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March 14, 1988

BY HAND

Mr. W. Wylie Spicer
Commission Counsel
Royal Commission on the
Donald Marshall, Jr. Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia

Dear Wylie:

Marshall Inquiry
Our File No. 9201/1

This is in response to yours of March 4, 1988 regarding the study relating to Indians/Natives in criminal justice in Nova Scotia.

Enclosed is a document entitled "A Research Proposal for an Examination of Public Legal Education Programming for the Micmac People of Nova Scotia" submitted to the Federal Department of Justice by the Union of Nova Scotia Indians on September 12, 1985. Also enclosed is a document which I believe is the Federal Department's response.

The Federal Department contacted the Department of the Attorney General in May, 1987, and the matter was subsequently discussed between the Attorney General's Department and the Department of Social Services, which as you know has responsibility in Nova Scotia for Aboriginal matters.

It is the position of the Department that since the subject matter of the study is being examined by the Marshall

Inquiry and since the proposal itself calls for a feasibility study at the outset, the Marshall Inquiry should complete its deliberations and make its report and recommendations before the matter of this research proposal is pursued further.

Yours truly,

Darrel I. Pink

DIP/cs
encl:
c.c. Mr. Jamie Saunders
Mr. R. Gerald Conrad, Q.C.

DALHOUSIE LAW SCHOOL HALIFAX CANADA B3H 4H9

CONFIDENTIAL

DATE: March 14, 1988

TO: W. Wylie Spicer, Counsel, The Royal Commission on the Donald Marshall Junior Prosecution

FROM: Archie Kaiser

SUBJECT: Compensation for Wrongful Conviction and Imprisonment: Quantum, Principles, Factors and Process

---

Following our telephone conversation of Friday, March 11, I reviewed some of any materials with a view to assisting you in your preparation for your examination of Mr. Giffin. Obviously, there was very little time available to properly advise you on the issues which might arise during the testimony of this witness, but I am sending along these brief notes anyway.

A. Quantum

I attach a table where I have noted a few awards, both recent and as far back as 1905. The examples should be studied with caution. They are largely drawn from the U.S. and U.K. experience and I make no claim that this is anything near an exhaustive list. The rules, such as they are, in the U.K. are based upon various ministerial statements and provide for ex gratia payments. The American cases vary widely as far as the basis of claim is concerned. Until recently, many states passed a moral obligation bill which was quite fact-specific and which would provide for the state agreeing that a cause of action could be brought against it in the courts. There are contemporary examples (e.g. New York) giving a legislative entitlement to compensation. Beyond these differences in the mechanism of compensation being paid, there are important distinctions in the legal systems and economic conditions among the various countries which could make

a simple foreign exchange conversion quite misleading.

None the less, you may learn something from my short list. The Quantum of awards has not been a matter of great interest for me, dwelling as I have been on broader issues.

B. Principles

Any compensation scheme (or for that matter, any decision on an individual case in the absence of a scheme) must have some basic set of principles as a foundation for the assessment of the individuating factors which must be considered before an award can be made. It would, of course, be possible to merely set an arbitrary formula similar to that found in some workers' compensation programs, for example, $10,000 per year for the first three years of imprisonment and $15,000 thereafter. In the same vein, there could be a ceiling on awards, regardless of the length or conditions of imprisonment or the effect on the life of the wrongfully convicted person.

However, there are far stronger arguments (and ample precedent) for full compensation for the injured party. Simple restitutionary principles should form the baseline for any award: the victim should be restored to the economic position he would enjoy if not for the wrongful act of the state. Beyond that, given the seriousness of convicting the innocent (it has often been said to be among the gravest problems with which a civilized society can concern itself) the idea of full compensation, on a fair and reasonable basis, is dominant in the little academic writing in the field and in many current legislative developments. Taking this stance inevitably means the rejection of any mechanistic formula or artificial ceiling and may mean that large sums ought to be paid to those who have been treated worst

by the criminal justice system - innocent people who have been found guilty and served long terms of imprisonment.

Out of interest, although the Federal-Provincial Task Force does not make a recommendation on the full compensation/no ceiling issue, they seem to be heading in the right direction, by their identification of arguments, at pp. 33-34.

The Thomas Royal Commission seems to have understood these issues and I note a few extracts from pp. 115-116.

> "This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals."
>
> "Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years." [Emphasis added]
>
> "We now consider the amount of compensation to be awarded to him to compensate him for all the damage, suffering, and anguish he has sustained mentally and physically as a consequence of his wrongful convictions and subsequent years in prison."

C. Factors

I am here going to address only a limited range of variables which ought to be considered in giving effect to the principles discussed above. I have drawn my rough list from several sources (citations available) and have amplified it in some areas which may be of interest to you in examining Mr. Giffin (and elsewhere). I am assuming that a person entitled to compensation would have been (i) convicted, (ii) imprisoned, (iii) pardoned or found not guilty on a reference, and (iv) a person who did not commit the

acts charged in the accusatory instrument. Any purported blameworthiness of his or her conduct will be addressed separately.

1. Non-Pecuniary Losses

(i) loss of liberty, which may be particularized in some of the following heads; indeed some overlap is inevitable;

(ii) loss of reputation;

(iii) humiliation and disgrace;

(iv) pain and suffering;

(v) loss of enjoyment of life;

(vi) loss of potential normal experiences, such as starting a family;

(vii) other foregone developmental experiences, such as education or social learning in the normal workplace;

(viii) loss of civil rights, such as voting;

(ix) loss of social intercourse with friends, neighbours and family;

(x) physical assaults while in prison by fellow inmates or staff;

(xi) subjection to prison discipline, including extraordinary punishments imposed legally (the wrongfully convicted person might, understandably, find it harder to accept the prison environment), prison visitation and diet;

(xii) accepting and adjusting to prison life, knowing that it was all unjustly imposed;

(xiii) adverse effects on future advancement, employment, marriage, social status, physical and mental health and social relations generally;

(xiv) any reasonable third party claims, principally by family, could be paid in trust or directly; for example, the other side of (ix) above is that the family has lost the association of the inmate.

Surely few people need to be told that imprisonment in general has very

serious and quite detrimental effects on the inmate, socially and psychologically. For the wrongfully convicted person, these harmful effects are heightened exponentially, as it is never possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. The above list is intended to add some specificity to the mainly non-pecuniary category which it reflects. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallize. The point is that prison, for many, teaches a very maladjusted way of being for life outside the institution and that the longer this distorting experience goes on, the less likely a person can ever be whole again. Especially for the individual imprisoned as a youth, the chances of eventual happy integration into the normal community (which by the way sent the accused to jail unfairly in the first place) must be very slim. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this likely chronic social handicap.

2. Pecuniary Losses

There will be considerable variability here, reflecting in part the person's skills and employability at the time of incarceration. One should be cautious in this regard, however, in assessing compensation, for it may be that the wrongfully convicted person's pre-existing marginality contributed to his or her being found guilty and kept in prison. If full compensation is one of the guiding principles, then each claimant should be given the benefit of the doubt on what his or her life would have held out

but for the mistaken conviction.

Some headings might include:

(i) loss of livelihood;

(ii) loss of employment related benefits, such as pension contributions by employer;

(iii) loss of future earning ability;

(iv) loss of property due to incarceration or foregone capital appreciation;

(v) legal expenses, in connection with the original trial and appeal, subsequent appeals or special pleas, any new trial or reference, and the compensation application itself. Most awards add the legal expenses, presumably on the belief that the wrongfully convicted person should not have to pay to secure his or her release and redress when he or she is the victim. A fortiori, when the imprisonment is long, the new evidence elusive or the authorities recalcitrant;

(vi) expenses incurred by friends and family; for example, in visiting the prisoner or securing his or her release, perhaps to be paid in trust for them or directly to them.

3. Blameworthy Conduct

Most compensation schemes envisage some reduction or exclusion for the person who has contributed to or brought about his or her own conviction. The obvious example would be the person who eagerly but fancifully confesses to a crime for which he or she was not responsible. Even there, caution is in order, for the criminal justice system is supposed to find the truth of allegations, even if the accused has been partly to blame for a particular falsehood or an atmosphere of untruth. Further, there is great imprecision in many statements to the effect that "the accused is the author of his or her own fate". How often can anyone confidently say that the accused's conduct is to be held to account to the tune of a 10% reduction of the total

award? Finally, the spectre of the state simultaneously thereby evading and projecting responsibility, in effect scapegoating and blaming the victim for its errors, must loom large in the mind of any conscientious person when it comes to assessing the relevance of the victim's behaviour.

By all means, some escape hatch should be reserved for the fraudulent victim or the reckless participant in a criminal trial, but this feature of a compensation scheme (or award) should not be used to punish the naive, the youthful, the feeble-minded, the powerless or the frightened, among others.

Actual awards seldom recite specifically why (or if) they may have been reduced due to this type of factor. Again, if fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown.

D. Process

You have not asked me to address this issue, so I will comment upon it very briefly. The fundamental point is that, in the absence of a statutory scheme, can there and ought there to be guidelines for the submission of an ex gratia claim? The answer must be an emphatic yes, if the state is accepting its responsibilities, moral and legal, in a bona fide manner. This provision of mere guidelines is by no means adequate to meet the obligations of a signatory to the International Covenant, but is a step in the direction of procedural fairness and basic decency.

I am not sure whether this was done in the Marshall case, but it ought to have been the first step of the Attorney-General once a decision had been

made to compensate. Materials would have been readily available, especially from the U.K. and adaptations could have readily been made for the Canadian environment and the facts at hand. If this were not done, then one in the position of Marshall would be left with trying to figure out the bases for a relatively unprecedented claim, with no indication by the government of how it has determined that it should discharge its moral and international legal obligations. The process could readily become a conventional cat and mouse bargaining game which is certainly not the proper spirit for the settlement of such issues.

I attach some recent British materials in the nature of an Explanatory Note to Claimants and a subsequent Ministerial statement. It is by no means ideal, but is much better than nothing.

There are many other "process" issues which could be addressed in this case, no doubt, but I am not now aware of the specific facts.

Best of luck in your examination. I am at your service.

AK/lmr
Attachments

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
VGAN, G.B., 1985	85 pending; Scot £18,500	eg Home Office	wounding 4 yrs, quashed on appeal		legal costs added	£ 4½ [illegible] + H.O. [illegible] + Justice submission ←	Confession withheld by Crown resulted in 4½ day more in prison	Justice 85 24-25; " 86 15; was still G of causing affray - [illegible] to 2
M. + P. McDONAGH All G.B. (this page) dates: see Justice cites →	—						C.A. rejects appeal; Justice calls for difficult case to be resolved by special tribunal [illegible] by lawyers.	Justice 85 26-27
E. CLARKE	85 —; 86 CA reference fails		murder				H.O. Minister meets [illegible] group & promises review; earlier rejected C.A. Ref. as said evid not new, but reinterpretation	85 Justice; '86 16-17 - C.A. upholds conv. - [illegible] it, despite some [illegible] slipping away
LIVESEY	85 —; 86 CA Ref. ordered; 87 " Dismissed		murder				Justice/BBC att'n results in refusal to reopen case	85 Justice; acc. likely [illegible] after murder; will [illegible]; 87 Justice - CA convinced of G
Canterbury Jeweller	86 pending	appeal out of time unopposed	4 yrs sent; 3½ mo served				confession of actual robbers made before trial not passed on to [illegible].	86 Justice
MYCOCK	? £11K per year [illegible]; £20K rec'd	CA. Ref on Home Sec order quashes conv.	robbery; 5 yrs. sent; served 2 yrs, 5 mos	police misconduct [illegible]; [illegible] taken into acc't	costs add'l		id. evid defective; police [illegible] mistaken id. to [illegible] def	86 Justice / BBC; + [illegible] material.
FOX	?	Home Sec asked for ref.	murder - W; [illegible] - maintains				alibi disbelieved; BBC uncovers other evid.	86 Just. BBC
STEEL	?	"	murder - life				police brutally extract [illegible]; other [illegible] and [illegible]	86 Just BBC
POCOCK	?	conv. & sent quashed [illegible] appeal	poss drugs (2); attempt. defeat ends of justice → 5 yrs → 2 [illegible]				p.o.'s [illegible] have seen what they described	87 Just.
LOUGHLIN	N.A.	sent appeal only	wounding [illegible] - life [illegible]				[illegible] in sent	87 Just

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
GB/86 likely "recent case" NGAN)	£18000	?	16 mos	£8000 re [illegible] loss [illegible]				22 Dec 86 [illegible] Ashman
USA/84 Texas GETER	SUIT $2 million	civil suit	19 mos/robbery					ABAJ June 84
USA/? Tennessee FORBES	$250 K award ($1.2 mil sought) on appeal	" "	5 yrs rape	- salary - loss approx [illegible] - physical injuries - legal expenses [illegible] - loss liberty	included			" "
USA/80 Calif. Grannelli (Von Vanerys?) see ⊕ [illegible]	$1 mil	civil suit - false imp.	2½ yrs 2nd murder	[illegible] infliction of emotional distress				3 New LJ 19 Dec 15/80 (in Dove ⊕) → p. 267 (check)
USA/1946 N.Y. Campbell	$115K	moral obligation bill; then suit	?; long term	- loss earnings + prison misery - suffering + effects of long term				Albany LR ⊕ Kasdan 202
USA NY Zimmerman	$1 mil (asked for $10 mil)	moral oblig. bill + suit	2? yrs/murder		as much as $500K deducted from award of $1 mil		victim unhappy w award; died soon after getting it; harsh prison treat.	⊕↑ 204 + protested innocence throughout [illegible]
USA Dabbs	$45K	suit; false arrest + imp	4 days					
NZ Thomas	$1.1 mil NZ			extensive disc.				⑤
UK/1905 BECK	£4K	eg	7 yrs				mist. id.	Justice 1982 Report ↓
UK/1928 SLATER	£6K	"	18½ yrs murder				didn't commit	"
" /1935/ Lowry [illegible]	£300-400	"	2 yrs [illegible]					
" 1965 Gross et al	£800-1000	'	8 mos robbery				wrong id.	
" [illegible]	[illegible]	[illegible]	[illegible]				" "	

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
Dougherty/UK/73	£2K	eg	8 mos/theft					Justice 82 ↓
Naughton/UK/77	£10K	"	3 yrs/robbery				alibi established	"
Benjamin/UK/76	£9K	"	rape/12 yrs → not served					
Taylor/1979/UK	£21K	"	5 yrs/murder				discredited sci evid.	
...ee/≈1982	£70	"	?/murder	Report contains Dice factors				
Stevens/76	£8.5K	"	3 yrs/robbery (out of work)	see esp. p. 11 – existing practice; p. 19+ – proposals; + comparative provisions				
Burke/80	£7.0K	"	18 mos/murder					
Daniels/USA 1985	$600K	civil suit; settled	6–18 yrs sex ass r att murder; served 4	treated badly by other inmates as sex off.				Huff ⓢ 538
Warwick/Fox Canada/1986	$275K	eg	8 of 10 yrs for rape				$100K deduction for victim of previous rape	
Howard/USA (Illinois)/1955	$51K	special bill	17 yrs served for murder					

HOME OFFICE LETTER TO CLAIMANTS

EXPLANATORY NOTE
EX GRATIA *PAYMENTS TO PERSONS WRONGLY CONVICTED OR CHARGED:*
PROCEDURE FOR ASSESSING THE AMOUNT OF THE PAYMENT

1 A decision to make an *ex gratia* payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2 Subject to Treasury approval, the amount of the payment to be made is at the direction of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.

3 The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an *ex gratia* payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.

4 In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the

following factors may thus be relevant according to circumstances:–

Pecuniary loss
Loss of earnings as a result of the charge or conviction.
Loss of future earning capacity.
Legal costs incurred.
Additional expense incurred in consequence of detention, including expenses incurred by the family.

Non-pecuniary loss
Damage to character or reputation.
Hardship, including mental suffering, injury to feelings and inconvenience.

The assessment will not take account of any injury a claimant may have suffered which does not arise from the conviction (eg as a result of an assault by a member of the public at the scene of the crime or by a fellow prisoner in prison) or of loss of earnings arising from such injury. If claims in respect of such injuries are contemplated, or have already been made to other awarding bodies (such as the courts or the Criminal Injuries Compensation Board), details should be given and included in the memorandum referred to in paragraph 3.

When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

5 In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.

6 Since the payment to be offered is entirely *ex gratia*, and at his discretion, the Home Secretary is not bound to accept the assessor's recommendation, but it is normal for him to do so. The claimant is equally not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections.

Friday, 29th November, 1985.

Written No. 173

Mr. Tim Smith (Beaconsfield): To ask the Secretary of State for the Home Department, if he will make a statement with regard to the payment of compensation to persons who have been wrongly convicted of criminal offences.

MR. DOUGLAS HURD

There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted Free Pardons by the exercise of the Royal Prerogative of Mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a Free Pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations. The International Convenant on Civil and Political Rights [Article 14.6] provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently

/ his

his conviction has been reversed. or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.

It has been the practice since 1957 for the amount of compensation to be fixed on the advice and recommendation of an independent assessor who, in considering claims, applies principles analogous to those on which claims for damages arising from civil wrongs are settled. The procedure followed was described by the then Home Secretary in a written reply to a Question in the House of Commons on 29th July 1976 (Official Report, columns 328-330). Although successive Home Secretaries have always accepted the assessor's advice, they have not been bound to do so. In future, however, I shall regard any recommendation as to amount made by the assessor in accordance with those principles as binding upon me. I have appointed Mr Michael Ogden QC as the assessor for England and Wales.

/ He

He will also assess any case which arises in Northern Ireland where my rt. hon. Friend the Secretary of State for Northern Ireland intends to follow similar practice.

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

MARITIME CENTRE, SUITE 1026, 1505 BARRINGTON STREET, HALIFAX
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CHIEF JUSTICE T. ALEXANDER HICKMAN
CHAIRMAN

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS
COMMISSIONER

THE HONOURABLE
MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

March 11, 1988

Professor Edward Renner
Psychology Department
Life Sciences Centre
Room 3263, 3rd Floor
Dalhousie University
Halifax, Nova Scotia B3H 4J1

Dear Professor Renner:

Thank you for your letter of February 24, 1988.

I am enclosing for your ready reference a copy of my previous correspondence dated December 10, 1987 wherein you will note that contrary to the suggestion contained in your letter I did not cite your paper, entitled, "The Bureacratic and Adversary Models of the Criminal Courts: The Sentencing Process". In fact, it was your proposal of September 28, 1987 and the paper which you quote therein entitled, "The Standard of Social Justice Applied to an Evaluation of Criminal Cases Appearing Before the Halifax Courts" which were the subject of our consideration.

The Commission is of course concerned with the issue of differential sentencing treatment based upon race and has undertaken a research project designed to address this issue. Obviously your earlier studies as they relate to this issue are suggestive and helpful.

Thank you. I remain,

Yours very truly,

John E.S. Briggs
Director of Research

JESB:jrc

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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THE HONOURABLE
MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

March 11, 1988

Mr. James O'Reilley, Esq.
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario K1A 0L6

Dear James:

Thank you for the materials and in particular, Professor Edwards' critique of Mark Rosenberg's paper.

I appreciate your assistance and look forward to chatting with you when you are in Halifax in May.

Yours truly,

John E.S. Briggs
Director of Research

JESB:jrc

PATTERSON KITZ
BARRISTERS & SOLICITORS

MAR 11 1988

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R. MALCOLM MACLEOD
ALAN C. MacLEAN
DENNIS ASHWORTH
WENDY J. JOHNSTON
ROBERT K. DICKSON
FERN M. GREENING

FRED J. DICKSON, Q.C.
DAVID R. HUBLEY, Q.C.
GERALD J. McCONNELL, Q.C.
RONALD A. PINK
LOGAN E. BARNHILL
JOEL E. FICHAUD
J. MARK McCREA
D. SUZAN FRAZER
BRUCE A. MARCHAND
RODNEY F. BURGAR
JANICE A. STAIRS
DENNIS J. JAMES

JAMES C. LEEFE, Q.C.
FRANK J. POWELL, Q.C.
CLARENCE A. BECKETT, Q.C.
GEORGE L. WHITE
DAVID R. FEINDEL
A. DOUGLAS TUPPER
DORA L. GORDON
LORNE E. ROZOVSKY, Q.C.
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TELEX 019-22893

ALSO OFFICES AT
TRURO, NOVA SCOTIA
BEDFORD, NOVA SCOTIA

March 11, 1988

BY HAND

Mr. W. Wylie Spicer
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear Mr. Spicer:

Our File No. 9201/1

Further to George MacDonald's review of the Attorney General's files this morning, I enclose copies of the documents requested.

Yours truly,

Catherine M. Hicks

Catherine M. Hicks
Legal Assistant to Darrel I. Pink

/jl
Enc.

0984-0259-01

February 9, 1984

Mrs. B. J. MacDonald
Box 475
STELLARTON, Nova Scotia
B0K 1S0

Dear Mrs. MacDonald:

This is to acknowledge receipt of your letter of January 18, 1984. I appreciate the interest which you have taken in this matter and wish to advise you that the Government of Nova Scotia will take your comments into consideration in its review of this matter.

In November of 1983, shortly after I became Attorney General for Nova Scotia, I met with Mr. Felix Cacchione, the solicitor representing Mr. Donald Marshall. At that time Mr. Cacchione outlined to me his client's requests for payment of his legal costs, compensation and a public inquiry into the original police investigation of the death of Mr. Sandy Seale. The Government of Nova Scotia has not yet made a decision on these requests. I do understand that the Government of Canada has decided not to pay any costs or compensation to Mr. Marshall.

As you may know, after Mr. Marshall's conviction was set aside by the Appeal Division of the Supreme Court of Nova Scotia, charges were laid against Mr. Roy Ebsary in connection with the death of Mr. Sandy Seale. In November of 1983 Mr. Ebsary was convicted of manslaughter and sentenced to five years imprisonment. He has since appealed both his conviction and his sentence, and that appeal has not yet been heard by the Appeal Division of the Supreme Court of Nova Scotia.

2/...

#3

It is my view, as Attorney General, that I must not either say or do anything which might, even inadvertently, prejudice or even appear to prejudice the criminal proceedings involving Mr. Ebsary which are still before the courts by virtue of his appeal. For that reason I have determined that the Government of Nova Scotia ought to make no public statement or decision on Mr. Marshall's requests until such time as the criminal proceedings involving Mr. Ebsary are disposed of by the courts.

At this point in time, therefore, the Government of Nova Scotia has neither accepted nor rejected the requests communicated to me by Mr. Marshall's solicitor and I intend to await the outcome of the criminal proceedings involving Mr. Ebsary before making any public statement of the intentions of the Government of Nova Scotia with respect to those requests.

Again I do want to thank you for taking the time and trouble to write to me about this matter and, I remain.

Yours very truly,

Ronald C. Giffin

April 11, 1984

Dear

Mr. Steve Murphy of radio station C.J.C.H., in Halifax, has passed on to me the letter which you had written to him in connection with the Donald Marshall matter.

Because of the interest which you have expressed in the matter, I thought that in this letter I might outline to you the steps which the Government of Nova Scotia has been taking to deal with this very complex and important matter.

In November, of 1983, shortly after I became Attorney General, I met with Mr. Felix Cacchione, the solicitor representing Mr. Donald Marshall. At that time, Mr. Cacchione outlined to me his client's request for payment of his legal costs, compensation and a public inquiry into the original police investigation of the death of Mr. Sandy Seale. In passing, I should note that it is my understanding that the Government of Canada has refused to pay any costs or compensation to Mr. Marshall and has taken the position that responsibility for these matters rests with the Government of Nova Scotia.

2/...

As you may know, after Mr. Marshall's conviction was set aside by the Appeal Division of the Supreme Court of Nova Scotia, charges were laid against Mr. Roy Ebsary in connection with the death of Mr. Sandy Seale. In November, of 1983, Mr. Ebsary was convicted of manslaughter and sentenced to five years imprisonment. He has since appealed both his conviction and his sentence and it is my understanding that the appeal will be heard by the Appeal Division of the Supreme Court of Nova Scotia on May 18, 1984.

Throughout my dealings with this matter I have indicated as clearly as I can that, as Attorney General, I must not either say or do anything which might, even inadvertently, either prejudice or appear to prejudice the status of the criminal proceedings involving Mr. Ebsary and which are still before the courts by virtue of his appeal.

My Cabinet colleagues and I therefore faced a very difficult task in dealing with the requests put forward by Mr. Cacchione. After a great deal of careful consideration, we concluded that a public inquiry could not be conducted while the Ebsary case is still before the courts, but that it would be appropriate for us to conduct an independent inquiry into the questions of costs and compensation.

The Government of Nova Scotia has, therefore, appointed Mr. Justice Alex Campbell, of the Supreme Court of Prince Edward Island, to conduct an inquiry into these matters and to make recommendations to the Government of Nova Scotia with respect to them. At the same time, there is a clear understanding on the part of Mr. Justice Campbell that his conduct of his inquiry must not in any way trespass upon the status of the criminal proceedings involving Mr. Ebsary.

Mr. Justice Campbell has now advised the Government of Nova Scotia that he expects to be able to complete his final report on these matters by September of 1984. As an interim measure, he has recommended a payment of twenty-five thousand dollars partial compensation to Mr. Marshall. I am pleased to advise that the Government of Nova Scotia has accepted this recommendation and a payment in that amount is now being made to Mr. Marshall through his solicitor. I look forward to receiving Mr. Justice Campbell's final report in September and hope that the Government of Nova Scotia will then be able to act further on these matters.

Yours very truly,

Ronald C. Giffin

09-84-0261-01

April 12, 1984

Rev. Peter Stewart MacDonald
Box 100
ST. GEORGE'S, Bermuda

Dear Rev. MacDonald:

This will acknowledge your letter concerning Mr. Donald Marshall, Jr.

Because of the interest which you have expressed in the matter, I thought that in this letter I might outline to you the steps which the Government of Nova Scotia has been taking to deal with this very complex and important matter.

