pointed out to
24 us in the past, my client doesn't speak for the entire Micmac
25 nation or the entire Indian community in Nova Scotia and so

1 these kinds of decisions have to be made on a community-by-
2 community basis.

3 But I'm putting forward the view on behalf of my client
4 that, by and large, the non-Indian system of justice is not
5 relevant to the needs of Indian communities and therefore, we
6 say where not relevant, the dominant society must let go of some
7 of the levers of power. They must allow indigenous solutions,
8 solutions by the Aboriginal peoples themselves. They must stop
9 asserting power to control and to subject the Native community.

10 We say in our submission to you that where you do have
11 purely Indian problems (you might call intra-Indian) within the
12 Indian community, such as matters that happen on the Reserve or
13 such as matters off Reserve that only involve Indians, that it is
14 appropriate to work towards a Micmac tribal justice system that
15 will be able to assist in the resolution of those problems and
16 ultimately have the authority to resolve them if necessary.

17 The second kind of issue that we try to address in our
18 submissions is the relationship between Micmac communities and
19 the non-Indian population, and the non-Indian population and the
20 non-Indian system. This now would be situations that might
21 involve Indians and non-Indians taking place outside of the
22 boundaries of Indian Reserves. Here the thrust of what we're
23 suggesting is that where these two communities come into contact,
24 there is a need to allow scrutiny of the treatment of Indians by
25 an Indian tribal justice system. That kind of solution probably

1 would have resolved the problems that Mr. Marshall faced. In
2 other words:

3 That there would be room for mutual involvement by Micmac
4 justice system officials to the evidence against people like Mr.
5 Marshall to carry out their own investigations;

6 Have the resources to carry out those investigations;

7 To assist in bringing forward evidence;

8 To have a judicial determination of whether there is
9 sufficient evidence to put somebody on trial and to hold
10 preliminary matters such as arraignments on Reserves;

11 To only hold the actual trial itself outside of the Reserve
12 community that the individual comes from;

13 And should an eventual conviction be entered, to allow the
14 Micmac system to proffer advice and assist in questions of
15 sentencing and disposition and ultimately questions of how the
16 Micmac convicted person will be housed or prisoned or treated
17 after the sentencing process has taken place.

18 That kind of thing needs to be based on a mutual involvement
19 between the two communities so that each community understands
20 that its interests are being protected and still be room for the
21 development of mutual trust related to the competence and
22 fairness and integrity of both systems.

23 Some, I understand, have put the views forward to Your
24 Lordships, and I guess I'm referring to Mr. Pink in particular,
25 (I wasn't here when he indicated it.) but I took the thrust of
his comments to be that such a system was not terribly practical,
that the Native community did not have the institutions, the
resources were not ready to institute such a system; that the
Micmac community was not well enough developed to run such a
tribal justice system. And of course, I would respond to those

1 kinds of concerns by acknowledging that there will be start-up
2 problems, that there will need to be a transition phase, that
3 there are probably a host of things that are not addressed in our
4 submission. Indeed, I don't feel out of place in saying that I
5 have a sense of pessimism as to whether a system like this would
6 ever be approved by the dominant culture in this country, be it
7 here or anywhere else.

8 But putting that to one side, what I submit to Your
9 Lordships that your goal ought to be is to provide the vision to
10 set the goal, to set the agenda, of what the future should look
11 like on these issues in the Indian community. Then let's start
12 on the process of instituting and implementing the system.
13 Let's not reject it at the outset. Let's decide if it's the
14 right direction, if it's the right way to go. Let's take action
15 now instead of simply dismissing it. Let's not tinker on the
16 fringes. Let's cut to the core of the problem.

17 Those are the submissions which the Union of Nova Scotia
18 Indians makes at this time. I'm certainly happy to respond to
19 any questions or concerns.

20 MR. CHAIRMAN:

21 Thank you very much, Mr. Wildsmith. That's been a very good
22 presentation by you on behalf of your client, and as you have
23 indicated both your client and the Black United Front will have a
24 further opportunity to examine with us, the Commission, and
25 articulate your views.

1 MR. WILDSMITH:

2 Thank you, My Lord.

3 MR. CHAIRMAN:

4 We do appreciate, as well, your coming down today in what is, I
5 understand, was not the most pleasing of travelling conditions.

6 MR. WILDSMITH:

7 Totally terrible conditions, My Lord. I now welcome the
8 opportunity to join the plane again and bounce around for another
9 hour.

10 MR. CHAIRMAN:

11 We will -- We have two further submissions to be made, and both
12 counsel will be -- I'm told will be here tomorrow morning shortly
13 after nine o'clock. So we will rise until nine-thirty tomorrow.

14

15 HEARING ADJOURNED AT 5:03 o'clock in the afternoon of the 2nd day
16 of November, A. D., 1988

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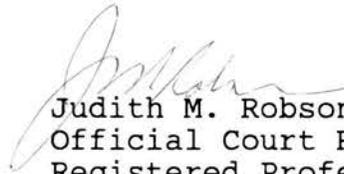
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COURT REPORTER'S CERTIFICATE

I, Judith M. Robson, an Official Court Reporter, do certify that the transcript of evidence hereto annexed is a true and accurate transcript of the Royal Commission on the Donald Marshall, Jr., Prosecution as held on the 02nd day of November, A. D., 1988, at Sydney, in the County of Cape Breton, Province of Nova Scotia, recorded on tape, transcribed and checked on CAT (computer-assisted transcription) by staff of Sydney Discovery Services, and that same is valid only if it bears my raised seal.



Judith M. Robson
Official Court Reporter
Registered Professional Reporter

Sydney Discovery Services
November 02, 1988