

ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION

VOLUME 93

Held: November 03, 1988

At: St. Andrew's Church Hall
Bentinck Street
Sydney, Nova Scotia

Before: Chief Justice T. A. Hickman, Chairman
Assoc. Chief Justice L. A. Poitras, Commissioner
Hon. G. T. Evans, Commissioner

Counsel: George MacDonald, Q. C., Wylie Spicer, & David Orsborn:
Commission Counsel

Clayton Ruby, Ms. Marlys Edwardh, & Ms. Anne S. Derrick:
Counsel for Donald Marshall, Jr.

Ronald N. Pugsley, Q. C.: Counsel for John F. MacIntyre

Donald C. Murray: Counsel for William Urquhart

David G. Barrett: Counsel for the Donald MacNeil estate

Jamie W. S. Saunders, & Darrel I. Pink: Counsel for
Attorney General

James D. Bissell: Counsel for the R.C.M.P.

Al Pringle: Counsel for Correctional Services Canada

William L. Ryan: Counsel for Evers, Green and MacAlpine

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

Bruce H. Wildsmith: Counsel for Union of N. S. Indians;

E. Anthony Ross: Counsel for Oscar N. Seale, and for Black
United Front.

Court Reporters:

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1 INQUIRY RECONVENED AT 9:31 o'clock in the forenoon on Thursday,
2 the 3rd day of November, A. D., 1988, at Sydney, in the County of
Cape Breton, Province of Nova Scotia.

3 MR. CHAIRMAN:

4 Mr. Merrick.

5 MR. MERRICK:

6 Thank you, My Lords.

7 My submission to you this morning is going to relate solely
8 to that portion of this Inquiry that heard evidence concerning
9 the R.C.M.P. investigation of the Honourable Roland Thornhill in
10 1980. Mr. Thornhill wishes to state at the outset that he
11 believes the work of this Commission to be of exceptional
12 importance to the administration of justice in this Province and
13 consequently to the people of Nova Scotia. The mandate of this
14 Commission is to investigate the administration of justice in the
15 Province of Nova Scotia using as a focus the Donald Marshall,
16 Jr., case. For purposes of comparison the Commission has also
17 heard evidence as to how the Attorney General's department
18 handled several other files including that of Mr. Roland
19 Thornhill. Because of the political career and high profile of
20 Mr. Thornhill, any evidence concerning him attracts media and
21 public attention. In dealing with the evidence tendered, the
22 submissions made, and the ultimate report of this Commission, it
23 is important and only fair to ensure that there is no
24 misunderstanding, nor any improper or incorrect impression
25 created.

1 Through no fault of this Commission itself, the fact is that
2 throughout the handling of the case of the Honourable Roland
3 Thornhill, there has been innuendo, distortion and a mis-
4 understanding of the background facts. Over the course of these
5 hearings and, in fact, over the past eight years, the case of Mr.
6 Thornhill has been tried, and in the minds of some, he has been
7 convicted without the benefit of trial. Had charges been laid,
8 Mr. Thornhill would have had the advantage of being able to
9 defend his actions in a court of law. An acquittal would have
10 vindicated him. Even a conviction, had such occurred, would have
11 ended the matter once and for all. Rather for the last eight
12 years, Mr. Thornhill has, as a public figure in political life,
13 laboured under the cloud of suspicion created by the R.C.M.P.
14 investigation. Ultimately Mr. Thornhill felt compelled to resign
15 his Cabinet portfolio.

16 Mr. Thornhill acknowledges that based on the evidence, the
17 handling of his case by the Attorney General's department can be
18 described as showing an advantage or favouritism while the
19 evidence also shows that Donald Marshall was treated at a
20 disadvantage personally causing Mr. Marshall great injury. What
21 is made perfectly clear from the evidence, however, is that the
22 handling of these two matters was carried out by the system that
23 administers justice in this Province and had at no time any
24 involvement by Mr. Thornhill.

25 Mr. Thornhill had financial difficulty and made arrangements

1 with the banks to settle this difficulty. He did not at any
2 time, however, become involved in any discussions regarding
3 whether, in fact, what he did was also a criminal act. He was
4 not aware at the time that the law required that he have the
5 written authorization of his political superior, the Premier, to
6 the settlement with the banks. Mr. Thornhill was also never
7 advised by the Attorney General's department of this provision of
8 the law and he does not know whether the Premier was aware of the
9 need for the letter. Had he known of that requirement, he
10 obviously would have discussed with the Premier the obtaining of
11 such a letter. If the Premier had refused, Mr. Thornhill would
12 never have gone into Cabinet. The evidence does show that at the
13 time in question the Premier was aware of the settlement with the
14 banks. It was Mr. Thornhill's understanding that he had the
15 personal confidence of the Premier regarding his actions and,
16 therefore, made his decision to accept his appointment to
17 Cabinet.