In November, of 1983, shortly after I became Attorney General, I met with Mr. Felix Cacchione, the solicitor representing Mr. Donald Marshall. At that time, Mr. Cacchione outlined to me his client's request for payment of his legal costs, compensation and a public inquiry into the original police investigation of the death of Mr. Sandy Seale. In passing, I should note that it is my understanding that the Government of Canada has refused to pay any costs or compensation to Mr. Marshall and has taken the position that responsibility for these matters rests with the Government of Nova Scotia.

--2

Item # 5

As you may know, after Mr. Marshall's conviction was set aside by the Appeal Division of the Supreme Court of Nova Scotia, charges were laid against Mr. Roy Ebsary in connection with the death of Mr. Sandy Seale. In November, of 1983, Mr. Ebsary was convicted of manslaughter and sentenced to five years imprisonment. He has since appealed both his conviction and his sentence and it is my understanding that the appeal will be heard by the Appeal Division of the Supreme Court of Nova Scotia on May 18, 1984.

Throughout my dealings with this matter I have indicated as clearly as I can that, as Attorney General, I must not either say or do anything which might, even inadvertently, either prejudice or appear to prejudice the status of the criminal proceedings involving Mr. Ebsary and which are still before the courts by virtue of his appeal.

My Cabinet colleagues and I therefore faced a very difficult task in dealing with the requests put forward by Mr. Cacchione. After a great deal of careful consideration, we concluded that a public inquiry could not be conducted while the Ebsary case is still before the courts, but that it would be appropriate for us to conduct an independent inquiry into the questions of costs and compensation.

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--3

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Yours very truly,

Ronald C. Giffin

09-84-0261-01

March 7, 1985

Rev. Duncan E. Roach
Chairman
Calvin United Session
417 Smith St.
NEW WATERFORD, Nova Scotia
B1H 3R3

Dear Rev. Roach:

Thank you very much for your letter, of February 20th, 1985, concerning the Donald Marshall case. You state in your letter that the trial of Mr. Roy Ebsary has been concluded, however, I must correct that statement. While the third trial of Mr. Roy Ebsary has been concluded, I have been advised by my officials that Mr. Ebsary, through his solicitor, has filed an appeal against both his conviction and sentence. That appeal will, I assume, be heard in due course by the Appeal Division of the Supreme Court of Nova Scotia. One of the options open to the Appeal Division of the Supreme Court of Nova Scotia in dealing with that type of appeal is the ordering of a new trial. It is therefore altogether possible, as has already happened in this particular matter, that we could have yet another trial.

The foregoing means that the criminal proceedings involving Mr. Roy Ebsary are still very much before the courts and, as I have indicated, on many occasions in connection with this matter, it is

2/...

my view that the Government of Nova Scotia cannot consider proceeding with any type of public inquiry into this matter while the criminal proceedings involving Mr. Ebsary are still before the courts.

I appreciate your taking the time and trouble to write to me about this matter and, I remain,

Yours very truly,

Ronald C. Giffin

NOTE: Form let being sent out to people who write in suggesting such a public inquiry.

09-84-0261-01

June 17, 1986

Captain C.V.D. Smith
Apt 18, 6259 Coburg Rd.
HALIFAX, Nova Scotia
B3H 2A2

Dear Captain Smith:

Thank you very much for your letter of June 3rd. I note in particular, your request that the events surrounding the conviction of Donald Marshall in 1971 ought to be the subject of a full and open public inquiry.

As you know, after Mr. Marshall's conviction was set aside by the Appeal Division of the Supreme Court of Nova Scotia, criminal proceedings were instituted against Mr. Roy Ebsary in connection with the death of Sandy Seale for which Mr. Marshall had originally been convicted. There have been several trials and appeals in connection with the criminal proceedings against Mr. Roy Ebsary and I am advised that his solicitors are now seeking leave to appeal to the Supreme Court of Canada from the latest decision by the Appeal Division of the Supreme Court of Nova Scotia.

I have taken the view that the Government of Nova Scotia ought not to address the question of a public inquiry while the criminal proceedings, involving Mr. Ebsary, are still before the courts. I have tried to be exceptionally careful to avoid doing anything which would trespass, or even

2/...

appear to trespass, upon Mr. Ebsary's rights as an accused person standing before the courts charged with a serious criminal offence. At this point, I do not know when the criminal proceedings involving Mr. Ebsary will be finally concluded; however, I do want to assure you that whenever that event occurs the Government of Nova Scotia will then deal as expeditiously as possible with the question of a full public inquiry along the lines which you have indicated.

I do want to thank you for taking the time and trouble to write to me about this very important matter and, I remain,

Yours very truly,

Ronald C. Giffin

August 27, 1986

M E M O R A N D U M

TO: Mr. Gordon F. Coles, Q.C.

FROM: Hon. Ronald C. Giffin, Q.C.

Assuming that the Supreme Court of Canada does not grant leave to Roy Ebsary to appeal, we shall, in early October, have to proceed with the public inquiry.

I thought perhaps in preparation for this we could dispose of some points. My preference would be to ask Chief Justice Alex Campbell to take this on. I shall raise this at Cabinet informally and, if Cabinet agrees, then I will make a private approach to him and see if he would be able to do it. If he isn't, then we shall have to look elswhere.

One can only guess at the cost of this kind of an Inquiry, however I assume that we have no money in our budget for this fiscal year for this. If so, we shall have to prepare a submission to Management Board for approval for the necessary funding and at least provide them with a ball-park figure.

With respect to the terms of reference, it seems to me that these should be as broadly worded as possible and perhaps Hal Stevens could offer us some assistance in this regard because I am sure that he has participated in the drafting of such terms of reference on a number of occasions in the past. Since compensation has been paid to Donald

---2

Marshall, I would assume that it is not necessary for us to include that item in the terms of reference, although I suppose it is at least within the realm of possibility that Campbell might end up making some further recommendation in this regard.

Another issue will be that of access to confidential files in this Department. I have no problems with Chief Justice Campbell having access to such files, on the understanding that it would have to be left to his judgment as to whether or not all of the contents of such files would be made public or if there might be any items which should for any reason remain confidential. Unless you have any particular concerns to the contrary, I would be prepared to state, when the Inquiry is announced, that all files in our possession would be made available to him.

I would assume that practical arrangements, such as a place to hold the Inquiry, staff assistance, transcripts etc. will also have to be dealt with, and at some point we shall have to involve Ron MacDonald in our discussions.

I suppose that some employees of this Department, both past and present, and perhaps even including you and me, will be called upon to testify. My immediate inclination is simply to say that if asked to do so we certainly should. My concern here is that I think we want to be as open and cooperative vis-a-vis the entire exercise as we reasonably can be and do whatever we properly can to avoid even the slightest suggestion of any kind of failure to disclose any pertinent information.

May I suggest that after we have both had an opportunity to think about the matter for a few days that we should get together and discuss it more fully.

09-84-0261-01

September 19, 1986

Mr. Rene St. Pierre
245 Polaris Road
Timmins, Ontario P4N 8A7

Dear Mr. St. Pierre:

I wish to acknowledge your letter of September 6th.

It would be improper for me to comment on this case since the case of Roy Newman Ebsary, who was subsequently charged with the death for which Mr. Marshall was originally convicted, is still before the Courts. It is the intention of this government to hold an inquiry into the Donald Marshall, Jr. matter when the Courts have made their final determination on the Ebsary case. In the interim, I can only suggest that you contact a library in your area which can advise you as to where press and other reports of the Marshall case can be found.

Yours very truly,

Ronald C. Giffin

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90 CHURCH STREET
P.O. BOX 1068
TRURO, NOVA SCOTIA
B2N 5B9
TELEPHONE 902-895-1641
FROM HALIFAX 429-7741

MAR 1 1 1988

COPY March 11, 1988

CONFIDENTIAL

Professor Bruce Archibald
Dalhousie Law School
Halifax, N.S.
B3H 4H9

Dear Professor Archibald:

Marshall Inquiry
Our File No. 9201/1

This is further to John Briggs' letter to me of February 17, 1988. We have previously forwarded to you copies of the Currie, Coopers & Lybrand report as well as the preliminary material prepared by that firm.

We are now able to address the other matters raised by Mr. Briggs in the above-noted letter. I shall address the items in the order requested:

1. A copy of the "unit by unit review" relating to criminal prosecutions (reference page 2)

We are not able to locate this material. I suspect if it exists, it is still in the possession of the consultants as part of their file.

2. A copy of the background paper or study supporting the "September reorganization, 1980" which re-organization envisaged increased departmental direction and control of the prosecution function. (reference page 5)

There is no background study. When you met with Mr. Conrad, you were given a full account of the background leading to the September, 1980 reorganization.

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P.O. BOX 1068
TRURO, NOVA SCOTIA
B2N 5B9
TELEPHONE (902) 895-1641
FROM HALIFAX 429-7741

COPY

3. A definition of the "public offices' function".

I am not sure what Mr. Briggs was looking for. Reference to the Public Officers Act would probably provide an answer to the question if a definition is all that is required.

4. A copy of "the findings of our review which provided the basis for reaching agreement among the department of the Attorney General and Management Board" with respect to the merits of the necessary organizational changes. (reference page 10)

5. A copy of the background study/paper/memorandum supporting the recommendations put to Management Board on April 14, 1981.

Documents with these descriptions to not exist. I am advised that the consultants were carrying out organizational reviews for a number of departments of government. This commenced in November, 1980. We are not able to locate any specific terms of reference as they relate to the study of the Attorney General's department. I am advised that after the consultants were retained, they dealt directly with the Deputy Attorney General who supported a review of the structure of the department. It is believed that any instructions to the consultants from that point were verbal. I have not been able to confirm this with Mr. Coles, who is away from his office for a couple of weeks but, if that is desired, I shall endeavour to do so.

As for the approval of the material by Management Board, I am advised that the organizational review was approved by Management Board at its meeting of April 14, 1981, after which implementation commenced.

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B2N 5B9
TELEPHONE (902) 895-1641
FROM HALIFAX 429-7741

COPY

I hope this sufficiently deals with the details of the procedures used in that reorganization. If you have further questions, please advise.

Yours truly,

Darrel I. Pink

DIP/jl

c.c. Mr. John Briggs
Mr. R. Gerald Conrad, Q.C.

PATTERSON KITZ
BARRISTERS & SOLICITORS

MAR 11 1988

LEONARD A. KITZ, Q.C., D.C.L.
JOHN D. MacISAAC, Q.C.
DOUGLAS A. CALDWELL, Q.C.
JAMIE W. S. SAUNDERS
ROBERT M. PURDY
RAYMOND F. LARKIN
S. RAYMOND MORSE
DARREL I. PINK
JACK A. INNES, Q.C.
DIANNE POTHIER
JANET M. CHISHOLM
PETER M. ROGERS

DONALD J. MacDONALD, Q.C.
PAUL M. MURPHY, Q.C.
RICHARD N. RAFUSE, Q.C.
J. RONALD CREIGHTON
J. RONALD CULLEY
NANCY J. BATEMAN
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ALSO OFFICES AT
TRURO, NOVA SCOTIA
BEDFORD, NOVA SCOTIA

March 11, 1988

BY HAND

Mr. W. Wylie Spicer
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear Mr. Spicer:

Our File No. 9201/1

Further to your request this morning, I enclose a copy of the letter to Gordon Coles from Felix Cacchione found in Volume 33 at page 457.

Yours truly,

Catherine M. Hicks

Catherine M. Hicks
Legal Assistant to Darrel I. Pink

/jl
Enc.

09-84-0256-01A
09-84-0256-01

LAMBERT & CACCHIONE

BARRISTERS & SOLICITORS

Michael A. Lambert, LL.B.
Felix A. Cacchione, B.A., LL.B.

Suite 903
1649 Hollis Street
Post Office Box 547
HALIFAX, NOVA SCOTIA
B3J 2R7

Telephone
(902) 423-9143

June 7, 1984

HAND DELIVERED

Gordon Coles, Q.C.
Department of the Attorney General
1723 Hollis Street
Halifax, Nova Scotia

Dear Mr. Coles:

RE: DONALD MARSHALL, JR.

Further to the recent meeting attended by myself, Mr. Hugh McIntosh and you and Mr. Endres of your Department, I am writing on a without prejudice basis to outline a proposal for settling Donald Marshall's claim for compensation.

In setting out this proposal we have adopted a global approach rather than attempt to allot specific dollar amounts to specific heads of damage and I suggest this is appropriate given the lack of precedent but we have also indicated a number of factors which we have considered in arriving at the overall figure.

In adopting this approach I point out that the one figure which is reasonably capable of accurate assessment is a calculation of loss of income. That figure has received some media attention and it is ~~-~~$324,333.00. It is included in our overall figure.

(1) - level of schooling /
(2) - status of " at time of incident
(3) - age.
(4) - employment opportunities if not incarcerated.
(5) bases for determining the amount of 324,333.00. Is this net/gross?

. . . . /2

Following is a list of the factors to which I have referred and obviously some must be given more weight than others but they all serve to focus attention on the many different aspects of Mr. Marshall's claim and constitute an outline of the case which would be presented to the Commission if that should be necessary:-

1. Pain and suffering
2. Loss of enjoyment of life
3. Deprivation of liberty
4. Loss of civil rights
5. Loss of social intercourse
6. Humiliation
7. Discipline measures in prison
8. Psychological assaults in prison for refusing to admit to guilt
9. Ignominy of all matters relating to being in prison
10. Pain and suffering caused to him in the damage to his reputation by media coverage of his conviction and sentence including the knowledge that his family suffered the same public humiliation and suffering
11. Adverse effects on future advancement, employment, marriage, social status and social relations generally

. . . ./3

12. Loss of opportunities to acquire assets

13. Loss of the mobility so important to native persons as a part of their cultural heritage

14. Pain and suffering through being unable to obtain parole because of his refusal to admit guilt

15. Loss of income

16. Pre-judgment (or its equivalent) interest

17. Legal costs of establishing his innocence and pursuing his claim for compensation

GLOBAL AWARD $550,000.00

This figure is over and above the interim payment already made and in arriving at it we have attempted to be reasonable and realistic recognizing that it is probably in the public interest that Mr. Marshall's claim be settled this way thus avoiding the full expense of conducting the commission hearings but as well recognizing that the public outrage which has manifested itself over Mr. Marshall's claim will only be satisfied by an award of this proportion.

We are not adverse to a "structured settlement" being set up if that will afford an income tax advantage to Mr. Marshall and if the same yield to him can be achieved by a less initial outlay by the Province through such a scheme. However, we would appreciate an early reply to our proposal at least in principle; that is, as to whether or not the Government is prepared to pay an award in this amount, leaving the form of payment to be worked out in detail.

. . . ./4

Finally, in the event that the Government does decide to pay Mr. Marshall compensation in this amount, we request on his behalf that the actual amount of the payment be kept confidential as we foresee publication could generate a great deal of unwanted attention for Mr. Marshall.

We look forward to hearing from you.

Yours very truly,

Felix A. Cacchione

FAC/oh

MAR 1 1 1988

SMITH, GAY, EVANS & ROSS

BARRISTERS & SOLICITORS

BRUCE W. EVANS
(Also of the Alberta bar)
JEREMY GAY
E. ANTHONY ROSS, M. Eng., P.Eng.
W. BRIAN SMITH
KEVIN DROLET

604 QUEEN SQUARE
P.O. BOX 852
DARTMOUTH, NOVA SCOTIA
B2Y 3Z5
Telephone (902) 463-8100
Facimile (902) 465-2313

March 10, 1988

File #1085-01

ROYAL COMMISSION
ON DONALD MARSHALL, JR., PROSECUTION
Suite 1026, Maritime Centre
1505 Barrington Street
Halifax, NS
B3J 3K5

Attention: Susan Ashley - Executive Secretary

Dear Ms Ashley:

Re: Research Projects

Having received the memorandum of December 7, 1987 addressing **Research Projects - Terms of Reference**, I had quite a few meetings which involved Gerald Taylor, Burnley Jones and Calvin Gough of the Marshall Inquiry Committee of the Black United Front, specifically to address the adequacy of the Research Projects as outlined as these relate to the stated reasons supporting the application for standing as advanced by the Black United Front.

At first glance, it is the consensus of the Committee (which I endorsed) that the Terms of Reference seems to cover the concerns of the Black United Front. However, as can be expected, the adequacy of the execution of these Terms of Reference can only be determined once the reports of the experts have been filed.

It is my understanding that subsequent to a meeting between members of the Committee and Mr. Briggs, a letter was forwarded to the Black United Front confirming that some research is in fact being done on the question of sentencing.

The Committee would like the opportunity to discuss the preliminary findings of the experts and are available at your earliest convenience.

Yours very truly,

SMITH, GAY, EVANS & ROSS

PER: E. Anthony Ross

E. ANTHONY ROSS

EAR/lms
cc: G. Taylor

MAR 1 1 1988

UNIVERSITY OF TORONTO

DEPARTMENT OF POLITICAL SCIENCE
100 ST. GEORGE STREET
TORONTO, CANADA M5S 1A1

8 March 1988

Mr. John E.S. Briggs
Director of Research
Royal Commission on the Donald Marshall, Jr., Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3 J 3K5

Dear John:

As outlined in your letter of January 18, 1988, I have carried out several rounds of analyses upon the Charter of Rights data and forwarded them to Richard Apostle, Scott Clark and Wilson Head. I have also seen Richard's first draft presenting these results.

I trust that our work has been to your satisfaction. Accordingly, I am requesting payment of $3,000 for my services and those of my assistants.

I am pleased to have been able to contribute to the work of the Royal Commission. Should you require any additional services, please let me know.

Sincerely,

Joseph F. Fletcher

Joseph F. Fletcher
Assistant Professor

Office of the Dean

YORK UNIVERSITY

OSGOODE HALL LAW SCHOOL

4700 KEELE STREET, DOWNSVIEW, ONTARIO M3J 2R5

March 10, 1988

George W. MacDonald, Esq.
Commission Counsel
Royal Commission on the Donald Marshall, Jr., Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax
Nova Scotia

Dear Mr. MacDonald,

Re: Donald Marshall, Jr. Commission of Inquiry

I enclose a copy of my Legal Opinion concerning the jurisdiction of the Marshall Commission to compel the Justices of the Nova Scotia Supreme Court, Trial Division, to testify about certain aspects of their decision in the 1983 Marshall Reference.

Yours sincerely,

James C. MacPherson
Dean

JCM/P

SMITH, GAY, EVANS & ROSS

BARRISTERS & SOLICITORS

BRUCE W. EVANS
(Also of the Alberta bar)
JEREMY GAY
E. ANTHONY ROSS, M. Eng., P. Eng.
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DARTMOUTH, NOVA SCOTIA
B2Y 3Z5
Telephone (902) 463-8100
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March 10, 1988

File #1085-01

ROYAL COMMISSION
ON DONALD MARSHALL, JR., PROSECUTION
Suite 1026, Maritime Centre
1505 Barrington Street
Halifax, NS
B3J 3K5

Attention: Susan Ashley - Executive Secretary

Dear Ms Ashley:

Re: Research Projects

Having received the memorandum of December 7, 1987 addressing **Research Projects - Terms of Reference**, I had quite a few meetings which involved Gerald Taylor, Burnley Jones and Calvin Gough of the Marshall Inquiry Committee of the Black United Front, specifically to address the adequacy of the Research Projects as outlined as these relate to the stated reasons supporting the application for standing as advanced by the Black United Front.

At first glance, it is the consensus of the Committee (which I endorsed) that the Terms of Reference seems to cover the concerns of the Black United Front. However, as can be expected, the adequacy of the execution of these Terms of Reference can only be determined once the reports of the experts have been filed.

It is my understanding that subsequent to a meeting between members of the Committee and Mr. Briggs, a letter was forwarded to the Black United Front confirming that some research is in fact being done on the question of sentencing.

The Committee would like the opportunity to discuss the preliminary findings of the experts and are available at your earliest convenience.

Yours very truly,

SMITH, GAY, EVANS & ROSS

PER: E. Anthony Ross

E. ANTHONY ROSS

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

MARITIME CENTRE, SUITE 1026, 1505 BARRINGTON STREET, HALIFAX
NOVA SCOTIA, B3J 3K5 902-424-4800

CHIEF JUSTICE T. ALEXANDER HICKMAN
CHAIRMAN

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS
COMMISSIONER

THE HONOURABLE
MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

BY COURIER

March 10, 1988

Mr. Darrel I. Pink
Patterson, Kitz
Suite 1600, 5151 George Street
Halifax, Nova Scotia B3J 2N9

Dear Darrel:

I enclose the package of Cabinet documents determined to be relevant by the Commissioners in June of 1987. Some of these documents as you will no doubt realize, are already included in various of the volumes already in evidence. Since these documents will be used in examining various of the Attorneys General, I thought it would be more useful to put them all in one place. We will distribute them to Counsel on Monday morning and introduce them in evidence prior to the testimony of Mr. Giffin.

As mentioned in your letter of June 16, 1987 to Commission Counsel, you have waived any question of privilege with respect to these documents.

Yours very truly,

W. Wylie Spicer
Commission Counsel

WWS:jrc

attachments

MAR 10 1988

GREEN SPENCER

Barristers & Solicitors

PETER G. GREEN, Q.C.
MILTON J. VENIOT, Q.C.
CATHERINE S. WALKER
PAUL E. RADFORD
JEFFREY H. MORRIS
GOLDIE L. TRAGER
ANGUS E. SCHURMAN
PETER F. SPENCER, Q.C.
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1301 PURDY'S WHARF
HALIFAX, NOVA SCOTIA
B3J 2X1

FILE NO.

March 9, 1988

George MacDonald, Q.C.
The Royal Commission on the
Donald Marshall Prosecutions
Suite 1026
1505 Barrington Street
HALIFAX, Nova Scotia
B3J 3K5

Dear Mr. MacDonald:

Alan Story

As you know from our previous telephone conversations, we represent Alan Story and the Toronto Star.

Late last week I was advised by Mr. Spicer that Commission Counsel did not intend to call Mr. Story and other journalists as witnesses at the Inquiry. However, I realize that Mr. Pugsley or other counsel with standing before the Inquiry do have a right to apply to the Commissioners to ask them to issue a subpoena for the attendance of these witnesses.

As I have indicated in our previous discussions, it is the position of Mr. Story and the Toronto Star that Mr. Story should not have to testify at the Inquiry. When I spoke to Mr. Spicer last week he confirmed to me that if Mr. Pugsley or any other counsel did make an application to the Commission with respect to a possible subpoena being issued against Mr. Story, that I would be given as much notice as possible of this application in order that I might speak to the motion on behalf of my client.

Furthermore, if you are notified by Mr. Pugsley (and perhaps by Mr. Ross who I understand wrote a letter as well) that he does not intend to make application to have Mr. Story called as a witness, I would appreciate being advised of that fact as well.

Thank you for your cooperation to date.

Yours very truly,

GREEN SPENCER

Alan V. Parish

AVP/cgr

PATTERSON KITZ
BARRISTERS & SOLICITORS

MAR 1 0 1988

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ALSO OFFICES AT
TRURO, NOVA SCOTIA
BEDFORD, NOVA SCOTIA

March 10, 1988

VIA COURIER

Mr. W. Wylie Spicer
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear Wylie:

Our File No. 9201/1

I enclose documents 153, 154, 160, 227, 237 and 239 from our chronology, being the further documents you requested.

Yours truly,

Darrel I. Pink

/jl
Enc.

09-84-0257-01

153

Nova Scotia

Department of Attorney General

Office of the Minister

PO Box 7
Halifax, Nova Scotia
B3J 2L6

902 424-4044
902 424-4020

File Number 09-84-0257-01

August 29, 1983

Miss Ruth Cordy
28 - 1545 Oxford St.
HALIFAX, Nova Scotia
B3H 3Z3

Dear Miss Cordy:

I appreciate your letter, of July 26th, with respect to Donald Marshall.

I would remind you that the Appeal Division was critical of Mr. Marshall stating that he was untruthful before them and before the trial court in 1971. As a result the five judges of our Appeal Division considered that Mr. Marshall was, in large part, the author of his own imprisonment and that if he had been truthful with the police and the court before and at his original trial, that he may well have established his innocence of the murder charge at that time.

One has to remember as well that Mr. Seale and Mr. Marshall were both in the park at Sydney on the night of the murder and planned to rob somebody and indeed were in the course of robbing Ebsary when he allegedly struck at both Seale and Marshall with a knife and in the case of Seale, this proved fatal. I may add that I have made it publicly clear that despite this if Mr. Marshall or someone on his behalf makes a formal claim for compensation it will be given sympathetic consideration by me and the Department.

Yours sincerely,

Harry W. How, Q. C.

09-84-0257-01

09-84-0257-01

154

~~09-82-0236-08~~

September 7, 1983

Mrs. Noreen Provost
4058 St. Georges Ave.
NORTH VANCOUVER
British Columbia
V7N 1W8

Dear Mrs. Provost:

My sincere apologies for not replying sooner to your letter of May 15th which reached my office on May 24th. It came during the closing week of the Provincial Legislature when I was very much involved in the wrap-up of our legislative program. In addition, during the session, I got somewhat behind in my personal correspondence and am just now getting to many of the letters which came in in the latter part of May.

I very much share your view that we have not given enough attention to the victims of crime. Since taking office in 1978, I have had the satisfaction of proclaiming legislation providing for compensation to victims of crime in this Province which the former Government had enacted some three years before we took over but never implemented. It does not provide all of the compensation that I would like, but at least is a very significant beginning and all we can do at the moment within the resources at our disposal.

With respect to the Marshall case, you will understand that most of the media, in their simplistic approach, portray Mr. Marshall as a victim of injustice. In fact, our Supreme Court, Appeal Division, in reviewing his case and hearing evidence from witnesses who reversed their evidence that they had testified eleven years ago, came to the conclusion that there was now such a doubt of the whole of the evidence that no jury would convict in the event of a retrial. The Court therefore felt obliged to find Mr. Marshall not guilty. This should not be

--2

interpreted as finding him innocent and indeed the Court took pains to point out that had he been truthful in the orginal trial and to the police before the trial, his original conviction might not have happened. The Court took pains to say how unsatisfactory his evidence was even before the Appeal Division.