18 Whether justice is performed at an advantage or a
19 disadvantage to an individual without their knowledge, it is the
20 individuals and the system as a whole which suffer. Having said
21 that, Mr. Thornhill wishes to state emphatically that although
22 the last eight years have been personally difficult for him and
23 his family, he in no way wishes to suggest that his situation
24 could ever be compared to what appears to have been the injustice
25 which has been put upon Mr. Donald Marshall, Jr.

1 My Lords, Mr. Thornhill wants to thank this Commission for
2 the opportunity of appearing before it, and I would personally
3 like to thank Commission counsel and their staff for the co-
4 operation which they have extended to us.

5 Thank you.

6 MR. CHAIRMAN:

7 Thank you, Mr. Merrick. Mr. Proudfoot, would you like to come up
8 here and --

9 MR. PROUDFOOT:

10 Good morning, Mr. Chairman, Your Lordships.

11 My name is Gordon Proudfoot. I'm counsel for the Canadian
12 Bar Association, Nova Scotia Branch. We have prepared and
13 distributed a two-volume brief dealing specifically with the
14 obligation of Crown disclosure.

15 Our brief takes the view that one of fatal errors in the
16 criminal justice system which lead to the conviction of Donald
17 Marshall, Jr., were the inadequate rules and inadequate law, in
18 our view, regarding Crown disclosure of exculpatory or favourable
19 evidence to the accused.

20 This submission will advise this Royal Commission on the
21 current status of Crown disclosure in Canada, the United States,
22 and from selected foreign jurisdictions. After canvassing these
23 various laws and practices, certain conclusions are reached as to
24 what fundamental principles of Crown disclosure should be
25 adhered to. This report makes three recommendations to improve

1 Crown disclosure so that another Donald Marshall case will never
2 occur again.

3 There is no legislation requiring Crown disclosure in
4 Canada. The only law is the common law originating from the
5 Supreme Court of Canada's various decisions and some appellate
6 decisions as well.

7 The Supreme Court of Canada has enunciated a general rule
8 that the Crown must disclose the outline of its case to the
9 accused prior to trial. However, the Supreme Court of Canada has
10 never produced a list of what that evidence should include. And
11 until this day, the only penalties for a crown prosecutor not
12 making proper disclosure are law society disciplinary proceedings
13 pursuant to the various law society codes of ethics and the
14 Canadian Bar Association Code of Professional Conduct. Indeed
15 this did happen in British Columbia in the case of Re Cunliffe
16 where a Crown failed to disclose to the defence the name of a
17 witness favourable to the accused.

18 So aside from the vagaries of the case law and the legal
19 profession's codes of ethics, the only real rules compelling
20 Crown disclosure are embodied in the so-called guidelines
21 prepared by the various Attorney General's departments across
22 this Country. These guidelines are not law. These are simply
23 statements of policy. If the crown prosecutor decides to ignore
24 these guidelines, there are no penalties. The guidelines
25 followed in the majority of Canadian provinces model themselves

1 after the Uniform Law Conference Disclosure Guidelines which
2 were passed at the 1985 Halifax Conference attended by the
3 representatives of the various provincial Attorneys General.
4 The uniform guidelines are found in volume two of our submission,
5 which is found at page 468.

6 However, there uniform guidelines, it is submitted, are
7 flawed in various ways, and we list those defects as we see them
8 at page 15 in volume one of our report. We say that there are
9 nine reasons why these uniform guidelines are inadequate. In the
10 preparation of this brief, we surveyed all twelve Canadian
11 jurisdictions and all American United States. All provinces and
12 territories responded except for Quebec, Prince Edwards Island,
13 Newfoundland, and the Yukon. The results of those surveys are
14 found in table form at page 19, volume one of our submission.

15 Of the United States surveyed, thirty-seven -- or seventy-
16 five percent responded and those results have been enclosed in
17 the tables which commence at page 28 of volume one. The
18 Americans have taken a far more aggressive role in codifying the
19 rights of the accused to State disclosure. More progressive
20 American States have actually codified Crown disclosure
21 procedures with sanctions. Unlike Canada, the rules are not just
22 guidelines or policy. They are the law.