One of the penalties in public life is the target you are for prublic criticism. Much of this comes from biased individuals who use the politician as a focus of their hostility or rage. That is why it is so refreshing to receive a letter, such as yours, from a person who tries to see both sides of a question and be restrained in their comments. I appreciate therefore receiving letters such as yours and I wish you the best in your personal endeavours and as a member of Citizens United for Safety and Justice.

Very sincerely,

Harry W. How, Q.C.

04-84-0258

Cape North P.O
N.S. BOC 1C0
Nov. 25, 1983

Hon. Ronald C. Giffin
Attorney-General,
Province House,
Halifax, N.S.

Dear Sir: Enclosed are two clippings from the Montreal "Gazette", dated almost exactly six months apart, yet making the same points. I am sending both to emphasize that time has been allowed to pass and nothing has been done on these matters.

There is currently a good deal of discussion on the payment of Mr. Marshall's legal fees, but I hear nothing on the question of the behavior of the Sydney police officers mentioned. Let others argue as to whether the nation or the province should foot the bill — I am concerned with what the "Gazette" calls "an outrageous display of indifference" --- "neither the Nova Scotia government nor the provincial police commission has shown the slightest interest." The "Gazette" concluded, last May, "Only in a police state are the police held to be above the law."

May I urge that as the new Attorney-General you take steps to investigate the behavior of the Sydney police in this matter.

Yours very truly,
Mary D. Cox

09-84-0261-01

227

Saint V[illegible] Convent
4 Concord Street
Glace Bay, N.S.
Nov. 8, 1984.

Rt. Hon. Ron Griffin, M.L.A.
Office of Attorney General
Halifax, N.S.

Dear Mr. Griffin:

The enclosed clippings from the Cape Breton Post highlight two areas of concern regarding the administration of justice in the province of Nova Scotia.

With reference to the Marshall Case, I plead with you to comply with the request of W.R. Hussey of Moncton, N.B., based on the facts of the case so familiar to all Canadians at this time and possibly to people of other countries also.

In addition, I have two observations regarding Roy Ebsary which lead me to make this appeal:

1. His cynical attitude when I saw him in public in perfect health.
2. His relationship and that of his family with another young man recently sentenced to " life in Prison".

In connection with the latter, may I ask the following questions?

1. Why were Rosemary Wall and George Snow who " had agreed to lie to the police" chosen as witnesses in Supreme Court?
2. Are drug addicts; users; abusers and/or trafficers legally accepted as witnesses in the Supreme Court?
3. Why was there so much reference to Mr. McDonald in the WALKER SECOND DEGREE MURDER TRIAL?His trial was over.
4. Do you think in view of these facts, Kenneth Walker was really " not guilty"?

Thank you!

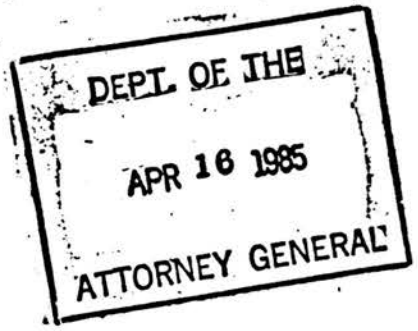
Sister Agnes Winifred

PREMIER HFX

JUSTICE OTT

~~09-85-0135-01~~ 09-85-0135-01A 237

MR. GORDON F. COLES, Q.C.:
DEPUTY ATTORNEY GENERAL OF NOVA SCOTIA
1723 HOLLIS STREET
3RD FLOOR
HALIFAX, N.S.:



JUSTICE OTT

APRIL 16 1985

DRAFT TELEX FROM MINISTER OF JUSTICE TO
ATTORNEY GENERAL OF NOVA SCOTIA

THE HONOURABLE RONALD C. GIFFIN, Q.C.:
ATTORNEY GENERAL OF NOVA SCOTIA
1723 HOLLIS STREET
P.O. BOX 7
HALIFAX, NOVA SCOTIA
B3J 2L6

DEAR MR. GIFFIN:

YOU WILL UNDOUBTEDLY RECALL THAT AT THE FEDERAL-PROVINCIAL CONFERENCE OF MINISTERS RESPONSIBLE FOR CRIMINAL JUSTICE AND JUVENILE JUSTICE HELD IN NOVEMBER 1984 IN ST. JOHN'S, NEWFOUNDLAND, I INDICATED THAT THE FEDERAL GOVERNMENT HAD A ROLE TO PLAY IN THE AREA OF COMPENSATION OF PERSONS WHO HAVE BEEN WRONGFULLY CONVICTED AND PUNISHED. IT WAS ALSO DECIDED AT THAT MEETING THAT A FEDERAL-PROVINCIAL TASK FORCE WOULD BE ESTABLISHED TO EXAMINE THIS ISSUE AND PREPARE OPTIONS FOR OUR CONSIDERATION.

YOU HAVE NO DOUBT BEEN MADE AWARE BY YOUR DEPUTY ATTORNEY GENERAL THAT THE TASK FORCE WAS ESTABLISHED IN JANUARY 1985, AT A FEDERAL-PROVINCIAL MEETING OF DEPUTY MINISTERS WHO WERE INTERESTED IN THIS ISSUE. THE WORK OF THE TASK FORCE IS WELL IN HAND.

I AM HAPPY TO INFORM YOU TODAY THAT I HAVE BEEN AUTHORIZED TO PARTICIPATE IN THE COMPENSATION AWARDED TO DONALD MARSHALL JR. BY THE NOVA SCOTIA GOVERNMENT. AS A RESULT, I AM PLEASED TO ANNOUNCE THAT I WILL BE SENDING A CHEQUE TO THE GOVERNMENT OF NOVA SCOTIA, FOR THE SUM OF DLRS. 135,000, AN AMOUNT REPRESENTING 50 PERCENT OF THE TOTAL COMPENSATORY AWARD FOR MR. MARSHALL, AS PART OF A FEDERAL INVOLVEMENT VIS-A-VIS THE COMPLEX ISSUE OF COMPENSATION OF PERSONS WHO ARE WRONGFULLY CONVICTED.

JOHN C. CROSBIE

COPY BY TELEX TO:
MR. GORDON F. COLES, Q.C.:

PREMIER HFX

09-84-0261-01

June 18, 1985

Honourable John Crosbie, P.C., Q.C., M.P.
Minister of Justice
Government of Canada
Justice Building
Wellington and Kent Sts.
OTTAWA, Ontario
K1A 0H8

Dear Mr. Minister:

This is to acknowledge receipt of your telex of April 16th, 1985 concerning the decision by the Government of Canada to participate in the compensation awarded to Donald Marshll, Jr. by the Nova Scotia Government. I do apologize for my delay in responding to your telex; however, it was only recently that Stewart McInnes and I were able to arrange an mutually agreeable time and place for presentation of the cheque by Stewart on behalf of the Government of Canada. This has now been done and I would like to take this opportunity to thank you very sincerely for the part you have played in bringing this about.

I cannot resist noting that when Mr. MacGuigan was the Minister of Justice under the Trudeau administration, he was highly critical of the Nova Scotia Government's handling of this very difficult and indeed virtually unprecedented situation, but at the same time he and his colleagues consistently refused to make any monies available either for compensation or for legal costs for Mr. Marshall. Your decision in this matter represents a welcomed reversal of what I felt to be a totally hypocritical

2/...

stance on the part of Mr. MacGuigan and is greatly appreciated.

Yours very truly,

Ronald C. Giffin

PATTERSON KITZ
BARRISTERS & SOLICITORS

MAR 0 9 1988

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ALSO OFFICES AT
TRURO, NOVA SCOTIA
BEDFORD, NOVA SCOTIA

March 8, 1988

BY HAND

Mr. George MacDonald, Q.C.
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear Mr. MacDonald:

Our File No. 9201/1

This is further to yours of January 17, 1988, and John Briggs' of February 24, 1988, to Jamie Saunders.

I am able to confirm, after checking with all individuals involved, that Messrs. Coles, Gale, Herschorn, How and Giffin do not have any file materials, personal, working or other related material with regard to either the Thornhill or MacLean files.

With regard to the specific documents you have sought, we advise as follows:

1. There are no notes/minutes kept by Mr. Coles and/or Mr. Gale of the meeting between themselves and Messrs. Sarty, Cormier, Superintendent McGibbon and Inspector Blue on November 22, 1983, at the Auditor General's office.

2. There are no preliminary RCMP investigative reports in the Attorney General's files for the period from November, 1983 and April, 1984 with respect to the MacLean case. To be more specific, we have provided access for you to all files in the Attorney General's Department relating to the MacLean case.

3. There are no notes/minutes of a meeting between Attorney General How, the Deputy Attorney General and Chief Superintendent Feagan at the Attorney General's office on November 12, 1980, relating to the Thornhill case. To be more specific, we have provided to you access to all files in the Attorney General's Department as they relate to the Thornhill case.

We confirm there are no additional files in the Attorney General's office relating to either the Thornhill or MacLean case.

We have met with the Auditor General who has personally reviewed the files and provided to us copies of all material relevant to the audit and subsequent discussions into Billy Joe MacLean. This file material has been provided to us. Because of the statutory provisions which relate to the Auditor General's files, we will not be able to provide access to this file in advance of receipt of a subpoena for purpose of access to the file. Upon receipt of that subpoena, we will arrange for your review of the file and can further discuss copying of any material, should that be requested.

We are awaiting receipt of advice regarding other specific files you have requested. When received, we shall advise.

Yours truly,

Darrel I. Pink

DIP/jl

PATTERSON KITZ
BARRISTERS & SOLICITORS

MAR 0 9 1988

LEONARD A. KITZ, Q.C., D.C.L.
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BEDFORD, NOVA SCOTIA

March 9, 1988

BY HAND

Mr. W. Wylie Spicer
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear Wylie:

Our File No. 9201/1

I have yours of March 4, 1988, regarding Eileen Richards.

Have you checked with the defence counsel who is noted on the Sydney Police book?

I am not sure what you want us to do regarding this. Hopefully we will have a chance to discuss this shortly.

Yours truly,

for Darrel I. Pink

DIP/jl

Nova Scotia

Attorney General

Memorandum

From Gordon S. Gale, Q.C.
Director (Criminal)

Our File Reference 09-85-0133-14

To D. William MacDonald, Q.C.
Deputy Attorney General

Your File Reference

Subject

Date January 18, 1988

In regard to the new list of functions to be performed by the Solicitor General there should be added the appointment of Analysts and Qualified Technicians under Section 238(1) of the Criminal Code.

GSG:jd

From Bruce Archibald

Attorney General

Solicitor Services
Prosecutions
Fatality Inquiries Act
Courts
Registries of Deeds
Registries of Probate
Sheriffs
Public Trustee
Nova Scotia Legal Aid Commission
Expropriations Compensation Board
Public Utilities Board
- Gasoline & Fuel Oil Licensing Act
- Motor Carrier Act
- Salvage Yards Licensing Act
Registry of Joint Stock Companies
Securities Act
Horse Racing Commission
Marshall Inquiry
Criminal Injuries Compensation Board
Young Offenders
- prosecutions

Solicitor General

Correctional Services (Corrections Act)
Police Act (Police Commission)
Can/NS Agreement on Provincial
& Municipal Police Services
Atlantic Police Academy
liaison with RCMP and Municipal Police
liaison with Canadian Security
Intelligence Service (CSIS)
Representation to Police Chiefs Assoc.
Criminal Code *
- probation transfers (s. 665)
- wire taps
- firearms
- gun clubs
- Lieutenant Governor's Board of Review (s. 547)
Can/NS Agreement on Firearms
(Prov. Firearms Office)
Block Parent Program

Young Offenders
- facilities
(Co-ordinate with Dept. of Community Services)

Regulations Act

*S.2 of the Criminal Code defines "Attorney General" as the Attorney General or Solicitor General of the Province in which ... proceedings are taken and includes his lawful deputy ...

MAR 0 9 1988

March 3, 1988

Dear George;

I am writing with regard to my video-taped interview with Roy N. Ebsary. The last time we spoke, back in November when I was brought down there for the hearing, you asked me to give you some written request, if I wanted to get the tape back. I did indeed leave a request with the front desk at the Holiday Inn but to this date I have not received my property. I have also made one telephone call to your Halifax office, to no avail. I would appreciate getting that tape back as soon as possible. I am sure that by this time, everybody from police to news media has made illegal copies of that tape. It must be remembered that the only permission I ever gave for that tape to be used was by your investigation and your investigation only.

So if you somehow did not receive my note requesting the return of my property, please accept this as my formal request.

sincerely

David Frankelyn Ratchford

PATTERSON KITZ
BARRISTERS & SOLICITORS

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TRURO, NOVA SCOTIA
B2N 5B9
TELEPHONE (902) 895-1631
FROM HALIFAX 429-7741

MAR 0 8 1988

CONFIDENTIAL

COPY

March 8, 1988

Professor Bruce Archibald
Dalhousie Law School
Dalhousie University
Halifax, N.S.
B3H 4H9

Dear Professor Archibald:

Marshall Inquiry
Our File No. 9201/1

Further to your meeting with Mr. R. A. MacDonald, I enclose the following:

1. Copy of the Hay format rating as it applies to Prosecutors;

2. A Prosecuting Officers' list whichindicates which employees are full-time or part-time and distinguishes between Civil Service and Order in Council appointees.

In this second document the designation PT denotes a part-time employee.

I trust this is the information you require and it will be of assistance.

Yours truly,

Darrel I. Pink

DIP/jl
Enc.

c.c. Mr. John Briggs
Mr. R. Gerald Conrad, Q.C.

Solicitor General Canada | Solliciteur général Canada

340 Laurier Avenue West
Ottawa, Ontario K1A 0P8

MAR 0 8 1988

March 2, 1988

Mr. John E.S. Briggs
Director of Research
Royal Commission on the
Donald Marshall, Jr., Prosecution
Maritime Centre
Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear John:

Please find enclosed a copy of my curriculum vitae. I personally would be pleased to be of any assistance I can to you and the Commission's research. However, the current atmosphere in this Ministry is defensive and somewhat paranoic and I think your request will be met with some resistance. So your letter should make it clear that this is not a request for the Ministry's policy, etc., and that the process will not be a public one, etc. I am both annoyed and embarrassed to have to operate under these constraints but this is Ottawa. Who knows, maybe I will be in a position soon where none of these things will matter.

Best of luck with the research and I look forward to receiving your letter and doing battle with the bureaucracy.

Sincerely,

Chris Murphy
Senior Research Officer
Police Systems Research

Encl.

Canada

CURRICULUM VITAE

CHRISTOPHER JAMES MURPHY

Education

1964-67	Bachelor of Arts, St. Francis Xavier University, Antigonish, Nova Scotia, Canada. Major in History.
1969-72	Master of Arts, Department of Sociology, Dalhousie University, Halifax, Nova Scotia. August 1972.
1976-85	Doctor of Philosophy, Degree Programme, Department of Sociology, University of Toronto.

Scholarships and Awards

1970-71	Fellowship, Department of Sociology, Dalhousie University, Nova Scotia.
1971	Research Grant awarded by Research Development Fund, Faculty of Graduate Studies, Dalhousie University.
1976	Bursary awarded by Department of the Solicitor General, Canadian Government, Centre of Criminology, University of Toronto.
1977-78	Fellowship Award. Centre of Criminology, University of Toronto.
1977-78	Grant in Aid of Research. Centre of Criminology, University of Toronto.
1978-79	Ontario Graduate Scholarship (declined).
1980	Grant in Aid of Research. Fellowship Award, Centre of Criminology, University of Toronto.
1981	Doctoral Fellowship, SSHRC Canadian Government.

Professional Experience

1967-68	Volunteer Teacher, Montego Bay, Jamaica: English, Science, Physical Education. Canadian Universities Service Overseas (C.U.S.O.).
1972-75	Living Unit Program Co-ordinator, Springhill Medium Security Prison, Canadian Pententiary Service, Canadian Federal Government.
1975-76	Lecturer, Department of Sociology, St. Francis Xavier University, Antigonish, Nova Scotia (Deviance; Criminology) (Part-time).
1978-80	Lecturer, Department of Sociology, St. Francis Xavier University, Antigonish, Nova Scotia (Sociology of Deviance, Social Problems, Criminology, Sociology of Law).
1980-81	Leave of absence to conduct thesis research.
1981-82	Assistant Professor, Department of Sociology, St. Francis Xavier University, Antigonish, Nova Scotia (Sociology of Deviance, Sociology of Mass Media, Selected Topics In Criminology, Introductory Criminology).
1982	Research Officer, Department of the Solicitor General, Research Division.
1984	Appointed Senior Research Officer, Programs Branch, Ministry Solicitor General, April.
1983, 85, 87	Sessional Lecturer, Department of Sociology, Carleton University, "Police and Society".
1986, 88	Lecturer, Canadian Police College: Executive Development Course.
1987, 88	Sessional Lecturer, Department of Criminology, University of Ottawa. 2303 (Und.)/3305 (Grad.) Police and Society/ Issues in Policing and Social Control.

Research Experience

1970	Field Researcher, Halifax, Nova Scotia. The Commission of Inquiry into the Non-Medical Use of Drugs, Canadian Federal Government.
1971	Research Assistant, Nova Scotia. "Youth Culture Study",. Department of Health and Welfare, Canadian Federal Government.
1972	Field Researcher, Nova Scotia, "Maritime Youth Culture Study," Department of Health and Welfare, Canadian Federal Government.
1980-81	Field Reserach in "The Social and Formal Organization of Small Town Policing". Ph.D. Dissertation.
1982-83	Principal Researcher, Community Based Policing Project, Research Division, Solicitor General.
June 83	Research Officer, Research Division, Ministry of The Solicitor General. Responsible for conducting, developing and managing research projects on criminal justice issues.
June 84	- Community Based Policing: Research & Policy Review: Solicitor General. (Author). - Criminal Investigation Study V.P.D., Dr. Duncan Chappell, Simon Fraser University (Project Manager). - Toronto Police, Community Policing Evaluation. ARA Associates (Project Manager).
June 85	- Ottawa Police Zone Policing Project. ABT Associates (Project Manager). - Toronto Community Survey: Attitudes & Expectations Regarding Crime and Policing. (Author). - Rural Crime & Criminal Justice, Dr. R. Kail, Dalhousie University (Project Manager). - Native Policing in Canada: Literature Policy Review, Dr. B. DePugh, Carleton University (Project Manager).

June 86
- International Conference on Community Policing, March 1986. Ottawa (Organizer).
- Organizational Change in Policing: Ottawa Police. Final Report, Colin Meridith, ABT Associates (Project Manager).
- Toronto Community Policing Project. Working Paper No. 1. (Author).
- Fredricton: Mini-station Evaluation
- Winnipeg: Community Policing Feasibility Study: Dr. R. Linden, University of Manitoba (Project Manager).

June 87-88
- Victoria Community-Based Information System Development Project Project Manager).
- Ontario Conference/Community Policing Research and Policy (Organizer and Panel Chairman).
- Survey Analysis of Community-Policing: Toronto Evaluation (Author).
- Montreal Police Role Study (Project Manager).
- National Data Analysis Project: Trends in Crime and Policing (Author).
- Repeat Call Analysis/Family Abuse Intervention Options for Police (Development).
- Rural Family Violence and Police Response: Victimization Survey (Development).

Publications and Reports

1970 "Drug Use Patterns: Halifax". A research report submitted to the Commission of Inquiry into the Non-Medical Use of Drugs.

1972 "Youth Behaviour Patterns and Methedrine Abuse: A Self-Reference Group Analysis," Master of Arts thesis, Department of Sociology, Dalhousie University, Halifax, Nova Scotia.

1972 "Life Styles and Values of Maritime Youth," co-author. Research report submitted to the Department of Health and Welfare, Canadian Government.

Publications and Reports (continued)

1973 "The Implementation and Integration of the Life Skills Program in a Medium Security Setting." A report submitted to Springhill Institution and Nova Scotia Department of Education.

1984 "Community Based Policing: A Review of Critical Issues." Department of the Solicitor General, Programs Branch Technical Report.

1985 "Assessing Police Performance". User Report Series. Programs Branch Publication, Department of the Solictior General.

1986 "The Social and Formal Organization of Small Town Policing: A Comparative Analysis of RCMP and Municipal Policing". Ph.D. Dissertation, University of Toronto.

1986 "Toronto Community Policing Survey Project: Working Paper No. 1". User Report Series.

1987 Book Reviews "Public Violence in Canada" by J. Torrance, Canadian Journal of Sociology and Anthropology, 1987; "The New Blueline", Bayley & Skolnick, Canadian Police College Journal, 1987, Vol II, No. 3.

1987 "The Development, Impact and Implications of Community Policing in Canada" in Community Policing Rhetoric or Reality, Ed. by Mastrofski, S. & Green J. Sage Publication, (Forthcoming 87-88).

1988 "The Changing Ideology and Practice of Modern Policing: Review Essay", Canadian Journal of Sociology and Anthropology (forthcoming).

1988 "Community Policing in the 1980s, Recent Advances in Police Programs" (Co-Editor), Solicitor General: User Report Series.

1989 "Individual and Social Determinants of Attitudes Towards the Police: Survey Findings and Analysis," Working Paper No. 3, Solicitor General: User Report Series.

1989 National Trends in Policing and Crime (1964-1988), Solicitor General: User Report Series (forthcoming).

Papers Presented

1983 Chair & Panel Organiser: Evaluating Community Policing, American Society of Criminology Meeting, Denver, Colorado.

1983 "The Social and Formal Organization of Small Town Policing". Paper presented to American Society of Criminology, Denver, Colarado.

1983 "Unresovled Issues in Community Based Policing." Paper presented to American Society of Criminology, Denver, Colorado.

1984 "Current Issues and Prospects in Social Science Research.". Keynote Address, Annual meeting of the Ontario Police Planners Association, February 1984.

1984 "Assessing Community Policing: Progress, Problems, Propects". Paper delivered to American Society of Criminology Meetings in Cincinnati, November 1984.

1986 Conference Organizer - Community Policing: International Conference of Academics, Researchers & Police on New R & D in Community Based Policing programs. March 17, 18, 19, Ottawa.

1986 Canadian Perspective and Experiences in Community Policing, Kennedy School of Government, Harvard University, Executive Sessions on Community Policing, November.

1987 The Socio-Political Dimension of Police Reform: Community Policing, A Case Study. Public Lecture, Sociology Department, St. Mary's University, February 1987.

1987 "An Historical, Ideological, and Institutional Comparison of U.S. and Canadian Policing", Faculty of Social Science and Criminal Justice, Pennsylvania State University.

1987 "Community Policing in Canada: A Comparative and Developmental Perspective", International Symposium on Community Policing, Temple University.

1987 "Community Problems, Problem Communities and Community Policing", Paper presented at American Society of Criminology meeting, Montreal.

Papers Presented (continued)

1987 "Sam Steel And Wyatt Earp: Ideological and Structural Differences in Policing Canadian and U.S. Society", Paper presented at the American Society of Criminology meeting, Montreal.

1988 "Conceptual and Research Issues in the Development of Community Policing", National Workshop. Research and Policing, Canadian Police College.

Work in Progress for Publication

1. "Sam Steel and Wyatt Earp: Ideological and Structual Comparison of Policing in Canada and the U.S." (Revised paper for submission to Criminal Justice Quarterly).

2. "Community as Rhetoric and Reality in Community Policing: A Conceptual and Empirical Exploration." (For submission to special edition on the Concept of Community in Criminal Justice for the Journal of Research on Crime Delinquency.)

3. Organizational Variation and the Production of Crime Rates.

4. The Social and Formal Organization of Small Town Policing: A Comparative Analysis of RCMP and Municipal Policing (Research Monograph).

Ph.D. Program Description

The following is an outline of my Ph.D. Program at the University of Toronto:

(1) Course Work:

(a) Centre of Criminology: University of Toronto

Credit: 1040F Theories of Crime: J. Hagan, Professor of Sociology and Law

3150S Crime in Historical Perspective: J. M. Beattie, Professor of History

(b) Department of Sociology: University of Toronto

Credit: 301A Sociology of Law: Austin T. Turk, Professor of Sociology

2001 Research Methods: Professors Bodeman, Kervin and Isajiw/Sociology

(2) Comprehensive Examination

(a) Sociology of Law
(b) Sociology of Deviance and Criminology

(3) Thesis Topic: The Social and Formal Organization of Small Town Policing: A Comparative Analysis of R.C.M.P. and Municipal Policing.

Thesis Committee: Director Dr. Richard Ericson
Professor of Sociology
University of Toronto

References:

Dr. Richard Ericson
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130 St. George Street
Toronto, Ontario M5S 1A1

Dr. Gerald Woods
Director, Research Division
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340 Laurier Avenue W.
Ottawa, Ontario K1A 0P8

Dr. Michael Petrunik
Department of Criminology
University of Ottawa
Pavillon Tabaret 046A
75 Laurier Street East
Ottawa, Ontario K1N 6N5

Dr. Carol LaPrairie
Senior Policy Analyst
Policy Development Section
Department of Justice
239 Wellington Street
Ottawa, Ontario K1A 0H8

FACULTY OF LAW,
UNIVERSITY OF TORONTO

78 Queen's Park
Toronto, Canada M5S 2C5

March 1, 1988

George W. MacDonald, Q.C.
Commission Counsel
Royal Commission on the Donald Marshall Jr.
Prosecution
Suite 1026, Maritime Centre
1505 Barrington Street
Halifax, N.S.

Dear Mr. MacDonald:

My colleague, Professor John Edwards, has been kind enough to give me a copy of Professor Bruce Archibald's Opinion re the Use of Evidence and the Making of Evidentiary Rulings at the Trial of Donald Marshall, Jr. I have read the document and commend the scholarship going into it. I disagree however with Professor Archibald's comments on pages 31 and 32 about the need for enactment of codes of Evidence law.