23 Many states have also adopted the American Bar Association
24 standards for criminal justice. The standards for criminal
25 justice is a specialized code of ethics for State prosecutors and

1 the criminal defence bar. Now this is above and beyond the
2 American Bar Association model code for professional conduct.
3 The standards for criminal justice carefully outlines the ethical
4 guidelines as they apply to criminal procedures, including State
5 disclosure. Our report recommends a similar specialized national
6 code of ethics for criminal cases in Canada.

7 Reference is made to volume one, page 70 of our report which
8 extrapolates six important principles which, we submit, will
9 improve Crown disclosure procedure in Canada. These principles
10 are drawn from the failure and successes of state disclosure from
11 numerous jurisdictions.

12 The most significant of these conclusions is that disclosure
13 to the defence must not only come from the Crown, but also extend
14 to the investigating police agency. Without that rule, police
15 agencies who are actually conducting the investigation can
16 withhold evidence favourable to the accused. The ultimate goal
17 of any police investigation is surely the search for truth. Our
18 recommendations, which are enclosed on page 72 through 74, speak
19 for themselves.

20 We make no recommendation with regard to the current
21 guidelines that are in place as policy by the various Attorneys
22 General departments across Canada. It is our position that
23 these provincial policy guidelines are toothless and ineffectual
24 and have no place in the criminal justice system.

25 Nova Scotia implemented new and improved disclosure

1 guidelines July 18th, this year. The new Nova Scotia guidelines
2 still would not oblige the Crown to provide prior inconsistent
3 statements. I refer Your Lordships to page 46 of volume two of
4 our appendices which outline the current status of the new Nova
5 Scotia guidelines. It indicates on page 47 a list of seven items
6 that should be disclosed. Item (b) indicates that "copies of all
7 written statements made by witnesses" should be disclosed.
8 However when one reads the preamble, it is clear that the
9 "copies of all written statements" are only those statements that
10 are part of the case in chief for the Crown. Therefore, even if
11 the Marshall case happened today, the Crown would not be
12 obligated to provide the prior inconsistent statements of Chant
13 and Pratico.

14 The Nova Scotia guidelines and indeed the guidelines of all
15 provincial jurisdictions across Canada are ticking time bombs.
16 In fact, given the Crown disclosure guidelines now in place in
17 any Canadian province, another Donald Marshall tragedy could
18 happen tomorrow.

19 All provincial disclosure guidelines should be discarded and
20 replaced by two things. First, the Federal Government of Canada
21 should immediately implement amendments to the Criminal Code of
22 Canada to codify a Crown disclosure procedure. An adaptation of
23 the Law Reform Commission of Canada recommendations from the
24 1982 report is found at page 72 of our first volume. Second, a
25 specific code of ethical conduct for the Crown and defence bar

1 must be established. Where legislative requirements for
2 disclosure do not cover a particular situation, these ethical
3 guidelines will. The sanction of disciplinary, professional
4 action against individual lawyers is indeed a heavy one. In
5 proposing amendments to the Criminal Code, this report goes
6 farther than the Law Reform Commission did. Any application by
7 the Crown to withhold disclosure must, in our opinion, be made
8 inter-parties, not ex-parties. The defence counsel has a right
9 to know that an application is being made and to understand the
10 nature of the document, albeit the identification of the
11 witness, and the statement may not be available to the defence
12 counsel at the time of the application.

13 Also, the Criminal Code must compel the investigating police
14 agency to provide information to the Crown if that evidence would
15 tend to negate the guilt of the accused. In addition, disclosure
16 must extend beyond written statements to notes of verbatim
17 statements taken by the police. Police agencies may not follow-
18 up on evidence that favours the accused and may not document
19 exculpatory statements that favour the accused. The police
20 should, however, have written notes on file. Those written notes
21 must be made available to the defence counsel forthwith so full
22 answer and defence can be made.

23 Finally, the Law Reforms Report requires the prosecution to
24 provide only relevant statements. This, we see, is a major
25 defect in the Law Reform Commission's 1982 report. Under that

1 report, it would appear that if the crown prosecutor reasonably
2 believed that a particular statement was not relevant to the
3 case, he would not have to disclose it. Again we're plagued by
4 excessive discretion in the Crown. However, what is not relevant
5 to the Crown in the proving of its case may be very relevant to
6 the defence in the preparation of its case.

7 Some final thoughts.

8 Aside from the human errors that may have resulted in the
9 wrongful prosecution and conviction of Donald Marshall, Jr. The
10 root cause of injustice in this case and in various other
11 wrongful murder convictions in Australia, England, and in the
12 United States, were all tied to a failure of proper Crown
13 disclosure to the accused.