The proposed Canada Evidence Act, based on the Uniform Evidence Act, met with severe criticism from the Canadian Bar Association, legal scholars and other interested persons. My own criticisms were set out in written and oral submissions to the Senate Committee considering the Canada Evidence Act Bill in 1983. Copies of the initial pages of the brief and the transcript of testimony are enclosed. Similar criticisms of the Uniform Act, the product of the Federal/Provincial Task Force on Uniform Rules of Evidence, are set out in the preface to the second edition of my Evidence in the Litigation Process, which I also enclose. In its Report, the Senate Committee recommended withdrawal of the Bill and its reconsideration in the light of what the critics had said. The Federal Justice Department later produced a somewhat revised version which, in my view, does not meet the criticisms. At all events, the provincial Attorneys-General now seem uninterested in codification - or at least this codification.

Contrary to Professor Archibald, I do not see the law of evidence as "needlessly complex and difficult to master," nor do I believe that statutory evidence codes would (or could) render evidence law easier to understand or apply for the job at trial that must be done. Defects in the common law of evidence can and should be remedied by the judges in the light of the demands of the litigation process, with modest help from the legislatures in removing judge-proof anomalies. In my opinion, the basic reason for mistakes counsel and some judges make in resolving evidence problems is their confusion about some basic principles. That, in turn, stems to a large extent

from the poor law school education they got in the subject - often with practitioners as instructors. The education was informed by a view of evidence law as a collection of unrelated black-letter rules with no rationalia binding them into a meaningful whole. With scholars like Professor Archibald now teaching in the field, that reason for the mistakes should now be disappearing.

I would much appreciate your putting this letter and the enclosures before the Commisioners.

Yours very truly,

Stanley Schiff

Enc.

cc: Professor Bruce Archibald

Brief

to

STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

respecting

Bill S-33, "An Act to give effect, for Canada,
to the Uniform Evidence Act adopted by the
Uniform Law Conference of Canada"

from

Stanley Schiff
Professor, Faculty of Law
University of Toronto

April, 1983

1. As a long-time teacher of Evidence law and student of the litigation process, I conclude that the Uniform Evidence Act and Bill S-33, implementing it for Canada, are unwise, both in principle and content.

Principle

2. The court is our society's institution of last resort for the peaceful settlement of social disputes. The law of evidence - the body of legal doctrine governing the operation of the trial court - has traditionally been the product of judicial and not legislative law-making. That has been, and remains, appropriate: the judges dealing at the instant with particular problems of evidence presentation have developed the doctrine in response to the demands made by the very working of the institution.

3. In covering virtually the whole field of Evidence law, the Uniform Evidence Act and Bill S-33 would replace the body of common law doctrine except in the few instances where the statute is silent. But, despite the drastic change from wise tradition and practice, at no time did the fathers of the Uniform Act - the Federal/Provincial Task Force on Uniform Rules of Evidence - examine the considerations favouring and against a new statutory scheme as opposed to the existing common law regime. Nor, as far as I know, did the federal Department of Justice. The sponsors of the Uniform Act and the Bill have therefore ignored the great differences between how judges develop common law doctrine and how they elaborate statutory provisions in the course of judicial interpretation and application. As I have said, judges can (and do) mould common law Evidence doctrine to fit

changing demands of the litigation process. In contrast, judges must take the stark words and policy of statutory provisions as they find them - assuming that they even look for and discover the policy. However, despite the failure of the sponsors to weigh the differences, an inflexible body of statutory doctrine incapable of growth is proposed to replace the flexible body of common law doctrine capable of constant adjustment to need.

4. The Task Force also ignored another important matter worthy of extended consideration. Superimposing the detailed statutory superstructure of the Uniform Act onto the existing common law regime is bound to cause immense dislocation. Lawyers and judges must divine how much of the common law is retained and how much rejected, how much altered in small measure and how much confirmed in detail, how much to forget and how much to remember. The Uniform Act and Bill S-33 will provide a lifetime's work for the litigation bar merely responding to the dislocation.

5. I grant that the risks arising from the dislocation and the differences of judicial method and authority would be justified if the existing common law regime were so defective that it was beyond the power of judges to repair. But that is not the case in Canada. Most of existing Evidence law in this country is tolerably wise; it responds adequately to the problems the doctrine has been designed to solve. Most of what is not wise or sufficiently responsive can be reformed by judicial action. And, it is crucial to recognize, many judicial decisions, particularly in the last decade, show the judges' willingness and creative capacity. Witness, for

example, development of the law respecting exceptions to the hearsay rule by the Supreme Court of Canada in Ares v. Venner, [1970] S.C.R. 608. Witness development of the law respecting corroboration by the Supreme Court of Canada in Vetrovec v. The Queen (1982), 136 D.L.R. (3d) 89. Witness development of the law respecting psychiatric testimony by the Court of Appeal for Ontario in Regina v. McMillan (1975), 23 C.C.C.(2d) 160. Witness development of the law respecting character of a victim of crime by the Court of Appeal for Ontario in Regina v. Scopelliti (1981), 63 C.C.C.(2d) 481. What cannot be reformed by judicial action - I think mainly of statutory provisions - can be altered by modest legislative action.

6. Apparently bemused by how reformers of Evidence law in the United States have turned to codes, the Task Force did the same. But the Task Force did so without recognizing that the Americans have special problems respecting Evidence reform that Canadians do not: rigidly separated systems of state and federal courts; fifty-one separate state and federal jurisdictions with separate bodies of evidence doctrine and no central appellate court empowered to rationalize the law; thirteen federal judicial circuits with only the rarest appeal permitted to the Supreme Court on points of evidence law; criminal law and procedure constitutionally vested in the state legislatures; bodies of common law doctrine in the various American jurisdictions, much more defective than that in Canada, generated by enormous amounts of litigation. The Task Force also did not recognize that, even in the early years of judicial application, the Federal Rules of Evidence in the United States have spawned a flood of appeals,

resulting in variations of interpretation among the various federal courts of appeals. One of the leading commentaries on the Federal Rules, Weinstein's Evidence, now runs to seven volumes.

Content

7. If Canada must have what is substantially a statutory code of Evidence law replacing the common law doctrine, the provisions of the enactment must be wisely conceived. If they are not, bench, bar and litigating public will constantly suffer. Unfortunately, many of the provisions in the Uniform Act, duplicated in the Bill, are not wisely conceived. Some of these will be discussed below. In many instances, the underlying legal research, as shown in the Report of the Task Force, is shallow. Resulting provisions carry the mistakes of the research. In other instances, the Task Force assumed the wisdom of the current legal position, particularly if it was the pronouncement of the Supreme Court of Canada. Resulting provisions then freeze that position into statutory form incapable of growth. In yet other instances, attempts to render common law doctrine into statutory form have resulted in provisions misstating what the doctrine is. Finally, in some instances, although the Task Force may have come to a sensible conclusion, the Uniform Law Conference, apparently with little thought and certainly with no independent research, rejected the recommendations.

8. I conclude that bench, bar and public would be better served if Bill S-33 were not enacted. I recommend instead a remedial statute limited to defects in the existing Canada Evidence Act. Beyond that, only more careful study than has been done by either the Task Force or its predecessor, the Law Reform Commission of Canada, can reveal

areas of common law doctrine needing reform which judges cannot implement.

9. I turn now to a survey of the major defects in the Bill's provisions followed in each instance by recommendations for improvement.

Sections 3 and 6

10. There is little reason to enact provisions governing civil proceedings in courts subject to federal Evidence legislation. Section 6 is sufficient to incorporate the provisions of relevant legislation in the province where the court sits. In that way, counsel engaged in civil litigation before a court subject to this statute will not be obliged to learn separate bodies of statutory evidence doctrine where the federal doctrine diverges from that in his home province.

11. I therefore recommend that all provisions in Bill S-33 directed solely to civil trials should be omitted.

Section 9

12. Because it begs the question, the formula for allocating the legal burden to the claimant - "with respect to every fact essential to his claim" - has been rejected by leading commentators on Evidence law. Moreover, the provision does not refer to the legal burden respecting facts "essential to the" defence. Commentators have concluded that allocation of the burden is not susceptible to any formula; it is instead (in Wigmore's words) "merely a question of policy and fairness based on experience in the different situations." 9 WIGMORE, EVIDENCE, section 2486 at 275 (3d ed. 1940). Drawing on the case law and commentators' analysis, McCormick's editors offer

EVIDENCE

Ottawa, Tuesday, June 14, 1983

[*Text*]

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-33, to give effect, for Canada, to the Uniform Evidence Act adopted by the Uniform Law Conference of Canada, met this day at 4 p.m. to give consideration to the bill.

Senator Joan Neiman (*Chairman*) in the Chair.

The Chairman: Honourable senators, I offer my apologies to our witness today, Professor Stanley Schiff, of the Faculty of Law at the University of Toronto, not only because there are so few members who are able to be here today, but also because on at least one other occasion I have had to ask him to change the date of his appearance because of conflicting meetings at an earlier stage in the course of our hearings.

We are pleased to have you with us here today, Professor Schiff. We have had your brief for a few weeks, and it was circulated by the clerk to all the members. I understand that you simply want to speak to certain parts of it.

Before that, I would entertain a motion that the brief in its entirety be appended to the *Minutes of Proceedings* today.

Senator Deschatelets: I so move.

The Chairman: Is that agreed?

Hon. Senators: Agreed.

The Chairman: Professor Schiff, would you like to start?

Professor Stanley Schiff, Faculty of Law, University of Toronto: Thank you very much, Madam Chairman. My message to this committee is set out at the outset of my brief, and that message is this, that this is a bad bill in principle and in specific content, and it should not be enacted.

First let me address briefly the principle. It is my conclusion that Canada does not need and Canada should not have what is substantially a statutory statement of the law of evidence. Judges of our courts have traditionally created and moulded the law of evidence, and, because this is the law governing how information is funnelled to and used by triers of fact in court, judges are supremely suited as experts to create and adapt the laws of evidence to social need.

However, the statutory restatement that this bill contains will inevitably stifle common law judicial creativity, will replace it with judicial interpretation of statutory language, so instead of taking it trial problem by trial problem, with flexible judge-made rules and doctrines, counsel in court will be obliged to deal with provisions in the statute that, since they have been frozen into authoritative words, may not yield to the needs of the problems at hand through time.

Even worse, this bill does not purport to give us a self-contained code. Instead, it leaves open the application of common law doctrine when the very many provisions do not speak to

TÉMOIGNAGES

Ottawa, le mardi 14 juin 1983

[*Traduction*]

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le bill S-33, Loi donnant effet pour le Canada à la Loi uniforme sur la preuve adoptée par la Conférence canadienne de l'uniformisation du droit, se réunit aujourd'hui à 16 heures pour étudier le projet de loi.

Le sénateur Joan Neiman (*président*) occupe le fauteuil.

Le président: Honorables sénateurs, je tiens à présenter mes excuses à notre témoin d'aujourd'hui, M. Stanley Schiff, professeur de droit à l'université de Toronto, non seulement parce que nous ne sommes guère nombreux à la séance d'aujourd'hui, mais également parce que j'ai dû déjà lui demander de changer la date de sa comparution à cause d'incompatibilités d'horaire dans le programme de nos séances.

Monsieur Schiff, nous sommes très heureux de vous accueillir aujourd'hui parmi nous. Nous avons reçu votre mémoire il y a quelques semaines, et le greffier l'a distribué à tous les membres du Comité. Vous m'avez dit que vous vouliez simplement en aborder ici certains éléments.

Avant cela, j'aimerais obtenir une motion pour que votre mémoire soit intégralement annexé au procès-verbal d'aujourd'hui.

Le sénateur Deschatelets: Je propose une motion en ce sens.

Le président: Êtes-vous d'accord?

Des voix: D'accord.

Le président: M. Schiff, nous vous écoutons.

M. Stanley Schiff, professeur à la faculté de droit de l'université de Toronto: Je vous remercie, madame le président. Ce que j'ai à dire au Comité apparaît au début de mon mémoire; en quelques mots, j'estime que ce projet de loi est mauvais dans son principe comme dans sa forme, et qu'il ne devrait pas être adopté.

Considérons-le tout d'abord brièvement dans son principe. J'en suis venu à la conclusion que le Canada n'a pas besoin d'un énoncé statutaire du droit de la preuve; ce droit a été créé et façonné par les tribunaux, et comme il s'agit du droit qui régit les modalités d'acheminement et d'utilisation des renseignements par le juge des faits, c'est à celui-ci qu'il incombe de le façonner et de l'adapter aux besoins de la société.

En figeant le droit de la preuve dans une forme légale, ce projet de loi va inévitablement étouffer le dynamisme créatif de la common law, et le remplacer par une interprétation judiciaire d'un texte législatif, si bien qu'au lieu de procéder cas par cas, en bénéficiant de la souplesse des règles et des doctrines élaborées par les juges, les avocats vont devoir s'accommoder de dispositions légales dont le caractère impératif risque d'être incompatible avec les nécessités que comporteront les problèmes à régler.

De surcroît, ce projet de loi ne vise pas à nous doter d'un code complet et autonome. Bien au contraire, il ménage la possibilité d'appliquer la doctrine de la common law dans les

[*Text*]

some matters. So, the result is that counsel in court will have to try to figure out how the statutory provisions dovetail with the still existing small body of common law that is left open, with no indications in the statute itself of just how and where this is to be done.

Inevitably, the efforts of trial judges to interpret the language of the statutory provisions in this enactment, and to weave together the legislation and the common law which is left in place, will be challenged on appeal in our appellate courts, the body of case law will inevitably build, and, if the American experience is any guide, a weighty body of case law will soon be upon us, ever-growing, spawning weighty volumes of scholars' commentaries, so the hope that one piece of legislation will solve all the problems is obviously doomed, inevitably doomed, to be dashed.

These risks, these dangers and these inevitabilities might be justified if the existing common law of evidence across Canada were so defective, so flawed, that judges, acting in the traditional common law fashion, could not repair that body of law. But that is not the case in this country. Most of the common law evidence doctrine in Canada is tolerably wise; it works well enough; it is reasonably operative. The rest, for the most part, can be reformed by the judges' own creative powers put into action. Particularly in the last decade, the judges of this country have been active in this area, where they are supremely expert: for examples, reform of the hearsay rule and of the opinion rule by the Supreme Court of Canada, reform of the law respecting evidence of character and psychiatric propensity by the Court of Appeal of Ontario. They are just four different examples.

It appears that our reformers, our law reform commissions, our Task Force on Uniform Rules of Evidence, have looked south of the border and seen that there has been widespread codification in the United States. That is an example to be followed, so our reformers have thought. I am of the contrary opinion. That should not be our guide in this country. Either a guide should cause us to conclude that legislative restatement is a good thing in and of itself, or a guide that Canadian evidence law is so defective that, good or bad, legislative restatement is the wise remedy.

I say the American example should not be followed because the Americans have had difficult problems with their body of evidence law that Canadians do not have, problems to which their reformers and their constitutional and legal system responded with codes. They were solving peculiarly American problems. It would be cultural colonialism of the very worst kind to emulate the Americans in this respect just because American reformers have chosen to respond to peculiarly American problems with codes of evidence law. What I am saying there is, not that we should refuse to follow the Americans because they are American, but we should refuse to follow the Americans if our problems are different and do not yield necessarily to the same solutions. That is my message in that respect.

I think it is instructive that Mr. Justice Murray, who was the one and only judge on the federal-provincial Task Force on

[*Traduction*]

cas où ses très nombreuses dispositions laisseront une question sans réponse. De sorte qu'au procès, l'avocat devra essayer de voir de quelle façon les dispositions de la loi s'articulent avec les quelques éléments qui subsistent de la common law, sans avoir exactement, d'après la loi, de quelle façon il devra procéder.

Les décisions des juges qui vont interpréter les dispositions de ce projet de loi et tenter de les harmoniser avec les éléments de common law qui restent applicables, vont être contestées devant nos tribunaux d'appel; une jurisprudence va inévitablement se constituer; et si l'on peut se fier à l'expérience américaine, nous aurons bientôt affaire à une jurisprudence considérable, qui va constamment grossir et se répandre en énormes volumes de commentaires d'arrêts, ce qui réduit pratiquement à néant l'espoir de résoudre tous les problèmes grâce à cette loi.

Tous ces risques et ces dangers pourraient être justifiés si dans l'ensemble du Canada, le droit de la preuve en common law comportaient d'énormes lacunes, au point que les juges ne puissent restaurer cet élément de notre droit par les voies traditionnelles de la common law. Mais ce n'est nullement le cas. Dans l'ensemble, le régime de la preuve dans la common law est assez satisfaisant et donne d'assez bons résultats. Pour le reste, on pourrait s'en remettre aux pouvoirs réformateurs des juges. Ainsi, depuis dix ans, les juges canadiens ont fait remarquablement progresser cette branche du droit dans laquelle ils excellent, comme en témoignent notamment les réformes entreprises par la Cour suprême à propos du ouï-dire et de l'opinion personnelle, et les réformes des règles concernant la preuve en matière de moralité et de problèmes psychiatriques, entreprises par la Cour d'appel de l'Ontario, pour ne citer que ces quatre exemples.

Il semble que les réformateurs, les commissions de réforme du droit et le groupe de travail sur l'uniformisation des règles de preuve se soient inspirés de l'exemple américain, caractérisés par un effort de codification. Nos réformateurs y ont vu un exemple à suivre. Quant à moi, je suis de l'avis contraire. L'exemple américain ne devrait pas être suivi dans notre pays. Nous ne devons pas en conclure qu'une reformulation par voie législative est une bonne chose en soi, ni que le droit canadien de la preuve est défectueux au point qu'une réforme législative s'impose coûte que coûte.

J'estime que nous n'avons pas à suivre l'exemple américain, car aux États-Unis le régime de la preuve a posé des problèmes qui ne se posent pas chez nous, et que les systèmes constitutionnel et juridique ont tenté de résoudre par la codification. Il s'agissait de résoudre des problèmes spécifiquement américains. Ce serait s'infliger le pire forme de colonialisme culturel que de vouloir imiter les Américains dans ce domaine, sous prétexte que les réformateurs américains ont décidé de résoudre des problèmes spécifiquement américains en codifiant le droit de la preuve. Je veux dire par là qu'il ne s'agit pas de refuser de suivre les Américains simplement parce qu'ils sont américains, mais qu'il faut refuser de les suivre dans la mesure où nos problèmes sont différents des leurs, et où ils n'appellent pas nécessairement les mêmes solutions. Voilà ce que je voudrais dire à cet égard.

Vous remarquerez, que le juge Murray, qui était le seul juge parmi les membres du groupe de travail fédéral-provincial sur

[*Text*]

Uniform Rules of Evidence Act, which produced the Uniform Evidence Act, agreed substantially with the criticisms I have made in his dissenting report. You can find his dissent in the report of the Federal-Provincial Task Force at the end, and sprinkled through it at the ends of chapters Mr. Justice Murray has critically commented on what his brothers and sisters on the committee were doing as they went along, recognizing, stage by stage, that codification was the inevitable and ultimate result of what the task force was doing. At the end, when they were all done, he, the one professional judge, said, "No, you have justs done it all wrong." The one lonely voice.

From that I turn very briefly to content. Here I have dealt with many of the major defects section by section in my brief. I would be quite content to go through the sections, the very many of them that I have commented on, but I can leave that, unless someone wishes to ask questions on it. What I will do in these remarks is merely introduce those matters by repeating my criticisms of the underlying research of the Federal-Provincial Task Force upon which this bill is immediately based, and the overview of the report of the task force made by the Uniform Law Conference.

I say in my brief, and I repeat here, that it is in many respect very shallowly researched, and the shallow research has resulted in badly conveived provisions or recommendations for no provisions. In numbers of instances, there is the assumption by the Task Force that the latest word from a judge or judges is wise, and that results in statutory provisions that freeze the latest word, at least the latest word as of 1979 and 1980 when the report was drafted, into immutable law in statute. In some instances there are attempts to render the current common law as of 1979 into statutory form, and those result in provisions in the bill that misstate what the common law position actually is.

Finally, in some instances it is surprising, I think, when the report was put forward as the result of many years of painstaking research, that the Uniform Law Conference, with little or no research, and no independent thought in many instances, rejected some sensible recommendations on the floor of the Uniform Law Conference meeting and substituted their own. These, in some instances, are reflected in this bill.

So those are my submissions in introduction, Madam Chairman, simply taking me up to where, in my brief, I start looking at specific clauses of the bill.

The Chairman: Thank you, Professor Schiff.

Senator Godfrey: I do not believe that I am really equipped at this point to go into all of your specific objections, because those have to be studied by experts in the department. However, your appearance here means that your comments will be on the record and your suggestions will not be overlooked. Your general objection to the bill is not new. We have had other people making the same point. I must confess that I am a little confused at this point. How much variation was there in the law of evidence between the various provinces? Was there much significant variation?

[*Traduction*]

l'uniformisation des règles de preuve, dont émane la Loi uniforme sur la preuve, reprend en grande partie, dans son rapport de dissidence, les critiques que j'ai moi-même formulées. Vous trouverez son point de vue à la fin des différents chapitres du rapport du groupe de travail fédéral-provincial; M. le juge Murray a analysé de façon critique la démarche des membres du comité, tandis qu'il constatait, étape après étape, que les travaux du groupe allaient inévitablement déboucher sur la codification des travaux du groupe. Une fois les travaux terminés, le juge a dit: «Non, vous vous êtes fourvoyés d'un bout à l'autre.» Il était seul dissident.

Je ferai maintenant une courte digression sur le contenu. J'ai trité dans mon mémoire des principales lacunes, article par article. Je serais disposé à revoir les articles, dont j'ai commenté un grand nombre, mais je m'abstiendrai, à moins que quelqu'un n'ait des questions. Je me bornerai à introduire les sujets en reprenant les critiques que j'ai formulées sur la recherche du groupe de travail fédéral-provincial sur laquelle ce projet de loi est fondé et en effectuant un survol du rapport du groupe de travail rédigé par la Conférence canadienne de l'uniformisation du droit.

Comme je l'ai dit dans mon mémoire, la recherche demeure superficielle à bien des égards, ce qui a produit des dispositions mal conçues ou des recommandations qui n'ont pas été suivi de dispositions. Dans certains cas, le groupe de travail prend pour acquis que les dernières décisions judiciaires sont avisées d'où des dispositions statutaires qui figent ces dernières décisions sous forme de loi immuable, du moins les décisions de 1979-1980 au moment où le rapport a été rédigé. Dans certains cas, on a tenté de codifier la common law telle qu'elle était en 1979, d'où la présence dans le projet de loi de dispositions qui présentent une image fausse de l'état actuel de la common law.

Enfin, il est surprenant de constater que, après le dépôt du rapport qui faisait suite à de nombreuses années de recherche ardue, la Commission d'uniformisation du droit, après n'avoir effectué que peu ou pas de recherches et sans avoir de pensée indépendante à bien des égards, ait rejeté certaines recommandations fondées, lors de la réunion de la Conférence d'uniformisation du droit, pour y substituer ses propres vues. Le projet de loi reflète certaines de ces vues.

Madame le président. Vous avez entendu ma déclaration préliminaire, suivie, dans mon mémoire, d'un examen de certaines dispositions précises du projet de loi.

Le président: Je vous remercie, professeur Schiff.

Le sénateur Godfrey: Je ne crois pas être en mesure, à l'heure actuelle, d'aborder vos objections car elles devront être soumises à l'étude d'experts du ministère. Toutefois, puisque vous avez comparu, vos observations seront portées au compte rendu et vos recommandations ne seront pas ignorées. Votre opposition générale au projet de loi n'est pas nouvelle. D'autres l'ont manifestée avant vous. J'avoue que je suis un peu embarrassé. Quelle différence y a-t-il entre le droit de la preuve des diverses provinces? Y a-t-il des différencs importantes?

[*Text*]

Professor Schiff: The basic law of evidence is much the same throughout the whole common law world. I have been teaching courses on evidence for 17 or 18 years, and my material spans the common law world by using American, Australian, Canadian and English cases demonstrating a principle and how it is handled in various places.

So there is a common body of doctrine springing from a common sense of what a trial is supposed to be all about. In Canada there is not much difference in the common law of evidence province by province. What there have been are variations—small, I might say—when there has been statutory change from province to province; but even there very often one province will lead with specific legislation and other provinces will pick it up and adopt it almost word for word, or sometimes with minor variations. That has been particularly the case more recently; but as for great variations province by province, I do not see it.

Of course, we have in this country something that the Americans do not have, namely, a Supreme Court, where important matters can go, if necessary, and as a result of which the highest court in the land decides how the law of the country should be interpreted. That has been happening with increasing frequency, interestingly enough, over the last decade. I am publishing a second edition of my book on evidence law, and I cannot keep up with the Supreme Court. It came down at Christmas time with a case on opinion evidence, which said something sane, sensible and wise, that is going to dictate how judges treat the problem across the country.

Senator Godfrey: You mentioned that in the Ontario Court of Appeal there was a recent decision which was a step forward in the law evidence. What effect will that have on the other provinces? Would that ordinarily be adopted by the other provinces? What influence does one Court of Appeal have on another?

Professor Schiff: In our common law system in Canada, no appellate court decision of one province binds the appellate court of any other province. It depends on the persuasive impact of a particular decision. It so happens that the decisions I have in mind are both unanimous decisions of the Court of Appeal of Ontario and written by Mr. Justice Arthur Martin. Mr. Justice Arthur Martin is one of the great scholars on bench. Unfortunately he is retiring in about two weeks. He wrote at length in both instances I have in mind, and there is a little doubt in my mind that every other court in the country will pay a great deal of attention to it.

One of the cases I have in mind—namely, MacMillan—went to the Supreme Court of Canada, and the Supreme Court, by the strongest implication said "We agree with every comma, period and dash in this, and it is all over; Arthur Martin has stated the law". The Supreme Court dismissed the appeal and, in the course of dismissing it, adopted everything he said.

In another instance—namely, admissible evidence of character of the victims of crime—it did not go to the Supreme Court, so far as I know, but I cannot believe that other

[*Traduction*]

M. Schiff: Fondamentalement, le droit de la preuve est le même dans tous les pays de common law. J'ai enseigné le droit de la preuve pendant 17 ou 18 ans et je me suis fondé sur la jurisprudence américaine, australienne, canadienne et anglaise pour démontrer un principe et l'utilisation qu'on en fait d'un droit à un autre.

Il existe donc une doctrine commune, fondée sur une conception commune de ce qu'est un procès. Au Canada, la common law ne varie pas beaucoup d'une province à l'autre. Il y a bien eu des différences, mineures, résultant de modifications que les provinces ont apportées aux lois; mais même dans ce cas, il arrive souvent qu'une province adopte la première une loi et que les autres suivent et reprennent la même loi mot pour mot ou à peu près. Ça a été le cas, particulièrement ces derniers temps. Mais je ne vois pas qu'il y ait de différences majeures d'une province à l'autre.

Evidemment, nous avons une institution qui, aux États-Unis n'est pas la même, à savoir une Cour suprême à laquelle on peut soumettre, au besoin, les questions importantes de sorte que le plus haut tribunal du pays décide de l'interprétation à faire de la loi. Il est intéressant de noter qu'au cours de la dernière décennie on s'est adressé à la cour suprême à cette fin de plus en plus souvent. Je publie une seconde édition de mon livre sur le droit de la preuve et je ne réussi pas à garder le rythme de la Cour suprême. Vers Noël, la Cour suprême a rendu une décision dans une affaire d'expertise; cette décision, qui était censée et sage, a établi la ligne de conduite que les juges de ce pays devront dorénavant suivre à cet égard.

Le sénateur Godfrey: Vous disiez que la Cour d'appel de l'Ontario a récemment rendu une décision qui a fait avancer le droit de la preuve. Quel effet cette décision aura-t-elle sur les autres provinces? Quelle influence les cours d'appel exercent-elles les unes sur les autres?

M. Schiff: D'après la common law canadienne, un jugement rendu par une cour d'appel d'une province ne lie aucunement une cour d'appel d'une autre province. Le tout dépend de l'effet de persuasion du jugement en question. Il se fait que les jugements auxquels je pense ont fait l'unanimité de la Cour d'appel de l'Ontario et ont été rendus par le juge Arthur Maritn. Ce dernier est l'un des grands spécialistes de notre cour. Malheureusement, il va prendre sa retraite dans environ deux semaines. Il a beacoup écrit sur les deux causes en question et il y a peu de doute, à mon avis, que toutes les autres cours du pays porteront une grande attention à ces deux jugements.

L'une de ces causes, la cause MacMillan, a été portée devant la Cour suprême du Canada et les juges de cette dernière ont dit: «Nous souscrivons à chaque virgule, à chaque point et à chaque tiret de ce jugement; nous ne trouvons rien à redire car Authure Martin a exprimé la loi», ce qui en dit long. La Cour suprême a rejeté l'appel et, dans son jugement, elle s'est rangée entièrement à l'opinion du juge Martin.

Dans un autre cas, où il était notamment question de la recevabilité d'une preuve de la moralité de la victime du crime, le jugement n'a pas été renvoyé à la Cour suprême, pour

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appellate courts, faced with the same problem, will not find what Arthur Martin says supremely persuasive.

The advantage there, if I may say so, is that wisdom is then left unbridled, in the sense that an Arthur Martin is not stuck by the parameters set out in the statute into which the facts of a case must be fitted. He can think and do research, listen to counsel's argument, respond to what justice demands—what previous cases demand—and then give an argument responding to all of this which attempts to handle the problem at and; and the wisdom of it then lends itself to adoption by others who recognize the wisdom and can use it in slightly different fact situations to build further. That is the joy of the common law system. Wise judges thinking of problems, persuading brothers in other provinces that is how the problem should be handled, enact any provision at any given point in time, as a sort of be-all-and-end all, and you stop; and instead of an Arthur Martin thinking and worrying and trying to do the best he can with that problem, he then looks to, say, section 261, subclause (a) and says "What does that mean? What has the legislature told me to do?" It is a different process.

Senator Godfrey: Are you suggesting that judges in our Court of Appeal are not bound by a *stare decisis* to the same extent that they used to be?

Professoor Schiff: Yes, they do. In the examples I have in mind, Arthur Martin was faced with a situation where there was no binding precedent. They were some American cases and a little bit of Enligh case law. But nothing like this had come up before. He thought about it, he read commentators on it, and simply fashioned the rule as best he could. What is interesting—this happened about three years ago—is that the Uniform Law Conference dealt with this. The task force purported to render what he was saying into the Uniform Evidence Act. But when it got to the Uniform Law Conferece, they rejected it and amended it in such a way that Mr. Justice Martin's reasoning was squeezed right in and changed considerably. So what Mr. Justice Martin had said—based on the research he had one, and so on—would effectively, if this law were enacted, be legislated out of existence—which I find sad, because what it is replaced with is a much less wise provision. I mention it in my brief. It is one that, with all due respect to the Uniform Law Conference, some have labeled as "Crown-minded."

The Chairman: What is the specific point of reference? What is the section to which you are referring?

Professor Schiff: It is section 28. I refer to it in paragraph 29 on page 10 of my brief.

[*Traduction*]

autant que je sache, et je ne peux croire que d'autres cours d'appel, placées devant le même problème, ne trouveront pas extrêmement persuasifs les argurment du juge Arthur Martin.

L'avantage dans un pareil cas, si je puis dire, c'est qu'on laisse libre cours à la sagesse; en effet, Aurthur Martin n'est pas limité par les paramètres établis dans la loi et à l'intérieur desquels les faits pertinents doivent se situer. Il peut réfléchir et faire des recherches, écouter les arguement des avocats, faire ce que la justice exige—ce que les précédents exigent—et rendre ensuite un jugement qui tient compte de tout cela et qui résoud également le problème; et ces jugements sages sont ensuite adoptés par d'autres juges ou tribunaux qui reconnaissent leur bien-fondé et qui peuvent s'en inspirer dans des causes où les faits sont légèrement différents pour constituer leurs propres jugements. Voilà l'immense avantage du système de la common law: des juges sages réfléchissant aux problèmes, persuadant leurs confrères des autres provinces que tel moyen de les régler est le meilleur, adoptent telle ou telle disposition de la loi à un certain moment donné, de telle sorte qu'on est obligé de s'y reporter par la suite; et Arthur Martin, au lieu de réfléchir, de s'inquiéter et de tâcher de résoudre les problèmes au mieux, doit se reporter à l'article 261, alinéa a), par exemple, et se demander «Qu'est-ce que cela signifie? Qu'est-ce que les législateurs veulent que je fasse?» C'est une toute autre façon de procéder.

Le sénateur Godfrey: Voulez-vous dire que les juges de notre Cour d'appel ne sont plus liés dans la même mesure qu'auparavant par le respect des décisions rendues et des précédents?

M. Schiff: Non, ils sont liés. Dans les exemples que je vous ai donnés, le juge Arthur Martin se trouvait dans des situations où il n'y avait aucun précédent ni aucune décision antérieure à respecter. Il existait bien certains cas aux États-Unis et quelques rares précédents en Grande-Bretagne, mais aucune affaire de ce genre n'avait été jugée auparavant. Il a donc réfléchi à la question, il a lu ce que des commentateurs en disaient et il a simplement façonné la meilleure règle de droit qu'il pouvait imaginer. Cela s'est passé il y a environ trois ans et ce qui est intéressant, c'est que la Conférence canadienne de l'uniformisation du droit en a discuté. Le groupe de travail voulait intégrer ce qu'il disait dans la Loi sur la preuve uniforme. Mais la Conférence a rejeté cette règle et l'a amendée de telle manière que le raisonnement du juge Martin s'en est trouvé considérablement modifié. Ainsi, si le projet de loi devait entrer en vigueur, ce que le juge Martin avait dit après avoir fait des recherches et avoir beaucoup réfléchi serait effectivement supprimé à jamais, ce que je trouverais déplorable parce qu'on le remplacerait par une disposition beaucoup moins sage. J'en parle dans mon mémoire. C'est une disposition que, avec tout le respect que je dois à la Uniform Law Conference, certains ont qualifiée de «favorable à la Couronne».

Le président: Quelle est cette disposition? De quel article parlez-vous?

M. Schiff: Je parle de l'article 28, ou du paragraphe 29 de mon mémoire, à la page 10.

[*Text*]

The Chairman: Where I cannot follow your argument entirely is that *stare decisis* is, by its very nature, inflexible. That is the whole point of it. You have given excellent examples of judgments of Mr. Justice Martin, which will and should be followed. But we all know that there have been bad judgments that are equally binding and equally inflexible. It seems to me that good judges have always been resourceful enough to try to find their way around bad judgments, even if they cannot always do so. They can do the same thing here.

If that were the only objection you had, then I would not find it terribly persuasive, because I feel that, if the attempt at collating the law of evidence were in fact unobjectionable in certain particulars, the objective it is looking toward is not bad in itself. I am not persuaded that it is or will become inflexible. In my opinion judges will still be able to look at the words there and to interpret them as the circumstances demand. They have done that in the past and they will continue to do so. They have always been able to do that with our law, whether it was common law or statutory law.

Professor Schiff: I look at how judges are reacting in the 1980s. There has been, I think, since I was first a law student, a considerable tendency on the part of judges to stop pretending. Perhaps it is simply part of the increasing honesty of our society or perhaps it is because judges have grown up at a time when people are more skeptical, but I see the tendency of judges to stop pretending that they are not really changing the law or that the distinction makes sense when everybody with two eyes can see that it does not make sense.

I find, as I read the judgments, judges are simply saying, "No. That doctrine of such-and-such a judge in such-and-such a case in such-and-such a court I will not distinguish. I will say that it is wrong. It is wrong for the following reasons, and I will either overrule it or I will not follow it."

Judges are not inflexible. *Stare decisis* dictates that for the sake of being able to predict the future, for the sake of public respect or the stability of the law, judges should generally follow what has been laid down before, but *stare decisis* cannot and must not dictate perpetuation in perpetuity of error.

As I see it happening, our judges are saying more and more, "No, that last case was wrong," or a case 10 years ago, 20 years ago or 30 years ago was wrong. "It does an injustice. We are going to do what is right." I can give you examples right now not only from the Supreme Court of Canada, but from all the courts in our country, where more of our judges are honestly saying that in their reasons for judgment, attempting to do what is right, with recognition of the previous case law and recognition of the previous case law and recognition of the demands of fairness to the parties and the stability of law, but with clear recognition that justice must be done.

[*Traduction*]

Le président: Là où je ne vous suis plus, c'est que le respect des décisions rendues et des précédents est, par sa nature même, inévitable. Tout est là. Vous nous avez donné d'excellents exemples de jugements rendus par le juge Martin, des exemples qui devraient être suivis et qui le seront. Mais nous savons tous qu'il y a eu de mauvais jugements par lesquels les juges sont également liés et qui ne permettent aucune flexibilité. Il me semble que les bons juges ont toujours eu assez de compétence pour trouver le moyen de contourner les mauvais jugements rendus antérieurement, bien qu'il ne soit pas toujours possible d'agir ainsi. Ils pourraient faire la même chose ici.

Si c'est là votre seule objection, je ne la trouve pas terriblement persuasive parce que je crois que, si toutes les tentatives de codification de la Loi sur la preuve sont contestables à certains égards, l'objectif qu'elles visent n'est pas mauvais en soi. Je ne suis pas certain que la loi ne laisse ou ne permettra aucune flexibilité. À mon avis, les juges seront encore capables d'interpréter la loi selon ce qu'exigeront les circonstances. C'était le cas jusqu'à maintenant et il continuera d'en être ainsi. Les juges ont toujours été en mesure d'interpréter le droit, qu'il se soit agi de la common law ou du droit écrit.

M. Schiff: Je m'intéresse à la façon dont les juges réagissent dans la présente décennie. Depuis l'époque où j'étudiais le droit, il s'est dessiné chez eux une tendance marquée à cesser de jouer au magistrat. Peut-être cela est-il simplement attribuable à l'honnêteté de plus en plus grande de notre société ou au fait que les juges doivent exercer leurs fonctions dans un contexte où les gens semblent de plus en plus sceptiques, mais je constate chez les juges cette tendance à arrêter de prétendre qu'ils ne changent pas réellement la loi ou que cette distinction a du sens lorsque tout le monde de bonne foi voit qu'elles n'en a pas.

À mesure que je lis des jugements, je constate que les juges refusent simplement de citer la doctrine de tel juge dans telle affaire à tel tribunal parce que celui-ci se serait trompé pour les raisons suivantes, et qu'ils contredisent ce jugement ou ne le suivent pas.

Les juges sont capables de faire preuve de souplesse. Le *stare decisis* exige que les juges respectent généralement la jurisprudence établie pour que nous soyons en mesure de prévoir l'avenir et afin d'assurer le respect public de la loi ou la stabilité du droit, mais cette doctrine ne peut pas et ne doit pas dicter la perpétuation de l'erreur.

À ce que je constate, nos juges disent de plus en plus que la décision rendue dans la dernière affaire ou dans une affaire d'il y a 10 ans, 20 ou 30 ans, était erronnée, qu'il y avait une injustice et qu'ils vont la corriger. Je peux vous donner tout de suite des exemples de la Cour suprême du Canada, et même de tous les tribunaux du pays, ou de plus en plus de juges disent honnêtement que les motifs qui les ont amenés à rendre telle ou telle décision reconnaissent la jurisprudence ainsi que le besoin d'équité envers les parties et la stabilité du droit mais disent clairement que justice doit être faite.

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That is possible, even probable, in a common law regime. It is not necessarily impossible in a statutory regime, but it depends on how broadly worded the provisions are.

As I look at Bill S-33, many of the provisions are very narrowly worded. Judges will have one hell of a time getting round anything they may conclude in due course is unwise. They are sworn to uphold the law. A judge, with all respect, who says, "I don't like section 45, subsection (2), of the Canada Evidence Act, 1983. I am going to pretend that some of the words aren't there," to me is not only intellectually dishonest, but is, putting it mildly, tampering with his duty to uphold the law.

I could not endorse enactment of legislation which I thought was unwisely conceived and unwisely drafted because I thought that a tough, strong-minded judge, could be counted on to say in due course, "Well, I can get round this provision by interpreting it out of the way." That to me is not enactment which I could endorse.

Senator Godfrey: Sitting back here listening to you I think you are contradicting yourself. Twenty or twenty-five years ago one of the most respected judges in the Court of Appeal told me, "I listen to a case and decide which party has the merits on his side. I am a good enough lawyer that I can write a judgment to get round it," and so on and so forth. I think that is the way judges operate.

I have not seen much distinction between interpreting statutory provisions and interpreting the common law in that respect.

One of the best examples I can remember is the case in the Supreme Court of Canada having to do with changing the Senate. The section in the Constitution seemed quite clear to me, and yet they were so ingenious and were such great lawyers that they were able to get around that without any problem at all. It was plain English, but they decided that the government did not have the power to do it.

Consequently, I am a little less pessimistic and less disapproving, because I don't see the distinction you are making.

I agree that they will admit more publicly now that what they are doing is changing the law, but is there any real distinction between getting round a decision which is supposed to be followed under the rules, except in the Supreme Court of Canada which was announced that it will not be bound by *stare decisis*, and doing it your way? Surely all the other courts in Canada are bound by *stare decisis* and they are doing the same thing in getting their ingenious minds to work on the statutes. I don't quite see the distinction when you say one is right and one is not.

Professor Schiff: Well, sir, with respect to *stare decisis*, at least the Court of Appeal of Ontario and the Court of Appeal of British Columbia, and I am sure many of the other courts, have said they will not necessarily be bound by their own decisions, if they think they are wrong. The Supreme Court of Canada has certainly said that.

[*Traduction*]

Cela est possible, et même probable, dans un régime de *common law*, mais ce n'est pas nécessairement impossible dans un régime de lois; cela dépend de la formulation plus ou moins générale des dispositions de la loi.

Or, comme je regarde le projet de loi S-33, je constate que de nombreuses dispositions sont très restrictives. Les juges n'ont pas fini de se triturer les méninges pour trouver des arguments que leur permettront de contourner la loi; ils ont juré de la respecter. Sauf le respect que je lui dois, tout juge qui dirait: «Je n'aime pas l'article 45, paragraphe 2, de la Loi fédérale de 1983 sur la preuve et je vais «oublier» quelques mots», n'agirait pas seulement de façon malhonnête sur le plan intellectuel mais, pour le dire poliment, manquerait à son devoir de faire respecter la loi.

Je ne pourrais appuyer la promulgation d'une loi que j'estimerais être mal conçue et mal rédigée en espérant qu'un juge droit et ferme en vienne à déclarer qu'il pourrait contourner telle ou telle disposition en l'interprétant d'une certaine façon. Je ne pourrais appuyer une telle loi.

Le sénateur Godfrey: À vous écouter ici, je crois que vous vous contredisez: il y a 20 ou 25 ans, un des juges les plus respectés de la Cour d'appel me disait qu'après avoir entendu une cause, il était suffisamment bon juriste pour rédiger un jugement en faveur de la partie qui était le plus de bonne foi, peu importe le libellé de la loi. Je crois que c'est ainsi que les juges procèdent.

À cet égard, je n'ai pas constaté de distinction bien grande entre l'interprétation des dispositions d'une loi et l'interprétation du *common law*.

Un des meilleurs exemples dont je peux me souvenir est celui de la Cour suprême du Canada dans la question de la réforme du Sénat. L'article pertinent de la Constitution me semblait très clair et pourtant, ils ont été si subtils et si intelligents qu'ils ont réussi facilement à le contourner. Cet article était rédigé en langage clair, mais ils ont décidé que le gouvernement n'avait pas le pouvoir de modifier le Sénat.

Par conséquent, je suis un peu moins pessimiste et par conséquent plus porté à approuver votre point de vue, parce que je ne comprends pas la distinction que vous faites.

Je conçois qu'ils vont l'admettre publiquement maintenant qu'ils changent la loi, mais y a-t-il une distinction réelle entre contourner une décision censée reposer sur des règles de droit, sauf dans le cas de la Cour suprême du Canada qui a annoncé qu'elle ne serait pas liée par le *stare decisis*, et le faire de la façon que vous le proposez? Certainement que toutes les autres cours du Canada sont liées par le *stare decisis* et qu'elles font la même chose en faisant travailler leur génie à modifier les lois. Je ne vois pas très bien la distinction lorsque vous dites qu'une façon de procéder est bonne et l'autre pas.

M. Schiff: Eh bien, en ce qui concerne le *stare decisis*, au moins la Cour d'appel de l'Ontario et celle de la Colombie-Britannique, et bien d'autres tribunaux j'en suis certain, ont déclaré qu'ils ne sont pas nécessairement liés par leurs décisions s'ils estiment que ces décisions sont mauvaises. La Cour suprême du Canada a certainement déclaré cela.

[*Text*]

With respect to your example of the Senate reference, I am no supporter of the mode of reasoning which the Supreme Court of Canada judges used there. I must admit I am no expert there either, having read the case once years ago. I must rely on my constitutional law colleagues who tell me that they have many criticisms on the way in which the Supreme Court went about it.

I can only speak with confidence about the areas in which I have some knowledge, and in this area of evidence law I do find a much greater willingness to put out for public view opinions that the judges have backed up by case law and backed up by thought. These are not, with respect, opinions just backed up by a sort of gut reaction about who is right and who is wrong, but are on paper for all to see and in many instances are brilliantly reasoned. I think they are better reasoned than I have ever read in case law going back 50, 75 or 100 years. Excellent decisions are being delivered by some very fine judges. It is a tribute to the appointing agencies that we have so many good judges and a tribute to the bar that they have yielded so many good judges; but I do see a distinction, sir, between what the judges I am talking of have done, and will continue to do in the areas where they have the authority, the means and the technique of doing it, and statutory interpretation.

The words of a previous judgment of a court are not authoritative. The reasoning is persuasive. The rule, however stated, has the impulse of *stare decisis*, I grant, but it is—and this is part of our common law system—capable of development and capable of being discarded in due course, if it is thought to be wrong.

That is not so with a statute. Parliament speaks and the words are authoritative. The judge must take the words as they are. You are right that he must do so within limits, of course. I would be foolish to deny that. The words do not yield inevitable meanings which cannot change from context to context. Of course not, but they do have a limit. They must be read with reasonable meanings. It is suggested that if judges do not like it they will go beyond the reasonable meanings, or read into it what they think is needed, but that, I repeat, would be improper. You can say that they have done it before and can do so again, but my response to that would be that I do not want them to do it at all. I want them to be faithful to what Parliament tells them to do. They are subordinate to Parliament and must do what is in the legislation, like it or not, within the limits of the words. Therefore, those words had better be good words and well conceived so that they do a very good job.

My concern is twofold, the first being that putting it all into a big statute such as this one, with over 200 clauses, is stopping them from doing the job that traditionally judges have done in this area; secondly, and more specifically, the words chosen to do the particular job clause by clause are not good.

[*Traduction*]

En ce qui concerne votre exemple du Sénat, je ne suis pas d'accord avec le mode de raisonnement que les juges de la Cour suprême ont utilisé dans cette affaire. Je dois admettre que je ne suis pas un expert dans ce domaine, puisque cette affaire date de plusieurs années déjà. Je dois me fier à mes collègues en droit constitutionnel qui m'ont dit qu'ils avaient plusieurs critiques à formuler sur la façon dont la Cour suprême a réglé cette question.

Je ne peux parler avec assurance que dans les domaines où j'ai quelques connaissances, et dans le domaine du droit de la preuve, je constate qu'on admet bien plus volontiers les décisions que les juges ont rendues suivant la jurisprudence et leur pensée. Sauf le respect que je leur dois, ces décisions ne sont pas simplement formulées à la suite d'une sorte de réaction primaire sur ce qui est bon et ce qui est mauvais, mais figurent sur des documents que tous peuvent examiner et sont, dans de nombreux cas, brillamment dénontrées. J'estime qu'elles sont mieux démontrées que tout ce que j'ai vu dans la jurisprudence depuis 50, 75 ou 100 ans. Nous avons des juges très brillants qui rendent des décisions excellentes. Je rends hommage aux organismes qui nomment de si bons juges et au Barreau qui les produit en si grandes quantités; mais je vois une distinction, Monsieur, entre ce que les juges dont je viens de parler ont fait et continueront de faire dans des domaines où ils ont le pouvoir, les moyens et les techniques pour le faire, et l'interprétation des lois.

Le libellé d'un jugement antérieur d'un tribunal n'a pas force de loi. Le raisonnement agit par la persuasion. Quelle que soit la façon dont elle est formulée, la décision s'appuie sur le *stare decisis*, d'être mise de côté au moment opportun si on l'estime mauvaise, et cela fait partie de notre système de *common law*.

Il n'en est pas de même d'une loi. Le Parlement parle et les mots sont exécutoires. Le juge doit les prendre comme ils sont. Évidemment, vous avez raison de dire qu'il doit le faire à l'intérieur de certaines limites et je ne saurais le nier. Les mots n'ont pas une signification éternelle qui ne peut être changée d'un contexte à l'autre, c'est certain, mais ils ont bel et bien une limite. Ils doivent être lus de façon à avoir une signification raisonnable. On dit que si les juges n'aiment pas tel ou tel mot, ils élargiront son sens au-delà des limites raisonnables ou liront entre les lignes pour statuer sur ce qu'ils estiment vrai, mais cela, je le répète, ne servirait en rien la justice. Vous pouvez dire qu'ils l'ont déjà fait et qu'ils le feront encore, mais ma réponse sera que je refuse d'accepter cela. Je veux qu'ils soient fidèles à ce que le Parlement leur demande de faire. Ils relèvent du Parlement et doivent se plier à la loi, qu'ils l'aiment ou pas, dans les limites du libellé de la loi. Par conséquent, celle-ci doit être bien faite et bien conçue pour que les juges puissent faire un bon travail.

Ma préoccupation est double: d'abord le fait de tout mettre en une seule loi comme celle-ci, avec plus de 200 articles, les empêche de faire le travail qu'ils faisaient traditionnellement dans ce domaine; ensuite, et de façon plus précise, les mots choisis pour obtenir ce résultat, article par article, ne sont pas bons.

[*Text*]

Senator Godfrey: I gather from what you say that you have a very high opinion of the decisions handed down by the Supreme Court of Canada as they relate to the law of evidence?

Professor Schiff: Some decisions I do, some I do not.

Senator Godfrey: I recall as a law student many years ago that law professors used to be very critical of decisions. Genly speaking, though, you think the decisions of the Supreme Court of Canada, have been of high standing? You have no violent objections to some of the progressive decisions which have been handed down relating to the law of evidence? You do not see them crying out for reform?

Professor Schiff: I am not necessarily in complete agreement with every decision of the court. If I do not like a particular decision, I, like others, can criticize; I, like others, can attempt to educate; I, like others, can attempt to have that changed within the limits of my power. As a law teacher, all I can do is try to educate students, write articles and books, feed them up to the court and tell them that they erred. Judges tell us from time to time that we should tell them when they are doing things wrong because they do want to do things right. They say: "You law professors know—at least you think you know—tell us and we will consider what you say."

So, the plea I make is not born of a sense that everything that the Judges of the Supreme Court of Canada do is exactly to my liking; my plea concerns the fact that they are attempting to do things using intelligence, skill and thought in an attempt to do what is right in the context of this body of evidence law. Sometimes they do things I do not like, but at least they have the power to do it and the power to re-do it if things come out wrong.

I am not just speaking of the Supreme Court of Canada, but of all courts from the bottom to the top.

Senator Godfrey: You have said that there are certain areas where you think there should be legislation setting things out because the process for courts to correct themselves takes a long time.

I recall Dean Wright criticizing the Supreme Court of Canada about a particular case—and I forget the name of the case now since it was so long ago—and it took almost 20 years for that to be corrected. That seems like a long time to have to wait. What is your opinion on that?

Professor Schiff: As I said in my introductory remarks, the state of the body of common law relating to evidence is fairly good. It does nothing, it seems to me, except stultify development to render that into a statute. Why bother? Some have said, "Well, if it is in a statute, everybody can read the statute and know what it is." The trouble with that is that it is a fairly big statute and not everybody is going to read it, and even if they do read it, that leaves out the body of judicial interpretation of the statute which, inevitably, is going to put the gloss

[*Traduction*]

Le sénateur Godfrey: Je retiens de ce que vous dites que vous avez une très haute estime des décisions rendues par la Cour suprême du Canada en ce qui a trait au droit de la preuve?