14 When all is said and done, we humbly submit that the most
15 important thing that will flow from this Royal Commission of
16 Inquiry are not so much the findings of guilt or innocence, but
17 determining what, indeed, did go wrong and recommending solutions
18 so that what happened to Donald Marshall, Jr., will never, ever
19 happen again.

20 Those are our submissions.

21 MR. CHAIRMAN:

22 Thank you very much, Mr. Proudfoot. The Commission are most
23 grateful indeed for the Newfoundland Branch of the Canadian --

24 MR. MacDONALD:

25 The Nova Scotia Branch.

1 MR. CHAIRMAN:

2 -- Nova Scotia Branch. (I'm always getting carried away when I
3 refer to satellite provinces.) The Nova Scotia Branch of the
4 Canadian Bar Association and your obvious and highly professional
5 effort that has gone into your brief and your research, free of
6 charge, is to be commended and we receive this as a strong
7 indication of the commitment of the legal profession in the
8 Province of Nova Scotia to improvements in the justice system in
9 their Province and throughout Canada. We are indeed grateful to
10 you and your colleagues for their efforts.

11 MR. PROUDFOOT:

12 Thank you very much. And it's been a privilege and a pleasure to
13 have this opportunity.

14 MR. CHAIRMAN:

15 Well, today -- Oh, Mr. MacDonald, do you have any --

16 MR. MacDONALD:

17 No, My Lord, I'm delighted to say that Commission counsel has
18 nothing else to say.

19 MR. CHAIRMAN:

20 Well, today we conclude 93 days of public hearings as part of our
21 efforts to carry out our mandate as contained in the Order of the
22 Lieutenant Governor in Council of Nova Scotia issued on the 28th
23 day of October, 1986.

24 As a Commission, we sat for 53 days in Halifax, Nova Scotia,
25 and 40 days in Sydney, Nova Scotia. During that period, we have

1 heard testimony from 113 witnesses whose evidence is contained in
2 16390 pages of transcript. We've also received in evidence 176
3 exhibits, many of which are quite voluminous.

4 As the professional work of all counsel who have appeared
5 before this Commission during that past year or so has now come
6 to an end, with the exception of Commission Counsel whose work
7 will be restricted to providing assistance and advice in the
8 manner set forth in their factum filed with the Commission and
9 referred to by Mr. George MacDonald, Q.C., in his submission to
10 this Commission on Monday, this week, I wish on behalf of my
11 fellow Commissioners and on my own behalf to thank all counsel
12 for their professional industry that they have brought to bear
13 upon their work as they presented to us the point of view or
14 points of view of their clients and articulated the rights of
15 their respective clients. It's been a very salutary professional
16 performance by counsel.

17 When I say the work of the Commission from the point of view
18 of public hearings has now come to a conclusion, I must add one
19 caveat, that we are conscious of the fact that two issues remain
20 before the Courts which will be determined in due course,
21 hopefully as expeditiously and as quickly as possible. This will
22 not prevent the Commission's determination to get on with the
23 horrendous responsibility and duty that's now been imposed upon
24 us to review all of the evidence and the exhibits and the
25 submission of the counsel, and to prepare a report based upon the

1 evidence that we have heard and the studies which we have
2 commissioned which are still in a process of final completion.
3 We will in the ensuing months work in that connection and when
4 the final decisions of the Courts have been adjudicated, the
5 outcome thereof can be readily and will be readily incorporated
6 into our report for presentation to the Government of the
7 Province of Nova Scotia.

8 The research work that we have commissioned has been
9 subjected to very intensive scrutiny by the peers of the
10 researchers, by men and women who have brought to bear upon the
11 work their experience and skills in the particular discipline or
12 area of concern. We anticipate pursuing that same avenue of
13 criticism, constructive criticism of our research, until we feel
14 that we have had the benefit of the advice of all persons who
15 have expertise in the areas concerned. This is a well-
16 established pattern of Royal Commission endeavors to enable them
17 to make meaningful recommendations arising out of findings of
18 fact that are based upon the testimony that has been presented to
19 the Commission and arguments we have heard from counsel.

20 So least anyone may feel that the three of us as
21 Commissioners will now be able to relax, I say with some fear and
22 trepidation that I suspect our real work now begins and there the
23 ultimate responsibility in writing will falls upon our shoulders.