M. Schiff: Pour certaines, oui, pour d'autres, non.

Le sénateur Godfrey: Je me rappelle, quand j'étais étudiant en droit il y a de nombreuses années, que les professeurs de droit étaient très critiques des décisions rendues par les juges. Pourtant, de façon générale, vous estimez que la qualité des décisions rendues par la Cour suprême du Canada est très élevée? Vous n'avez donc aucune réserve à l'égard de certaines décisions progressives rendues relativement au droit de la preuve? Vous ne voyez pas les juges trépigner d'impatience en attendant une réforme?

M. Schiff: Je ne suis pas nécessairement en accord complet avec chaque décision du tribunal. Si je n'aime pas une décision particulière, je peux, comme d'autres, la critiquer; comme d'autres, je peux essayer de faire de l'éducation; comme d'autres, je peux essayer de changer ce qui est dans les limites de mon pouvoir. Comme professeur de droit, tout ce que je peux faire est d'essayer d'éduquer les étudiants, d'écrire des articles et des livres et de les produire devant les tribunaux, et dire aux juges qu'ils se sont trompés. Les juges nous disent de temps à autre que nous devrions leur dire s'ils rendent de mauvaises décisions parce qu'ils veulent bien faire les choses. Ils nous disent: «Vous, les professeurs de droit, qui savez ou du moins prétendez savoir, dites-nous votre idée et nous l'examinerons.»

Par conséquent, le plaidoyer que je fais ne veut pas dire que tout ce que les juges de la Cour suprême du Canada font correspond exactement à ce que j'attends; mon plaidoyer concerne le fait que j'essaie de faire des choses avec intelligence, aptitude et réflexion en vue de faire les bonnes choses dans le contexte de notre législation sur la preuve. Ils font parfois des choses que je n'aime pas, mais au moins, ils ont le pouvoir de le faire et de le défaire s'il s'avère qu'ils ont commis une erreur.

Et je ne parle pas seulement de la Cour suprême du Canada, mais de tous les tribunaux, du premier au dernier.

Le sénateur Godfrey: Vous avez déclaré qu'il y avait certains domaines dans lesquels vous croyiez que la loi devrait établir les choses parce que le processus que suivent les tribunaux pour les corriger est trop long.

Je me souviens de M. Dean Wright qui critiquait la Cour suprême du Canada au sujet d'une cause particulière—j'oublie le nom de cette affaire puisqu'elle date de si longtemps—toujours est-il que cette cause a pris presque 20 ans à se faire corriger. Il me semble que c'est une période trop longue pour attendre. Qu'en pensez-vous?

M. Schiff: Comme je l'ai dit dans mes remarques préliminaires, l'état de la jurisprudence concernant le droit de la preuve est assez bon. A mon avis, une loi ne fera rien d'autre qu'ajouter du verbiage inutile. Pourquoi s'en préoccuper? Certains ont déjà déclaré que si le droit de la preuve était codifié dans une loi, tout le monde pourrait lire celle-ci et savoir à quoi s'en tenir. Le problème, c'est que cette loi est plutôt volumineuse et que tout le monde ne va pas la lire. Et même si cela était, il y a toute l'interprétation judiciaire qui va inévita-

[*Text*]

on this statute which comprises 250 clauses now. That will be in articles, cases, textbooks and treatises, and soon it will look, not surprisingly, like every other statute. If you do not know the statute, you will have to read the books and the cases.

So, it is simply a dream to say that we are simplifying it by putting it into legislation. Every lawyer knows that. That is just not so. This is an attempt to fool the layman, and that is, as far as I am concerned, unworthy.

As far as specific areas are concerned, I think it is definitely wise to do so, and that should have been done many years ago. We should clean up the areas in the statutes respecting documents, proof of documents and authentication of documents, because they have grown like Topsy over the past 100 years. Every time a new document came along, we put in a new section. The Canada Evidence Act has many of those, as do the various provincial acts.

This legislation, as recommended by the Uniform Law Conference of Canada, wants to pull it together. That is a good idea, but that is one section. We could have done that many years ago.

Another provision that has caused a great deal of trouble relates to the challenging of the testimony of a witness on the basis of previous inconsistent statements. There has been a great deal of debate as to whether the mid-nineteenth century legislation—which requires that if it is your own witness, the witness must be adverse—makes any sense. Most modern commentators say that makes no sense whatsoever. It is a product of legislation which Canadians adopted from the English. That was first passed in England in 1854. This is 1983, and we have decided, after over 100 years of interpretation and application of that statute, that we probably do not want or need the requirement of the adverse witness, so let us re-draft that one section and take out and modernize the language.

We have experience telling us what the answer is. We do not need this bill to tell us that.

Those are just two examples.

Senator Bosa: Madam Chairman, Professor Schiff proposes the enactment of clause 72, which would allow in objective evidence. For Example, this might involve a murder weapon found by reason of an accused's confession, such confession being subsequently ruled inadmissible. In your view, would it be proper to admit such evidence if it were found by reason of the accused's confession, bearing in mind the confession itself is found to be inadmissible?

Professor Schiff: These are matters of value, and it depends which value one espouses as being important. I see a spectrum of values being protected by the rule of criminal evidence law that says an involuntary confession shall not be admitted. Values that most commend themselves to me as justifying that rule are values of protecting the citizen from improper police conduct and ensuring that our criminal trial process is one for

[*Traduction*]

blement faire enfler cette loi qui comprend déjà plus de 250 articles maintenant. Il faudra consulter articles, affaires, textes et traités, et il ne sera pas surprenant que cette loi ressemble très vite à n'importe quelle autre loi. Si vous ne la connaissez pas, vous devrez lire les livres et la jurisprudence.

Par conséquent, c'est tout simplement rêver que de prétendre que nous simplifions le droit de la preuve en le codifiant en une loi. N'importe quel avocat vous le dira. Cela ne se fait pas comme ça. Tout ce que cela fera, c'est le mêler le profane et ça ne vaut pas le coût, en ce qui me concerne.

Dans le cas de certains domaines particuliers, je pense qu'il est certainement très sage de procéder ainsi et que cela aurait dû être fait il y a de nombreuses années. En effet, nous devrions faire un nettoyage des articles de la loi traitant des documents, des preuves documentaires et de l'authentification des documents, parce qu'ils se sont multipliés au point de devenir un fouillis inextricable depuis cent ans. Chaque fois qu'un nouveau document se présentait, nous ajoutions un nouvel article. La Loi fédérale sur la preuve en a beaucoup, comme les diverses lois provinciales.

Cette nouvelle loi, recommandée par la Conférence sur l'uniformisation du droit de la preuve au Canada, veut tout mettre ensemble. C'est une bonne idée, mais ce n'est qu'un article. Nous aurions pu le faire il y a de nombreuses années.

Une autre disposition qui a causé beaucoup de problèmes concerne la contestation de la déposition d'un témoin sur la foi de déclarations antérieures incohérentes. On a bien débattu la question de savoir si une loi du milieu du XIX[e] siècle exige que votre propre témoin témoigne contre vous a du sens. La plupart des observateurs modernes estiment que cela n'a plus de sens aujourd'hui. C'est un produit de la législation que les Canadiens ont héritée des Anglais. Cette loi a été adoptée en Angleterre en 1854. Mais nous sommes en 1983 et nous avons décidé, après plus de 100 ans d'interprétation de cette loi, que nous n'avions probablement plus besoin ni ne voulions le maintien de l'exigence relative au témoin adverse; donc, remanions cet article, supprimons les mots inutiles et modernisons la langue.

Notre expérience nous révèle la solution. Ce projet de loi ne nous apportera rien de plus.

Ce ne sont là que deux exemples.

Le sénateur Bosa: Madame le président, M. Schiff propose l'adoption de l'article 72, qui permettrait une preuve matérielle. Ainsi, l'arme d'un meurtre pourrait être découverte par suite d'une confession de l'accusé, laquelle serait ensuite considérée irrecevable. A votre avis, serait-il convenable d'accepter une telle preuve si sa découverte résulte de la confession de l'accusé, compte tenu du fait que cette confession est elle-même jugée irrecevable?

M. Schiff: Il s'agit là d'une question de principes, et tout dépend des principes qu'on estime importants. Je crois que le droit de la preuve en matière criminelle, qui stipule qu'une confession non spontanée n'est pas recevable, protège certains principes. A mon avis les principes qui justifient le plus cette règle sont ceux qui visent à protéger le citoyen d'une conduite policière répréhensible et à assurer que notre système de

[*Text*]

which people can have respect so that dirty evidence cannot be put in by crown prosecutors, such evidence, through police assistance having been obtained in ways that our society should not permit.

So, since I put so much emphasis on those values, I find myself drawn to the conclusion that if the confession is not admissible, what is found as a result of the confession is also not admissible for exactly the same reason.

Senator Bosa: Does not section 24 of the *Charter of Rights and Freedoms*, which deals with the exclusionary rule, and which says that if evidence that is produced tends to bring the administration of justice into dispute, take care of this concern?

Professor Schiff: You are quite right.

Senator Bosa: Consequently, is there not enough of a safeguard there to ensure that evidence could not be extracted from the accused through violence or threats? Does that provision not take care of your concerns in that regard?

Professor Schiff: If, in fact, the way the police have handled the matter does violate any of the guaranteed rights and freedoms, for example, as set out in section 8 which says that everyone has a right to be secure against unreasonable search or seizure, it could happen that the police might get a confession out of him. For example, they may find a knife and ask the accused, "What is this?" and he may respond, "That is the knife I used to kill the deceased." That is a confession. The police may then offer the knife as evidence. If they beat the confession out of him, that is an unreasonable seizure.

Under section 24(2) the judge could determine that that evidence was obtained in a manner infringing section 8. The judge could find that the police did not beat him up enough, and, therefore, it does not bring the administration of justice into disrepute. Alternatively, he could find that the police beat him up too much.

You are quite correct, Senator Bosa, in that the judge will have the right to make that decision, and, perhaps, that is the appropriate way of handling it.

The rule of evidence law, the co-called "St. Lawrence" rule, allows the admission of any real object found as a result of an involuntary confession. That rule would be rendered less deadly to the values I am concerned with because a trial judge, if he found any of the rights or freedoms guaranteed by the charter were violated by police conduct, could still keep it out.

My concern is that perhaps the police did not get it in any way which violated these legal rights; perhaps this covers everything.

Senator Bosa: Is this section, in your opinion, an improvement on the American version of the exclusionary rule and the present rule which governs this particular matter?

[*Traduction*]

justice en matière criminelle mérite le respect de la population, de façon que les procureurs de la Couronne ne puissent produire des preuves obtenues d'une manière déloyale, par exemple des preuves obtenues grâce au concours des policiers, par des méthodes que notre société ne saurait tolérer.

Donc, étant donné l'importance que j'accorde à ces principes, je dois conclure que, si une confession n'est pas recevable, les éléments de preuve qui en résultent ne le sont pas non plus, pour les mêmes raisons.

Le sénateur Bosa: L'article 24 de la *Charte des droits et libertés*, qui stipule qu'il faut écarter les éléments de preuve dont l'utilisation est susceptible de déconsidérer l'administration de la justice, ne résoud-il pas ce problème?

M. Schiff: Vous avez raison.

Le sénateur Bosa: Par conséquent, n'est-ce pas là une garantie suffisante que des preuves ne peuvent être soutirées de l'accusé par la violence ou des menaces? Cette disposition ne dissipe-t-elle pas vos inquiétudes à ce sujet?

M. Schiff: Si, dans la réalité, les policiers ont utilisé des méthodes qui portent atteinte aux droits et aux libertés garantis, ils peuvent avoir soutiré une confession à l'inculpé. Mentionnons à titre d'exemple l'article 8 qui stipule que chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. Ainsi, les policiers peuvent trouver un couteau et demander à l'accusé «Qu'est-ce que c'est?» Ce dernier peut répondre: «C'est le couteau que j'ai utilisé pour tuer ma victime.» Il s'agit là d'une confession, et les policiers peuvent ensuite présenter le couteau comme preuve. S'ils ont obtenu la confession en usant de brutalité, c'est là une saisie abusive.

En vertu du paragraphe 24(2), le juge pourrait déterminer si la preuve a été obtenue d'une manière qui contrevient aux dispositions de l'article 8. Il pourrait décider que les policiers n'ont pas trop brutalisé l'accusé et que, par conséquent, l'utilisation de l'élément de preuve n'est pas susceptible de déconsidérer l'administration de la justice. Par contre, il pourrait juger que les policiers ont trop brutalisé l'accusé.

Vous avez parfaitement raison, Sénateur Bosa, en estimant que le juge aura le pouvoir de prendre une décision et que c'est peut-être là la meilleure façon de procéder.

La règle du droit de la preuve admet la recevabilité de tout objet matériel découvert à la suite d'une confession non spontanée. Cette règle porterait moins atteinte aux principes qui me sont chers, puisque s'il estimait que les policiers ont, par leur conduite, porté atteinte aux droits ou libertés garantis par la Charte, un juge aura le pouvoir d'écarter ces éléments de preuve.

Les policiers n'ont peut-être pas obtenu la confession en enfreignant ces droits reconnus par la loi. Voilà l'essentiel de ma pensée.

Le sénateur Bosa: À votre avis, cet article constitue-t-il une amélioration par rapport à la version américaine de la règle de l'irrecevabilité et à la règle qui régit actuellement cette situation?

[*Text*]

Professor Schiff: From my limited knowledge of what has been happening in the United States, it appears to me that the Americans have been struggling with the American exclusionary rule for over a decade. The Supreme Court has said that any evidence obtained in a manner that violates the Fourth Amendment—or the Fourteenth, as it incorporates the Fourth Amendment, protecting one against unreasonable search and seizure—is simply not to be admitted. Scholars there have said that that is very foolish because there can be serious violations and not so serious violations.

Clearly those Canadians who drafted this provision had that in mind, and were really concerned with serious violations that would hurt the administration of justice. They decided to leave it to a trial judge to make the decision about whether there is a violation and, as a result of the violation, evidence is found. Then the trial judge will decide, having regard to all the circumstances, whether allowing this to go into evidence will tend—and I am using the translation of the French version—to bring the administration of justice into disrepute. I think this is superior to the American exclusionary rule.

Senator Bosa: A witness before our committee attested to the fact that he thought it was a far superior way of dealing with the matter than the method employed under the American exclusionary rule.

Senator Deschatelets: Do we not have very clear jurisprudence covering the matter of confession? Do lawyers involved in criminal cases not know exactly what the rules of evidence are because the Supreme Court has made numerous decisions in this regard? It is my understanding that the principles which should be applied by the lower courts have been decided. This point was raised by some lawyers who had acted as defence counsel. They pointed out that it is clear, that we do not need any additional legislation and that this would add only to confusion.

My point is: Are you satisfied with the jurisprudence covering confession? Do we know the rules of the game?

Professor Schiff: Yes, for the most part, the rules are quite clear. Some development is going on.

My concern is different from that of the other witnesses you mentioned. The base rules, the so-called "rules of *Ibraham v. The King*" very clearly set that out. Everyone knows what that is about.

However, within the last decade, there has been some movement here and there from some judges attempting to expand the definition of "voluntariness" or to introduce a new element into the rule excluding confessions. In part, it has grown from developments in England; and, in part, it has grown from a sense of injustice by some of our Canadian judges in regard to what has been happening. I mention this in paragraph 45 of my brief, which starts at the bottom of page 13 and goes on to page 14. This paragraph discusses section 63.

[*Traduction*]

M. Schiff: D'après mes connaissances limitées de la situation aux États-Unis, il me semble que la règle américaine de l'irrecevabilité fait l'objet de contestations depuis une décennie. La Cour suprême a décrété que toute preuve obtenue par des méthodes qui enfreignent le quatrième amendement, ou le quatorzième puisqu'il inclut le quatrième, qui protège quiconque contre les fouilles, les perquisitions ou les saisies abusives, n'est tout simplement pas recevable. Les spécialistes américains estiment que c'est une aberration parce qu'il peut y avoir des infractions graves et peu graves.

Il ne fait aucun doute que les Canadiens qui ont rédigé cette disposition ont tenu compte de cet aspect et qu'ils se sont vraiment préoccupés des infractions graves qui pourraient nuire à l'administration de la justice. Ils ont décidé de laisser à un juge le soin de déterminer s'il y a eu infraction et si un élément de preuve a été découvert par suite de cette infraction. Le juge devra alors décider, eu égard aux circonstances, si l'utilisation des éléments de preuve est susceptible de déconsidérer l'administration de la justice. Je crois que c'est là une amélioration par rapport à la règle américaine de l'irrecevabilité.

Le sénateur Bosa: Un témoin convoqué devant notre comité a affirmé que, à son avis, cette procédure était de loin préférable à celle qu'emploient actuellement les Américains en vertu de la règle de l'irrecevabilité.

Le sénateur Deschatelets: N'avons-nous pas une jurisprudence très claire au sujet de la confession? Les avocats qui plaident des causes criminelles ne connaissent-ils pas exactement les règles de la preuve, étant donné que la Cour suprême a rendu de nombreux jugements à cet égard? Je crois comprendre que les principes que devraient appliquer les tribunaux de première instance ont déjà été établis. Certains qui ont fait fonction d'avocats de la défense ont fait cette remarque. Ils ont indiqué qu'il n'y avait aucune équivoque, que nous n'avions pas besoin d'une loi supplémentaire qui ne ferait que compliquer la situation.

Voilà où je veux en venir: Êtes-vous satisfait de la jurisprudence qui concerne la confession? Connaissons-nous les règles du jeu?

M. Schiff: Oui, les règles sont claires pour la plupart, et la situation s'améliore.

Mon point de vue diffère de celui des autres témoins que vous mentionnez. Les règles fondamentales, celle de l'affaire «*Ibraham c. Le Roi*», l'établissent très clairement. Tous savent de quoi il s'agit.

Toutefois, au cours de la dernière décennie, certains juges ont tenté d'étendre la définition de «déclaration spontanée» ou d'introduire un nouvel élément dans la règle, qui exclurait les confessions. Cette attitude découle, en partie, de certaines tendances en Angleterre et, en partie, d'une impression d'injustice qu'ont éprouvée quelques juges canadiens à certaines occasions. Je mentionne cet aspect dans mon mémoire, au paragraphe 45 qui commence au bas de la page 13 et se poursuit à la page 14. Ce paragraphe traite de l'article 63.

[*Text*]

Under the guise of talking about voluntariness—apart from fear of prejudice and hope of advantage—there has been a development towards the view that, even if a confession were induced without fear of prejudice or hope of advantage, it still might be excluded if there were oppressiveness. The English have actually incorporated that into their judges' rules.

At paragraph 45 I mention a Supreme Court of Canada decision, which came out after the task force had finished its work. Had they known about it, they undoubtedly would have recommended something different.

A unanimous Supreme Court of Canada talks in terms of something different from what they have specifically talked about previously respecting oppressive atmosphere.

The Chairman: What case are you referring to?

Professor Schiff: I am referring to *Hobbins v. The Queen.* While the basic rules are quite clear, and, therefore, your previous witness was right in that it is not necessary to put them into statutory form, my objection is that putting them into statutory form, as clear as it may be, is going to prevent the judges from developing beyond that if they find, over time, that justice requires it. That is mainly what bothers me.

Senator Bosa: My next question concerns your recommendation that section 50 be deleted on the basis that nothing justifies admitting hearsay evidence simply because the declarant is not available. In your view, the rules governing the admissibility of hearsay evidence should be the same for both criminal and civil proceedings. Are your concerns not alleviated by section 49(2) which allows the court, on counsel's application, to order the attendance of an unavailable declarant in a civil proceeding?

Professor Schiff: If you can find him and if he is not dead. What concerns me about section 50 is precisely the situation where the declarant is not available and cannot be made available. The court can order all it wants, but if the person cannot be found the court order is futile. That is my simple answer. Where the person is unavailable within the definition of section 49, then for the most part he could not be got there; but if he could be got there my criticisms would be somewhat blunted. If you look at section 49(1), paragraph (d), it says:

> is absent from the hearing and the importance of the issue or the added reliability of his testimony does not justify the expense or inconveniences.

That is a small area where I am concerned. I am concerned with the situations under paragraph (a), (b) and (c).

Senator Bosa: In criminal proceedings?

Professor Schiff: I understood you were talking about civil cases.

[*Traduction*]

Des discussions sur la déclaration spontanée, exclusion faite de la crainte d'un préjudice et de l'espoir d'obtenir un avantage, le point de vue suivant semble ressortir: même si une confession n'a pas été faite dans la crainte d'un préjudice ni dans l'espoir d'obtenir un avantage, elle peut quand même être exclue si elle a été faite dans un climat d'oppression. Les Anglais ont réellement intégré cette façon de voir dans les règles de leurs juges.

Au paragraphe 45, je mentionne une décision que la Cour suprême du Canada a rendu après l'achèvement des travaux du groupe de travail. Si les membres de ce groupe de travail en avaient pris connaissance, ils auraient sans aucun doute formulé des recommandations différentes.

Les propos unanimes des juges de la Cour suprême du Canada diffèrent de leurs remarques antérieures au sujet du climat d'oppression.

Le président: À quelle affaire faites-vous allusion?

M. Schiff: Je fais allusion à l'affaire *Hobbins c. La Reine.* Même si les règles fondamentales sont claires, et, de ce fait, votre témoin précédent avait raison d'affirmer qu'il n'est pas nécessaire de les inclure dans une loi, j'estime que si elles sont stipulées dans une loi de la façon la plus claire possible, les juges ne pourront plus les ignorer, s'ils en viennent à considérer, à un moment ou à un autre, que la justice l'exige. Voilà principalement l'objet de mes préoccupations.

Le sénateur Bosa: Ma prochaine question concerne votre recommandation de supprimer l'article 50 parce que, selon vous, il n'y a pas lieu d'accepter une déposition sur la foi d'un tiers simplement parce que le témoin n'est pas disponible. À votre avis, les règles régissant la recevabilité des dépositions sur la foi d'un tiers devraient être les mêmes en matière criminelle et civile. N'êtes-vous pas rassuré du fait que, en matière civile, le paragraphe 49(2) autorise le tribunal, sur demande du requérant, à ordonner l'assignation de l'auteur d'une déclaration qui n'était pas disponible.

M. Schiff: Si vous réussissez à trouver la personne et qu'elle n'est pas morte. Ce qui m'inquiète au sujet de l'article 50, c'est précisément les cas où une personne n'est pas disponible et où il est impossible de la retrouver. Le tribunal peut ordonner tout ce qu'il veut, mais s'il ne peut retrouver la personne, son ordonnance ne rime à rien. Voilà à quoi se résume ma réponse. Lorsqu'une personne n'est pas disponible selon la définition de l'article 49, il sera généralement difficile de l'amener devant le tribunal; toutefois, s'il était possible de l'y amener, mes critiques seraient un peu moins vives. Si vous le voulez bien, examinons l'alinéa *d*) de l'article 49(1) qui se lit comme suit:

> «si elle est absente de l'audition et que l'importance du point contesté ou le supplément de preuve qu'apporterait son témoignage ne justifie pas les frais ou les inconvénients . . .»

Cette question me préoccupe un peu. Je m'inquiète des situations visées aux alinéas *a*), *b*) et *c*).

Le sénateur Bosa: En matière criminelle?

M. Schiff: Je croyais que vous parliez des affaires civiles.

[*Text*]

Senator Bosa: Let me ask you another question. What are your thoughts on admitting as hearsay evidence in criminal proceedings, let us say, the notebook of a deceased policeman, who obviously cannot be present.

Professor Schiff: This bill, and indeed the common law, is replete with exceptions to the hearsay rule for all kinds of situations. If a deceased policeman's note fell under one of these exceptions it would be admitted anyway. The exception that came to mind as you spoke was the exception for a business document; that is, if the policeman made the record within the course of duty as a policeman, then it would be admissible under a couple of the provisions here, the business documents section and the section about documents made in the course of a business duty, or simply a duty. Even at common law it might be admissible under those circumstances.

Under the common law, over time the judges developed in these exceptions to the hearsay rule conditions governing admissibility designed to make sure that this was pretty trustworthy hearsay, not just any sort of hearsay; there had to be some guarantees of trustworthiness. Over time our legislatures have added, like the business documents provision, other provisions also with built-in guarantees of trustworthiness. What bothers me about the provision you directed me to, section 50, is that there is nothing like that there at all. It simply says, "If the declarant is unavailable, in goes his statement." Not a word about any guarantee of trustworthiness.

Senator Bosa: Would you consider it an improvement if the matter were decided by the judge? If the judge looked at the evidence and decided whether or not it should be admissible, would that be an improvement?

Professor Schiff: This legislation provides for that in a way. Section 45(3) says:

> A court may create an exception to the rule . . . that is not specifically provided for . . . if the criteria for the exception sufficiently guarantee the trustworthiness of the statement.

These people are trying to do it both ways. They say in section 45(3), "Well, if we do not talk about a hearsay exception anywhere else in this bill, then a judge can create one if the criteria for the exception sufficiently guarantee the trustworthiness of the statement." So they are concerned with trustworthy hearsay, and the judge has to think about that.

Then when you go on to section 50 they say, "We do not care about trustworthiness. If the declarant is dead or he is too sick to come or you cannot find him, in it goes." I say, make up your minds. Are you concerned with trustworthiness? Then leave it to section 45(3). If you are not concerned with trustworthiness, why have you got section 45(3)? I like section 45(3). I want a way out. I do not want our judges, even now, to be bound to exclude hearsay that does not fit into a pigeonhole. That does not make sense. I want our judges, when they do allow in hearsay, to think about the reasons for the hearsay

[*Traduction*]

Le sénateur Bosa: Permettez-moi de vous poser une autre question. Dans une affaire criminelle, faudrait-il, à votre avis, accepter comme «preuve par ouï-dire» les notes d'un policier décédé qui ne peut évidemment pas être présent?

M. Schiff: Ce projet de loi, et bien entendu le common law, prévoient maintes exceptions à la règle du ouï-dire, pour tous les genres de situation. Si les notes d'un policier décédé s'inscrivaient dans ces exceptions, elles seraient acceptées quoi qu'il en soit. L'exception qui m'est venue à l'esprit lorsque vous parliez, c'est l'exception quo concerne un document professionnel; ainsi si le policier a établi le document dans l'exercice de ses fonctions à titre de policier, le document serait recevable en vertu de certaines de ces dispositions, de l'article sur les documents professionnels et de l'article sur les documents établis dans l'exercice d'une activité professionnelle ou tout simplement d'une fonction. Même en vertu du common law, ce document pourrait être recevable dans ces circonstances.

En vertu du common law, les juges ont, avec le temps, dérogé à la règle du ouï-dire en ce qui concerne les conditions de recevabilité, afin de s'assurer que les dépositions sur la foi d'autrui étaient bel et bien dignes de foi et non pas simplement un ouï-dire; il fallait des garanties de la crédibilité. Peu à peu, nos législateurs ont ajouté d'autres dispositions, comme celles sur les documents professionnels, qui comportaient des garanties liées à la crédibilité. Ce qui m'inquiète au sujet de l'article 50 que vous m'avez amené à commenter, c'est qu'il n'offre aucune garantie de ce genre. Il indique simplement que si l'auteur n'est pas disponible, sa déclaration est recevable. Il ne prévoit aucune garantie quant à as crédibilité.

Le sénateur Bosa: A votre avis, s'agirait-il d'une amélioration si la décision était confiée à un juge, si ce dernier examinait la preuve et décidait si elle est recevable ou non?

M. Schiff: Dans un sens, cela est prévu dans le projet de loi. Le paragraphe 45(3) mentionne ce qui suit:

> «Le tribunal peut créer une dérogation, non prévue . . . à la règle . . . si cette dérogation est fondée sur des critères permettant d'établir qu'une déclaration est digne de foi.»

Les législateurs suivent deux avenues. Il n'est nullement fait mention ailleurs dans le projet de loi d'une dérogation concernant le ouï-dire, mais le paragraphe 45(3) prévoit qu'un juge peut créer une dérogation si elle est fondée sur des critères permettant d'établir qu'une déclaration est digne de foi. Ainsi, le fait qu'un témoignage soit digne de foi les inquiète, mais ils laissent au juge le soin de s'en occuper.

Ensuite, lorsque nous en arrivons à l'article 50, ils prétendent ne pas se soucier du fait que la déclaration soit, ou non, digne de foi. Il suffit que le témoins soit décédé ou qu'il soit trop malade pour venir témoingner, ou encore introuvable, et le tour est joué. Encore faudrait-il se décider. la véracité de la déclaration est-elle ou non importante? Dans l'affirmative, il faudrait s'en tenir au paragraphe 45(3). Sinon, à quoi sert cette précision? Personnellement, j'appuie cette disposition. J'aime bien qu'une porte de sortie nous soit ménagée. Je ne voudrais pas que les juges, même maintenant, soient tenus

[*Text*]

rule and to ask themselves, "In light of the reasons for the hearsay rule is this particular item of evidence, which is hearsay, and which does not fit into pigeon-holes already created for hearsay exceptions, sufficiently trustworthy?" If they say yes, in it goes; if they say no, then keep it out. Section 50 short-circuits that by saying, "If the declarant has dropped dead, bring the evidence in."

Senator Deschatelets: On the example you have just given, the present situation would be preferable to that created by that section of the bill, would it?

Professor Schiff: Yes, I think so.

Senator Deschatalets: There is not the uncertainty, I presume.

Professor Schiff: What there is is this. We have a hearsay rule, and we have quite well settled judge-made exceptions to the hearsay rule. In addition to that there are statutory exceptions, very similar across the country in various evidence acts. In addition to that, in 1970 the Supreme Court of Canada, in a leading case, *Arès v. Venner*, indicated that judges have the authority to create new exceptions to the hearsay rule in circumstances where the evidence is trustworthy enough. Some judges have taken them up on that. Our judges do not go wild on this, saying, "Oh boy! All hearsay goes in." They have been very careful and cautious.

The result has been—and this I think is where some critics of common law of evidence make a mistake—that counsel now know what the hearsay says, what the exceptions to the hearsay rule are and what the Supreme Court said in *Arès v. Venner*. Counsel, if he has any brains—and I hope counsel do; they are getting paid for using their brains—will say to themselves, "Look, it looks like hearsay and it does not fit into any pigeon-holes." This is not only counsel on one side, but also counsel on the other side. "However, maybe I can use *Arès v. Venner*. That is a well-known case; everybody knows about it, judges have talked about it, there was unanimity in the Supreme Court. I will try to get it into evidence, using the thinking of the Supreme Court in *Arès v. Venner*." Counsel can go forward and do that. The argument that his opponent will be surprised and unprepared is foolish. It is a Supreme Court of Canada case which is well known, and if his opponent is surprised his opponent is incompetent. Indeed, that decision of the Supreme Court was the inspiration for the task force in recommending what has ended up in this bill as section 4593). They liked it.

The Chairman: It is a good idea.

Professor Schiff: I think it is an excellent idea.

[*Traduction*]

d'exclure certaines ouï-dire qui ne tombent pas nécessairement sous le coup d'une catégorie définie. Cela n'aurait aucun sens. Je voudrais bien qu'au moment de recevoir un ouï-dire, le juge puisse réfléchir aux motifs à l'appui des dispositions pertinentes, ce se demander si, compte tenu de toutes les circonstances, la preuve présentée, sans nécessairement tomber sous le coup d'une clause conditionnelle définie, est suffisamment digne de foi. Dans l'affirmative, la preuve est recevable; sinon, elle est rejetée. L'article 50 se pose à l'encontre de ces principes en déclarant que la preuve devient automatiquement recevable, s'il se trouve que le témoin est décédé.

Le sénateur Deschatelets: En ce qui a trait à l'exemple que vous venez de nous exposer, la situation actuelle ne serait-elle pas préférable à celle suscitée par cet article du projet de loi?

M. Schiff: Oui, je le crois.

Le sénateur Deschatelets: Je présume donc qu'elle ne soulève aucune incertitude.

M. Schiff: Voici la situation telle qu'elle se présente: nous avons une disposition générale en ce qui concerne les ouï-dire, à la quelle s'ajoutent certaines règles d'exception bien instaurées dans l'usage par les juges. En outre, les diverses lois provinciales sur la preuve nous fournissent des clauses conditionnelles très semblables à ces règles. Par ailleurs, dans une importante affaire qui avait eu lieu en 1970, à savoir *Arès c. Venner*, la Cour suprême du Canada avait en quelque sorte habilité les juges à instaurer de nouvelles exceptions aux dispositions sur le ouï-dire lorsque, compte tenu des circonstances, la preuve se révèlait digne de foi. Certains juges se sont prévalus de ce droit, en faisant toutefois preuve de discrimination et d'une grande prudence.

De plus, et je crois que certains critiques du droit de la preuve se méprennent sur ce point, les avocats sont parfaitement au courant des dipositions sur le ouï-dire, des exceptions instaurées dans l'usage et de la décision rendue par la Cour suprême dans l'affaire *Arès c. Venner*. En toute logique, les avocats, qui sont d'ailleurs payés pour faire preuve de logique, sauront reconnaître les ouï-dire qui ne tombent dans aucune catégorie définie. Et cela vaut autant d'un côté que de l'autre. Ils seront donc en mesure de juger s'il y a lieu d'invoquer le précédent établi dans l'affaire *Arès c. Venner*, étant donné qu'il s'agit d'une affaire bien connue de tous, et des juges en particulier, à l'égard de laquelle il y avait eu consensus unanime. S'inspirant du raisonnement de la Cour suprême, ils seront donc libres d'avoir recours à cette jurisprudence. Je m'arrête toutefois avant le fait que le camp adverse puisse être surpris et désarmé par cette stratégie. Cette décision de la Cour suprême du Canada est bien connue de tous, et tout avocat qui s'en trouverait étonné révèlerait, du fait, son incompétence. En effet, c'est cette décision-même qui a poussé le groupe de travail à recommander l'inclusion, dans le projet de loi, des dispostions contenues au paragraphe 45(3). Les membres du groupe de travail souscrivaient donc à l'opinion de la Cour suprême.

Le président: C'est effectivement une bonne idée.

M. Schiff: Je crois que c'est une excellente idée.

[*Text*]

The Chairman: But that is the purpose of a lot of these areas. To me that seems to answer some of your objections to the fact that we may become too inflexible. This type of provision, which I agree is an excellent one, leaves the door open for judges to be creative, to be able to modify the law as situations demand. Perhaps we do not have enough sections such as that in this bill. However, to me that is a very concrete example of the benefits of having this type of evidence act, for everybody to be able to rely on it.

Professor Schiff: If I may respond to that, subsection (3) is not necessary, because *Arès v. Venner* says it better than that. Indeed the problem with attempting to reduce it to statutory language is that you had better get your language right, because while a judge's words can be used in a flexible way, a judge is not a statute. When he says something and gives reasons for judgment in the case, judges who follow him do not have to slavishly follow his particular words. With a statute you do, and some critics of clause 45(3) have said it is not worded properly, because it does not set out what the criteria for the exception might be. It leaves it too wide for the judge. "We do not know what Parliament has in mind here". In *Arès v. Venner*, because of the total reasoning of the court, there is more of an indication of what the Supreme Court has in mind. Once you attempt to render it in the statutory language, you have authoritative words that the judge must conjure with and work within.

The Chairman: Could it not be a combination? I gather that *Arès v. Venner* does not set out criteria, and perhaps that is just as well; but would not a competent counsel, having this section before him, and being aware of *Arès v. Venner*, say "Between the two, I am given the authority here; and also the decision of the Supreme Court of Canada, is giving guidance in the general direction I am to go or the general area of argument on which I can rely". That seems to be a useful combination. Perhaps I am being a devil's advocate here, because I think it is important to examine these sections in that light.

Professor Schiff: Madam Chairman, you have raised a problem that is endemic in this legislation, because no one knows the extent to which the common law is still operative in areas where this statute deals with the subject. The task force and the Uniform Law Conference both said that the common law is still alive where the statute does not speak. For example, when there is a provision such as clause 45(3), we are still at liberty to look to what the Supreme Court of Canada said. But we do not know, and that in itself will be the subject matter of litigation. I find that appalling. An attempt to create a source of easy access to evidence law is creating problems that we never had before. How do we mesh together the common law and the statute law when they talk about the same subject? So, in response to the chairman's question, I am not sure that

[*Traduction*]

Le président: Toutefois, j'ose espérer que ce soit là l'objet d'un grand nombre de ces dispositions. A mon avis, cela semble répondre à certaines de vos objections contre le fait que nous risquions de devenir trop intransigeants. Ce genre de dispositions qui, du reste, me semblent excellentes, incite les juges à faire preuve d'un esprit d'initiative, en adaptant la loi à chaque situation donnée. Les articles de ce genre sont peut-être trop rares dans ce projet de loi Cependant, cela représente à mon avis un exemple on ne peut plus concret des avantages que présente une telle loi sur la preuve, sur laquelle chacun pourrait se fonder.

M. Schiff: Si je puis me permettre de commenter votre observation, je dirai qu'à mon avis, le paragraphe (3) se révèle inutile, puisque la décision rendue dans l'affaire *Arès c. Venner* expose beaucoup mieux la situation. En effet, la formulation d'une telle disposition en langage juridique pose certains problèmes, en ce sens qu'elle exige l'emploi de termes précis, tandis que les paroles prononcées par le juge permettent toujours une certaine latitude d'interprétation. Une décision rendue par le juge diffère d'un texte de loi, en ce sens que celui qui décide de l'appliquer n'est pas tenu de l'observer mot pour mot; par contre la formulation d'un texte de loi vous engage de cette façon, et certains critiques du paragraphe 45(3) en ont contesté la formulation, soutenant que les critères d'exception demeuraient imprécis. Trop de latitude serait ainsi laissée au juge, et l'intention du Parlement demeurerait incertaine. De son côté, la décision rendue dans l'affaire *Arès c. Venner*, puisqu'elle expose l'ensemble du raisonnement du tribunal, donne une meilleure indication de l'intention de la Cour suprême à cet égard. Par contre, une fois cette disposition formulée en termes juridiques, le juge est alors lié par les termes employés et tenu de s'y conformer.

Le président: Ne pourrions-nous pas combiner les deux? Je crois comprendre que la décision rendue dans l'affaire *Arès c. Venner* ne prescrit aucun critère, et c'est peut-être mieux ainsi. Toutefois, un avocat compétent, mis en face de cet article de loi, et connaissant l'affaire *Arès c. Venner*, ne pourrait-il pas décider de faire appel à la fois aux dispositions de cet article et à la décision de la Cour suprême du Canada, en s'inspirant de cette dernière comme ligne directrice générale sur laquelle fonder son argumentation. Une telle combinaison pourrait se révéler utile. Au risque de me faire l'avocat du diable, je crois qu'il est important d'envisager ces articles dans cette optique.

M. Schiff: Madame le président, vous soulevez là un problème endémique inhérent à ce projet de loi, puisqu'il est impossible de déterminer dans quelle mesure la common law continue à s'appliquer dans les secteurs où l'objet qui nous intéresse est régi par les règles de jurisprudence. Le groupe de travail et la Conférence canadienne de l'uniformisation du droit ont tous deux déclaré que la common law demeurait en vigueur même lorsqu'il y avait eu jurisprudence sur un même point. Par exemple, en présence d'une disposition similaire à celle formulée au paragraphe 45(3), nous demeurons libres d'invoquer la décision de la Cour suprême du Canada. Toutefois, je ne peux me prononcer sur ce point, et je crois qu'il y a là sujet à litige. C'est, à mon avis, inconcevable. Les efforts que nous avons déployés en vue de faciliter l'accès au droit de la preuve

[*Text*]

lawyers and judges, if this were enacted, could look to the Supreme Court of Canada case in *Arès v. Venner*. I just do not know. I am not saying they can or they cannot. The only way we are going to find out is to litigate it. We do not have to litigate it now, but we shall have to litigate it then, and litigate it in every provision in this statute.

Senator Deschatelets: That is why many attorneys from both sides—for the defence and the Crown—have said that the bill will cause confusion in many sectors of the criminal and common law. Sections will have to be revised and decided by the highest court. Do you agree with that?

Professor Schiff: I say somewhere in my brief that this bill will create a heyday for counsel. I wish I were a practising lawyer. I could then make a living out of this, because it is filled with problems; and the clients will pay. Some will pay with a lifetime in jail, and others will pay out of their pockets. Clearly this lengthy piece of legislation will have to be litigated and relitigated for a very long time, just to find out what it all means; and one of the things we are talking about is to find out the extent to which the common law dovetails with the provisions that are here. How do you make it fit together? That has to go to the Supreme Court of Canada.

Senator Deschatelets: Professor Schiff, did you have anything to do with the Uniform Law Conference? Did you follow it?

Professor Schiff: The only thing I had to do with it was to read the reports of the task force as they came out. I glanced over them to see what was the latest thing they pulled; and each time I would say "Oh, no, they are not doing that". I was never consulted or asked. Indeed, at one point I asked the question of one of the people concerned with the task force: "Why are you not consulting with the law teachers, with those who teach and research in this area and think about it"? I shall never forget the reply that I received: "You academics had your chance with the Law Reform Commission. Now the practical people are going to do it".

Senator Deschatelets: So at least you read the reports.

Professor Schiff: The reports of the criminal cases and the draft chapters appeared over a period of approximately two years.

Senator Deschatelets: When Bill S-33 was introduced, you looked at it. Can you tell us if the report of the law conference is reflected in the bill? I am asking you this because a week or two ago we had before us as a witness Mr. Justice Pigeon, the former judge of the Supreme Court. He summed up his

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engendrent des problèmes auparavant inusités. Comment concilier la common law et la jurisprudence, lorsque les deux légifèrent sur un même point? En réponse à votre question, madame le Président, je ne suis pas certain que les juges et les avocats, dans l'éventualité où le projet de loi serait adopté, pourraient continuer à s'en référer à la décision rendue par la Cour suprême du Canada dans l'affaire *Arès c. Venner*. Toutefois, il m'est impossible de répondre catégoriquement à cette question. La seule façon d'y répondre sera de plaider cette cause. Nous serons évidemment tenus de plaider chaque disposition prévue dans ce projet de loi.

Le sénateur Deschatelets: C'est pourquoi bon nombre d'avocats des deux camps, soit la défense et la Couronne, ont déclaré que ce projet de loi allait semer la confusion sur plusieurs aspects du droit criminel et de la common law, et qu'il faudra, à cet égard, s'en remettre à la Cour suprême. Êtes-vous de cet avis?

M. Schiff: Quelque part dans mon mémoire, j'ai déclaré que ce projet de loi allait amener les beaux jours pour les avocats. Dommage que je n'exerce pas, à l'heure actuelle, la profession d'avocat; je pourrait en vivre largement, seulement avec cette question très complexe, que les clients voudront à tout prix démêler. Pour certains, ce prix sera la prison à vie et pour d'autres, de forts déboursés. Il est certain que ce texte de loi assez considérable nécessitera maintes plaidoiries, pendant encore de longues années, simplement en vue de circonscrire la question; l'un des aspects à résoudre consistera à déterminer dans quelle mesure la common law concordera avec les dispositions contenues dans ce projet de loi. Comment faire coïncider les deux? Cette question devra être résolue devant la Cour suprême du Canada.

Le sénateur Deschatelets: Monsieur Schiff, avez-vous participé à la Conférence de l'uniformisation du droit, ou l'avez-vous suivie, d'une façon ou d'une autre?

M. Schiff: J'ai dû me contenter de lire les rapports du groupe de travail, au fur et à mesure de leur publication. A chaque fois que j'ai jeté un coup d'œil aux rapports de droit pénal pour prendre connaissance des progrès accomplis, j'en ai été déconcerté. Jamais personne ne m'a consulté, ni sondé mon opinion. J'ai même demandé, à l'un des responsables du groupe de travail, pourquoi ce dernier ne consultait pas les professeurs de droit, ceux-là même qui entreprennent des recherches dans ce domaine et qui se penchent sur la question? Je n'oublierai jamais ce qu'il m'a répondu: «Vous, les universitaires, vous avez eu votre chance avec la Commission de réforme du droit. Maintenant, c'est aux gens pratiques à passer à l'action.»

Le sénateur Deschatelets: Du moins, vous avez pu lire les rapports.

M. Schiff: Oui, les rapports ou les affaires de droit pénal, et les versions préliminaires des chapitres qui ont été publiés sur une période d'environ deux ans.

Le sénateur Deschatelets: Vous aviez pris connaissance du projet de loi S-33 au moment de son dépôt. Pouvez-vous nous dire si les conclusions formulées dans le rapport de la Conférence de l'uniformisation du droit ont été respectées dans ce projet de loi? Si je vous pose cette question, c'est qu'il y a une

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testimony by saying that the bill did not reflect the report of the task force.

Professor Schiff: I read a newspaper report of what Mr. Pigeon said. I understood that he was complaining that the French translation was not the same as the French translation of the English in the Uniform Evidence Act, and he could not understand why that was so. As for Bill S-33, it is very close in English. I must admit that I have not read the French version and compared the two, but in English the two are very close. In some instances the Department of Justice apparently decided there was a certain provision they did not want and they dropped it. In other instances it was interesting that they disagreed with the Uniform Law Conference's disagreement with the task force, and they reintroduced a provision recommended by the task force which the Uniform Law Conference had rejected. I found that interesting. I can see why, in a couple of instances. But from the point of view of the English, they are very close.

Senator Deschatelets: I hesitate to try to sum up your presentation in a few words, but when you say that this is a bad bill in principle and content—I believe those are the words you used—do you mean that, so far as you can see, there is no need for this bill?

Professor Schiff: There is no need for Bill S-33. I am not saying that there is no need for reform of evidence law. My argument is that an all-embracing restatement in statutory form of evidence law is a bad thing. Even a good restatement would be a bad thing, but I do not think this is a good restatement. It is a bad thing because of the impact it has, as I have argued, on judicial creativity in moulding evidence law over time. There are, however, areas where there are now statutory provisions—I mentioned two of them earlier—which do need reform. Those do not need a 250-clause bill to deal with them. There are also areas of common law doctrine that might be—and I stress the words "might be"—rendered into statutory form.

Let me give you an example. The law of presumptions is very confused. It has seemed to me for a long time that a very simple two-section statute should be enacted to get rid of this mess. This statute does not do it. I find it absolutely amazing. Indeed, the Uniform Law Conference decided, "No. We are going to let this develop by the judges."

In one part of their report, and I think I am correct in this, the task force made a recommendation as to the burden of proof in a civil case respecting rebutting a presumption. I

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ou deux semaines, le juge Pigeon, ancien juge de la Cour suprême, est venu témoigner devant nous. Il a conclu son exposé en déclarant que le projet de loi ne reflétait pas les conclusions formulées dans le rapport du groupe de travail.

M. Schiff: J'ai lu, dans un journal, le compte rendu de la déclaration de M. Pigeon. J'ai cru comprendre qu'il se plaignait du fait que la version française différait de la traduction française du texte anglais de la Loi sur l'uniformisation de la preuve, et qu'il ne comprenait pas pourquoi cela était. Pour ce qui est du projet de loi S-33, la version anglaise est très fidèle; je dois admettre que je n'ai pas lu la version française, de manière à comparer les deux, mais en anglais, les deux versions concordent. Il semblerait que dans certains cas, le ministère de la Justice aurait décidé d'exclure certaines dispositions données. Il est d'ailleurs intéressant de noter que, dans d'autres cas, le Ministère n'appuyait pas l'opposition manifestée par la Conférence de l'uniformisation du droit à l'égard des conclusions tirées par le groupe de travail, et qu'il aurait décidé de représenter une disposition recommandée par ce dernier, mais rejetée par la Conférence. En quelques endroits, je peux comprendre pourquoi cela s'est produit. Quoiqu'il en soit, du point de vue de la version anglaise, il n'existe aucune divergence majeure.

Le sénateur Deschatelets: J'hésite à résumer votre exposé en quelques mots, mais lorsque vous déclarez que ce projet de loi n'est pas recommandable, tant sur le plan du principe que sur celui du contenu (je crois que ce sont là les termes que vous avez employés), entendez-vous qu'en autant que vous puissiez en juger, ce projet de loi est inutile?

M. Schiff: Le projet de loi S-33 est effectivement inutile. Par contre, il en n'est pas de même de la réforme du droit de la preuve. Je soutiens qu'une reformulation systématique de la réglementation sur la preuve n'est pas souhaitable. Même une bonne restructuration serait à mon avis néfaste, encore que cela ne soit pas le cas du projet de loi qui nous intéresse. En effet, une telle mesure serait néfaste en raison de ses incidences sur la créativité judiciaire, en enfermant, comme je l'ai déjà dit, le droit de la preuve dans un carcan. Toutefois, il existe certains secteurs dans lesquels les dispositions réglementatives apellent à être révisées, et j'en ai d'ailleurs déjà mentionné deux. Il n'y a pourtant pas lieu d'élaborer tout un projet de loi de 250 articles pour y remédier. Certains secteurs de la Common Law pourraient également être rendus sous forme de réglementation. Bien entendu, il ne s'agit que d'une simple possibilité.

Laissez-moi vous donner un exemple: les dispositions en matière de présomption sont assez complexes. Il me semble, depuis assez longtemps déjà, que l'adoption d'un simple règlement comportant à peine quelques articles pourrait efficacement palier à ce problème. Le présent projet de loi ne règle aucunement cette question. C'est tout de même incroyable. La Conférence de l'uniformisation du droit a simplement décidé qu'elle n'en ferait rien, et qu'elle laisserait cette question à la discrétion des juges.

Dans une partie de son rapport, et je ne crois pas me tromper sur ce point, le groupe de travail a formulé une recommandation relativement au fardeau de la preuve dans

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thought, "that is a good idea, because the case law is so confused here. A very simple two-line statement will take care of it and get rid of all the confusion." The Uniform Law Conference looked at the provision and said, "No. We don't want this." I have forgotten their exact reasons. "Let the judges develop it." It was just taken right out and so this statute says nothing about it.

Here was a chance to do a service, and yet they ducked it. And yet in other areas, where the law is quite clear and nobody needs any help because the law is not confused, they want to render it into statute. I say, if you are reform minded, well, reform.

Another area I find just shocking is that of similar facts, which is a very complex area of the law which I think I can understand. I can never get my students to understand what I am saying to them about it. Maybe that is an indication that I don't understand it, but I think I do understand it. The task force, the Uniform Law Conference and this bill have said nothing about that very difficult area of the law which I think can be reduced to a short statutory provision. I think it can. Maybe I am misled on this. This bill, following the Uniform Evidence Act which in turn follows the report of the tax force, simply ducks it.

Why does it duck it? Well, the report of the task force says, "Our judges have thought this through and they are doing a really good job. Let's leave it to common law development." My answer to that is that I do not think our judges have thought it through. I don't think it is as clear as they think it is. I think it is still pretty difficult. Maybe it is time for legislation, a short provision. I am not sure about that one. My real point is that if we are to have a reforming statute, then it must deal with the tough ones as well as the easy ones. But in a couple of areas they have ducked the tough ones. It is shocking.

Senator Deschatelets: Professor Schiff, have you read the brief which the Canadian Bar Association presented to this committee? Their conclusions are pretty much along the same lines as yours. They think there might be a need to improve the evidence law and they would welcome a uniform evidence act in certain sections, but they certainly do not agree with this entire bill.

Professor Schiff: I have not read their brief, sir. I have read their evidence, but only their evidence.

The Chairman: Well, Professor Schiff, you may be aware that they are to appear here a week from tomorrow with a very extensive brief. It sounds like they have prepared an exhaustive brief using a battery of lawyers and experts in various fields. We are looking forward with interest but with some trepidation to what they will have to tell us.

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une affaire de droit civil ayant trait à la réfutation d'un fait présumé. J'ai pensé: «Voilà une bonne idée, parce que le droit jurisprudentiel est tellement vague à ce sujet. Un simple énoncé de deux lignes suffirait à écarter toute cette confusion.» La Conférence canadienne de l'uniformisation du droit a dit qu'elle ne voulait pas de cette disposition. J'ai oublié les raisons précises qu'elle a invoquées. Elle a dit: «Laissons aux juges le soin de préciser». Par conséquent, il n'y a rien dans la loi à ce sujet.