24 I would like at this time on behalf of my fellow
25 Commissioners and myself to thank the appropriate boards of St.

1 Andrews United Church in Sydney for the cooperation they have
2 given us in providing what I'm sure everyone agrees to be most
3 satisfactory facilities to enable us to carry out our work while
4 sitting in the City of Sydney. The facilities lend themselves
5 admirably to Commission Hearings and should Nova Scotians decide
6 that Royal Commissions is an industry that they can't pass up and
7 should continue in other areas of endeavour, I would strongly
8 urge upon those who come after us that when sitting in Sydney,
9 the church hall of St. Andrews is a satisfactory place to hold
10 such hearings.

11 I would like to extend to Reverend Thomas G. Whent of St.
12 Andrews United Church, Sydney, the gratitude of all of us. I
13 speak not only for my fellow Commissioners and staff of the
14 Royal Commission, but I'm sure for all counsel, for the co-
15 operation and support we've received from him and from the church
16 secretary, Mrs. Debbie Glabay.

17 The patience and understanding of the caretaker of St.
18 Andrews United Church, Mr. Everett Watt, has been very salutary
19 indeed. He's had to put up with all of our idiosyncrasies and
20 with, excepting myself, I'm sure you will agree that sometimes
21 there are idiosyncrasies amongst a judiciary that are difficult
22 to control, but he's done it with great aplomb and we thank him
23 for it.

24 The work of our registrar, Mr. Malcolm Williston, has been
25 first class. He is the only man that I'm aware of who is able to

1 bring members of the legal profession to their feet and maintain
2 silence with two simple words uttered with great authority: "All
3 Rise". We thank you, Mr. Williston.

4 We thank Wilfred Smith for keeping us out of trouble and
5 showing us sometimes the delights of Sydney and ensuring that the
6 work of this Commission during our hearings have been carried out
7 with the least possible interruption.

8 To those who cannot stay away from delicious food, orange
9 juice and coffee and tea, and that includes most, may I on their
10 behalf say to the United Church Women of St. Andrews United
11 Church that we're all very grateful to them for being here every
12 day and providing us with samples of their culinary art. It's
13 been a great effort on their part.

14 The media have been following us around now for a year or
15 more and I've sure that they've had some problems at times
16 separating the wheat from the chaff, but by and large the
17 reporting has been objective and they have left the Commissioners
18 to themselves which, I'm sure, was tempting at times on their
19 part to try and find out what we're thinking. But we do our
20 best to disguise our thoughts. But in any event, I do commend
21 them and thank them for their attentiveness in covering the
22 hearings of this Commission.

23 Well, there's nothing left for us now but to get to work and
24 this we'll do with the cooperation of our very dedicated staff.
25 The Executive Secretary, Susan Ashley, will continue to put up

1 with us and order us around. Laurie Burnett will even do more of
2 that ordering around, and with their co-operation and other
3 Commission staff in Halifax, we will starting on Monday of next
4 week to get to work.

5 Now I'm sure that the media are saying: "When are you going
6 to complete your report?". If I knew that, I would be delighted
7 to give you a firm date, but relying on experience that I've had
8 with other Commissions -- with another Commission at least, and
9 appearing before Commissions some years ago and watching the work
10 of Royal Commissions throughout Canada, it is virtually
11 impossible to give a fixed date. I can tell you that we will
12 work assiduously to try and have our report delivered to the
13 Government of the Province of Nova Scotia by June 30th of next
14 year, but this is not to be interpreted as a firm guarantee. We
15 will only reach that date by a great deal of overtime work on the
16 part of all of us, but that is a goal that we have in mind. I
17 would like to think that we may be able to attain that. If we
18 don't, it will be for good and valid reasons because we are
19 determined that in the preparation of this report, we will not
20 sacrifice our review simply to meet deadlines.

21 The last person or group I would wish to thank for their
22 co-operation would be the Official Court Reporters of Sydney
23 Discovery Services who have been with us during all of our
24 sessions in Sydney and have faithfully and accurately recorded
25 the work that we have -- or the evidence that has been presented

1 to us during the Inquiry.

2 We have enjoyed being in Sydney a great deal. It's a very
3 attractive City. The generosity of the staff at the Holiday Inn
4 has been absolutely superb. And the waistline of many of those
5 around will attest to the fact that there are very good eating
6 places in this City.

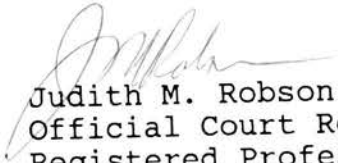
7 Thank you so much. We now adjourn.

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9 INQUIRY CONCLUDED AT 10:07 o'clock in the forenoon on the 3rd day
10 of November, A. D., 1988.

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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 03rd 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 03, 1988