L'occasion se présentait de faire quelque chose d'utile et on s'est esquivé. Mais dans d'autres secteurs où la loi est très claire et où personne n'a besoin d'aide parce qu'il n'y a pas de confusion, on veut l'inclure dans la loi. Tant qu'à faire des réformes pour le plaisir, eh bien faites-en.

Un autre point où je trouve leur attitude tout à fait révoltante, est celui de la similarité des faits. C'est une notion très complexe du droit que je pense comprendre, même si je ne peux jamais réussir à l'inculquer à mes étudiants. C'est peut-être un signe que je ne la comprends pas moi-même, mais au contraire je crois bien la comprendre. Le groupe de travail, soit la Conférence canadienne de l'uniformisation du droit, ainsi que le présent projet de loi n'abordent pas ce point très délicat du droit qui, à mon avis, pourrait être résumé dans une courte disposition de la loi. Je crois que c'est faisable. Je me trompe peut-être. Ce projet de loi qui fait suite à la Loi uniforme sur la preuve, qui à son tour fait suite au rapport du groupe de travail, a simplement évité la question.

Pour quelle raison? Le rapport du groupe de travail dit: «Nos juges ont réfléchi à cette question et ils accomplissent un très bon travail. Laissons cette question se régler selon l'interprétation de la common law.» A cela je réponds que j'estime que nos juges n'ont pas réellement étudié cette question à fond. Je ne crois pas qu'elle soit aussi claire qu'ils le prétendent. Je suis d'avis qu'elle demeure fort compliquée et qu'il serait probablement temps de légiférer, et de préparer une brève disposition à ce sujet. Je ne suis pas sûr de ce qu'il convient de faire mais là où je veux réellement en venir, c'est que si nous devons reformer le droit, il convient de traiter autant des questions compliquées que des questions simples. Mais dans quelques domaines, la Commission a évité les questions compliquées. C'est révoltant.

Le sénateur Deschatelets: Monsieur Schiff, avez-vous lu le mémoire présenté par les représentants de l'Association du Barreau canadien à notre comité? Leurs conclusions vont dans le même sens que les vôtres. Ils sont d'avis qu'il y a sans doute lieu d'améliorer la Loi sur la preuve et ils se disent prêts à accepter certains articles de la Loi sur l'uniformisation de la preuve, mais qu'ils ne sont certes pas d'accord avec toutes les dispositions du projet de loi.

M. Schiff: Je n'ai pas lu leur mémoire, monsieur. J'ai lu leurs témoignages seulement.

Le président: Eh bien, professeur Schiff, vous savez sans doute que des représentants de l'Association doivent comparaître ici dans une semaine et présenter un mémoire très complet. Il semble qu'ils aient préparé un mémoire exhaustif avec l'aide d'un bon nombre d'avocats et de spécialistes dans divers

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Senator Deschatelets: I believe that is the result of a discussion the bar had with officials of the department.

The Chairman: Yes. I believe it is a result of their own subcommittee's work.

Senator Deschatelets: I believe, Madam Chairman, that they said their original presentation was a preliminary presentation only.

The Chairman: Yes, and they said it was far from complete, that they had much more to say.

Senator Godfrey: Professor Schiff, I understood you to say that people from the law teaching profession were not encouraged to make representations. Being interested in the general idea of having the government give notice and comment, and so on, may I ask if you were actually discouraged from participating, or was that a choice you made on your own?

For instance, when I see things that annoy me, I write letters to the papers. I would have thought law professors would not need to be invited to tell the department what they thought of something they saw. I just wondered what the general atmosphere was. Why was there not a response at that time? You are certainly forthright in your brief today.

Professor Schiff: We were certainly not invited. We were certainly not involved. I was surprised, dismayed and unhappy about the composition of the task force. It was comprised of representatives of the Departments of the Attorneys Gen of the various provinces and of the Ministry of Justice of Canada. It had on it competent members of those departments, but none of them purported to be scholars in this field. They were competent and intelligent, undoubtedly, but not scholars. We like to think of ourselves as scholars, people teaching in universities and spending their lives thinking about these areas. However, these people went ahead and did their job. When I was told, as I was on the telephone, "You guys have had your chance. Now the practical people from the government and government departments will do the job which you messed up," that to me was not active encouragement, to say the least.

When every six months or so these preliminary reports came out in the criminal reports commercially published, it did not look to me as if that was an invitation for comment. I did not see it as such. Certainly, nobody ever wrote me a letter saying, "Schiff, you are a guy who works in this area. Why don't you give us the benefit of your thinking? We will take it into account." Not a bit of it. Those were preliminary reports from the task force to the master of the task force, which was the Uniform Law Conference. The Uniform Law Conference had said to them, "Investigate the law. Here are the guidelines to investigate the law. Come back to us by a certain deadline date and tell us what we, the Uniform Law Conference, should do." They did that. They got an extension because they did not

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domaines. Nous attendons avec intérêt, mais avec une certaine apprehension, leurs témoignages.

Le sénateur Deschatelets: Je crois que le mémoire fait suite à une discussion que des représentants du Barreau ont eue avec des fonctionnaires du ministère.

Le président: Oui. Je crois qu'il s'agit des conclusions du travail de son propre sous-comité.

Le sénateur Deschatelets: Je crois savoir, madame le Président, qu'ils avaient dit que leur premier mémoire n'était qu'un mémoire préliminaire.

Le président: Oui et ils ont ajouté qu'il était loin d'être complet, et qu'ils avaient encore beaucoup à dire.

Le sénateur Godfrey: Professeur Schiff, je crois comprendre que vous avez dit que les professeurs de droit n'avaient pas été encouragés à présenter des instances. Étant intéressé de façon générale à ce que le gouvernement donne un avis de ses intentions et obtienne des commentaires, puis-je vous demander si on vous a en réalité découragé de participer ou s'il s'agissait de votre propre choix?

Lorsque je lis des choses qui m'ennuient, j'écris des lettres aux journaux. J'aurais cru que les professeurs de droit n'avaient pas besoin d'une invitation pour communiquer au ministère leur point de vue. Je me demande simplement quelle était l'ambiance générale. Pourquoi n'y a-t-il pas eu des réactions à ce moment-là? Vous n'avez certes pas mâché vos mots dans votre mémoire aujourd'hui.

M. Schiff: Nous n'avons certes pas été invités à participer. J'ai été étonné, consterné, et malheureux de la composition du groupe de travail. Il comprenait des représentants des procureurs généraux des diverses provinces et du ministère fédéral de la Justice. Les participants étaient certes compétents, mais aucun d'eux ne pouvait prétendre être un spécialiste en la matière. Ils étaient compétents et intelligents sans doute, mais pas des spécialistes. Nous nous considérerons comme des spécialistes, nous enseignons dans les universités et passons notre vie à traiter de ces questions. Toutefois, ces personnes sont allées de l'avant et ont fait leur travail. Lorsque l'on m'a dit au téléphone: «Vous avez eu votre chance. Maintenant les hommes politiques et les fonctionnaires des divers ministères vont s'atteler à la tâche et essaieront de réparer les pots cassés» le moins que je puisse dire, c'est que cela ne m'a pas semblé une invitation très chaleureuse à participer.

La publication de ces rapports préliminaires dans les Canadian Criminal Law Reports ne m'a pas semblée être une invitation à faire des commentaires. Du moins, je ne l'ai pas considérée comme telle. Chose certaine, personne ne m'a écrit une lettre disant: «Schiff, vous travaillez dans ce domaine. Pourquoi ne pas nous faire bénéficier de vos idées? Nous en tiendrons compte» Bernique! Il s'agissait de rapports préliminaires du groupe de travail destinés au maître d'œuvre du groupe de travail, la Conférence canadienne de l'uniformisation du droit. On leur avait dit: «Faites enquête. Voici les lignes directrices. Revenez-nous à une certaine date et dites-nous ce que tous devrions faire, ce que la Conférence de l'uniformisation du droit, devrait faire». C'est ce qu'ils ont fait.

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meet the deadline. They took a couple of years more, but they responded.

I did not personally feel that I was being invited in any meaningful way to participate in that. Then, when the process was all over—and this to me was quite amazing—the Uniform Law Conference received the report, debated it and produced a Uniform Evidence Act, but did not then widely publish it. Indeed, I discovered I could not obtain a copy of it. I went round and asked people who had been on the task force to give me a copy. There weren't any available.

It certainly was not publicized in such a way that the bar knew about this. Indeed, some lawyers were amazed when they read in the newspaper that Bill S-33 had been introduced in the Senate. They had not heard of it before. Maybe they should have.

They should have read the Canadian Criminal Law Reports, but there was no real attempt to involve the profession on this on-going study, certainly no attempt was made, as was made by the Law Reform Commission. That commission advertised at length in legal magazines and invited the profession to get involved. This was an in-house product.

Senator Godfrey: They did not say they would welcome comments?

Professor Schiff: No.

The Chairman: Professor Schiff, do law professors have an association which reviews matters of common interest, as does the Canadian Bar Association, or do you work within that association? As we understand it, that is mostly comprised of the practising bar. You are in the academic field, so I wonder if there is a group of law professors which reviews various legislation in an attempt to formulate some opinions or level some criticisms.

Professor Schiff: Not in a formal way, although many of us are members of the Canadian Bar Association. I am a member of a number of the committees of that association. There is the Canadian Association of Law Teachers which gets together once a year at the Learned Societies' Conference. But that group does not attempt to keep up with on-going studies.

Indeed, when the Law Reform Commission of Canada published its report in 1975, a very important session of the Canadian Association of Law Teachers discussed that report because the commission asked the association for their views on the report. They found out in no uncertain terms that the profession did not like it. So, when we were invited to make submissions, we did. I made submissions, and there was an important discussion at a meeting of the Canadian Association of Law Teachers regarding that report. In the busy practice of law it is hard to get lawyers off their rear ends because they have clients pounding their doors for advice. It is hard to get them to do something unless they are specifically asked.

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Ils ont obtenu une prolongation parce qu'ils n'ont pu respecter la date limite. Ils ont pris environ deux ans de plus mais ils ont agi.

Je ne crois pas personnellement avoir été réellement invité à participer au processus. Puis, lorsque tout a été terminé—et j'en ai été très étonné—la Conférence sur l'uniformisation du droit a reçu le rapport, l'a débattu et a publié une Loi uniforme sur la preuve, mais ne l'a pas diffusée. En fait, j'ai constaté que je ne pouvais pas en obtenir d'exemplaire. J'ai demandé à des personnes qui avaient fait partie du groupe de travail de m'en donner un exemplaire, mais il n'y en avait pas de disponible.

Ce rapport n'a certainement pas été diffusé de façon à ce que le Barreau puisse en prendre connaissance. Certains avocats ont certes été étonnés de lire dans les journaux que le projet de loi S-33 avait été présenté au Sénat. Ils n'en avaient pas entendu parler avant. Peut-être aurait-il fallu leur en parler.

Ils auraient dû lire les *Canadian Criminal Law Reports* mais il n'y a eu en réalité aucun effort visant à faire participer les juristes à cette étude certes il n'y a eu aucune invitation comme celle qui a été faite par la Commission de réforme du droit. La Commission avait annoncé ses travaux dans les revues de droit et invité les juristes à participer. Mais ce document était une production interne.

Le sénateur Godfrey: La Conférence n'a pas fait savoir qu'elle accueillerait volontiers tous commentaires?

M. Schiff: Non.

Le président: Monsieur Schiff, les professeurs de droit ont-ils une association qui étudie les questions d'intérêt public, comme le fait l'Association du barreau canadien? Travaillez-vous au sein de cette dernière association? Si j'ai bien compris, la plupart des praticiens du droit en font partie. Comme vous œuvrez dans le secteur universitaire, je me demande s'il y a un groupe de professeurs de droit qui étudient les diverses lois en vue de formuler certaines opinions ou critiques.

M. Schiff: Non, pas de façon officielle, bien qu'un grand nombre d'entre nous sommes membres de l'Association du barreau canadien. Je fais partie d'un certain nombre de comités de cette association. Il y a l'Association canadienne des professeurs de droit qui se réunit une fois par année à la Conférence des sociétés savantes. Mais ce groupe ne se tient pas au courant des études en cours.

Certes, quand la Commission de la réforme du droit au Canada a publié son rapport en 1975, une session très importante de l'Association canadienne des professeurs de droit a été consacrée à la discussion de ce rapport, parce que la Commission avait demandé à l'Association de lui faire part de ses vues. Il est apparu sans équivoque que les professeurs n'aimaient pas le rapport. Aussi, lorsque nous avons été invités à présenter un mémoire, nous l'avons fait. J'ai présenté un mémoire et une discussion importante a eu lieu au cours d'une réunion de l'Association canadienne des professeurs de droit concernant ce rapport. Il est difficile de faire participer des avocats, parce que la pratique du droit les tient très occupés, les clients se bousculant à leur porte pour obtenir des conseils. Il est

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I know from reading the evidence of the Canadian Bar Association that they were not involved in the beginning, they were not involved as things went along, and they certainly were not involved when the Uniform Evidence Act was published, referred to the Department of Justice, and came out as Bill S-33.

Senator Deschatelets: Are you saying that, once the conference made its report, it should have been tabled by the Minister of Justice as a green paper to promote discussion on this matter?

Professor Schiff: That could have been done. In the fall of 1981, quite by accident, I found out that the task force report had been adopted by the Uniform Law Conference of Canada. This was through meeting a friend on the street who was on that task force. I asked him what was being planned, and he told me that they were drafting the Uniform Evidence Act. I asked him for a copy of it and he told me that the draft was not available yet. I asked him if he would send me a copy when it was available and he said we would. I waited for that, and around Christmas of 1981 I telephoned him and asked for a copy. At that time he told me he only had the one copy but would be pleased to photocopy it for me. He did so, and that is know I received my copy. I then asked him how I might obtain a copy of the report, and he said that the members of the task force were not given one. I asked him where I might obtain one and he referred me to the Department of Justice. I called the officials of the Department of Justice and was told that Carswell's would be publishing it. I called a friend at the department and asked him for a copy and he said he could not spare it. Carswell's finally published that during the following summer, and since I know someone at Carswell's I picked up a free copy. Otherwise I would have had to pay $80.

The next thing I heard was that this bill was presented in the Senate, and I learned that from a notice in the paper. I immediately telephoned Ottawa and asked the Department of Justice office of publicity to send me a copy of the bill.

When I told people that the Uniform Evidence Act was published and available in the fall of 1981 or the beginning of 1982, they were amazed. I was running photo copies off on my photocopying machine so that people would have copies. Several downtown lawyers had not heard of it, and I made copies available to them.

Senator Deschatelets: Madam Chairman, the same criticism has been levelled by the Canadian Bar Association, whether it was well-founded or not.

The Chairman: There appears to be a serious hiatus in our law-making process. Perhaps as a result of our experience, the Minister of Justice will take notice of those criticisms, and I am sure he will.

[*Traduction*]

difficile d'obtenir qu'ils fassent quelque chose à moins qu'on le leur ait demandé particulièrement.

Je sais, après avoir lu les témoignages de l'Association du barreau canadien, que ses membres n'ont pas participé dès le début, et même par la suite. Chose certaine, ils n'ont pas pris part au processus lorsque la Loi uniforme sur la preuve a été publiée, renvoyée au ministère de la Justice, et déposée devant le Parlement dans le projet de loi S-33.

Le sénateur Deschatelets: Vous croyez qu'une fois que la Conférence a fait son rapport, le ministre de la Justice aurait dû déposer un Livre vert, afin d'encourager la disucssion sur cette question?

M. Schiff: On aurait pu procéder de cette façon. Au cours de l'automne de 1981, tout à fait par hasard, en rencontrant dans la rue avec un ami qui faisait partie de ce groupe de travail j'ai appris que le rapport du groupe de travail avait été adopté par la Conférence canadienne de l'uniformisation du droit. Je lui ai demandé quels étaient leurs projets, et il m'a dit qu'ils étaient en train de rédiger la Loi uniforme sur la preuve. Je lui en ai demandé un exemplaire et il m'a dit que le projet n'était pas encore prêt. Je lui ai demandé s'il pouvait m'en faire parvenir une copie lorsqu'il serait publié et il a acquiescé. J'ai attendu et aux alentours de Noël 1981, je lui ai téléphoné et lui ai réitéré ma demande. Il m'a déclaré à l'époque qu'il ne possédait qu'un seul examplaire, mais qu'il serait heureux de m'en faire une photocopie. C'est ce qu'il a fait et c'est ainsi que j'ai obtenu ma copie. Je lui ai ensuite demandé comment il me serait possible de me procurer un exemplaire du rapport et il m'a dit que les membres du groupe de travail n'en avaient pas reçu. Je lui ai demandé où il serait possible de s'en procurer un et il m'a dit de m'adresser au ministère de la Justice. J'ai appelé les fonctionnaires de ce ministère qui m'ont dit que Carswell publierait le rapport. J'ai appelé un ami du ministère pour lui demander un exemplaire et il m'a répondu qu'il n'avait aucun exemplaire disponible. Carswell a finalement publié le rapport l'été suivant et, étant donné que je connais un représentant de cette société, j'ai obtenu gratuitement un exemplaire, sans quoi j'aurais dû payer $80.

J'ai ensuite appris que le projet de loi devait être présenté au Sénat, et ce, grâce à un avis publié dans le journal. J'ai immédiatement téléphoné à Ottawa et ai demandé au bureau de la publicité du ministère de la Justice de m'envoyer un exemplaire du projet de loi.

Lorsque j'ai dit à certaines personnes que la Loi uniforme sur la preuve était publiée et serait disponible au cours de l'automne 1981 ou au début de 1982, ils étaient surpris. J'ai utilisé ma machine à photocopier pour pouvoir distribuer des exemplaires. Plusieurs avocats du centre-ville n'étaient pas au courant et je leur ai remis des copies.

Le sénateur Deschatelets: Madame le Président, qu'elle soit fondée ou non, la même critique a été formulée par l'Association du barreau canadien.

Le président: Il semble y avoir une lacune sérieuse dans notre méthode d'élaboration des lois. Peut-être qu'à la suite de notre expérience, le ministre de la Justice prendra note de ces critiques et je suis certaine qu'il le fera.

[*Text*]

As you may be aware, the department will go over all the evidence we have heard and will hear to the end of June when Parliament adjourns. The departmental officials will go over these criticisms and suggestions in detail. I am hopeful that, in the fall, not only members of the bar, but members of the academic community will be aware of the revisions.

It is the intention at this point to produce some kind of evidence act, and fortunately the Minister of Justice has said that he is not rushing anyone, that he hopes the proposed legislation will be acceptable to everyone, and that it satisfies the criticisms levelled by those concerned.

On behalf of the members of the committee, I thank you for your appearance today.

Honourable senators, I should like to remind you that we have a meeting scheduled tomorrow at 4 p.m. At that time the officials from the Canadian Business Equipment Manufacturers Association will appear before the committee.

Senator Asselin: On the same bill?

The Chairman: Yes.

Senator Asselin: Why are we proceeding with this bill when we know that this is a bill which is not acceptable? All of the witnesses who have appeared before the committee have said that. Why waste our time? We should be doing something else. We should report this bill to the Senate recommending that it be referred back to the department and that the department re-write the bill. Why waste our time?

The Chairman: Senator Asselin, there are probably two aspects to your comments. First of all, it would be unfair to say that all the witnesses think the bill is a bad one.

Senator Asselin: The vast majority of them think so.

The Chairman: For instance, Mr. Greenspan and the two women counsellors who appeared the week prior to Mr. Greenspan's appearance had serious objections to specific areas of the bill, but in general they approved of the bill.

I think Mr. Justice Pigeon in fact approved of the bill.

Senator Asselin: He did not say very much.

The Chairman: But he did say that he approved of the general idea.

All we can hope to achieve is to get on our record in the next couple of weeks as much comment on the bill as possible so that the departmental officials can review that during the summer. That being the case, they will have all of the suggestions and criticisms and we can hope to be presented with a modified and improved bill in the fall.

Senator Deschatelets: How many witnesses are lined up?

The Chairman: We have the Canadian Business Equipment Association scheduled for tomorrow. A meeting was scheduled

[*Traduction*]

Comme vous le savez probablement, le ministère examinera tous les témoignages que nous avons entendus et que nous entendrons jusqu'à l'ajournement du parlement, à la fin du mois de juin. Les fonctionnaires du ministère étudieront en détail ces critiques et ces propositions. J'espère qu'à l'automne, non seulement les membres du Barreau mais aussi les membres de la communauté universitaire seront informés des révisions.

Actuellement, l'objectif est de produire une loi sur la preuve, et le ministre de la Justice a heureusement déclaré qu'il ne pressait personne, qu'il espérait que la loi envisagée sera acceptable pour tout le monde et qu'elle répondra aux critiques formulées par les intéressés.

Au nom des membres du comité, je vous remercie d'avoir comparu aujourd'hui.

Honrables sénateurs, je désire vous rappeler que nous avons une réunion prévue pour demain à 16 heures, au cours de laquelle les représentants de l'Association canadienne des fabricants d'équipement de bureau comparaîtront devant le comité.

Le sénateur Asselin: Relativement au même projet de loi?

Le président: Oui.

Le sénateur Asselin: Pourquoi poursuivons-nous l'étude de ce projet de loi alors que nous savons qu'il n'est pas acceptable? Tous les témoins qui ont comparu devant le comité l'ont déclaré. Pourquoi perdre notre temps? Nous devrions nous occuper d'autre chose. Nous devrions faire rapport de ce projet de loi au Sénat en recommandant qu'il soit renvoyé au ministère afin que ce dernier procède à une nouvelle rédaction. Pourquoi perdre notre temps?

Le président: Sénateur Asselin, vos remarques comportent deux aspects. Tout d'abord il est injuste de dire que tous les témoins sont d'avis que le projet est mauvais.

Le sénateur Asselin: C'est l'avis de la grande majorité.

Le président: Par exemple, M. Greenspan, ainsi que deux conseillers qui ont comparu avant lui ont formulé des objections sérieuses sur des points précis du projet de loi mais, dans l'ensemble, elles l'approuvaient.

En fait, je pense que le Juge Pigeon approuve le projet de loi.

Le sénateur Asselin: Il n'était pas très enthousiaste.

Le président: Mais il a déclaré qu'il approuvait l'idée générale.

Tout ce que nous pouvons espérer, c'est d'obtenir, au cours des prochaines semaines, le plus d'observations possible au sujet du projet de loi afin que les fonctionnaires du ministère puissent les étudier au cours de l'été. Ils auront ainsi en main toutes les propositions et critiques, et il est à espérer qu'on nous présentera un projet de loi modifié et amélioré à l'automne.

Le sénateur Deschatelets: Combien de témoins doivent comparaître?

Le président: L'Association canadienne des fabricants d'équipment de bureau doit comparaître demain. Une réunion

S. Schiff, Evidence in the Litigation Process, 2d ed. 1983

PREFACE

This second edition comes at what may be a critical juncture in the development of Canadian evidence law. A new Canada Evidence Act, modelled closely on the Uniform Evidence Act, has been introduced into Parliament. If the statute is ultimately enacted, counterparts similar in content are likely to follow in at least some of the provinces. Where that occurs, the fabric of the common law regime explored in the following pages will disappear, replaced by what are, in all but name, codes of the law.

That, I am convinced, would not be desirable.

Evidence law should remain flexible, capable of ready and wise response to new problems of trial process as they arise. A comprehensive statutory statement cannot fit this bill. Legislation necessarily sets out doctrine as conceived at a given point of time, frozen into a particular set of authoritative words. Statutory policy and language repel judicial attempts to adjust as need dictates. Granted, inflexibility may be a small price to pay if the body of common law supplanted is defective beyond the power and will of judges to repair. Fortunately, that is not the case in this country. Most of the common law of evidence is tolerably adapted to the problems it must solve. Most of what is not can be corrected in the courts. That Canadian judges are increasingly willing to take on the job is shown by some of the more recent judicial efforts this book canvasses.

Even assuming that a comprehensive statutory statement of evidence law were desirable, its inflexibility dictates that policy and language must be wisely conceived in the first instance. Here the Uniform Evidence Act is deeply flawed. For the most part embodying recommendations of the Federal/Provincial Task Force on Uniform Rules of Evidence, its provisions carry the inadequacies of the Task Force's work. Shallow research and analysis, unwarranted assumptions about the wisdom of existing doctrine, mistakes in articulating doctrine: all have left their mark. In some instances, although the Task Force came to sensible conclusions, its parent body, the Uniform Law Conference, rejected resulting recommendations. Examples are discussed at relevant points in this book. In sum, even if evidence law in Canada should be translated into statutory form, we deserve better than the Uniform Evidence Act.

As in the first edition, I have omitted most supporting references a student in a first course in evidence law would not likely want to look up. Unless widespread enactment of the Uniform Evidence Act renders the research useful only to historians, I still contemplate publishing the references as footnotes in a future edition or in a supplementary volume. For this edition, the cases have been checked through law reports and unpublished judgments issued up to late February 1983. Statutes have been rendered current as of mid-April.

I am grateful to those who have given permission for the reprinting of excerpts from the books, periodical articles and other materials indicated: American Bar Association (ABA Model Code of Professional Responsibility, rev. 1980, copyright American Bar Association); American Law Institute

MAR 0 2 1988

The LORD NELSON
P.O. Box 700
Halifax, Canada
B3J 2T3

March 1, 1988

Royal Commission on the Donald
Marshall Jr. Prosecution
Maritime Centre, Suite 1026
1505 Barrington St.
Halifax, N.S.
B3J 3K5

Attention: Ms. Susan Ashley

Dear Ms. Ashley:

Enclosed please find The Lord Nelson Hotel's function contracts for your upcoming function.

Please read them over carefully, and if all the details are correct, sign the contracts and return the yellow copies to my attention in the Sales Office. Please note that receipt of the signed yellow copies of the contracts is confirmation of your booking.

If changes or corrections are necessary, please contact me as soon as possible.

The Lord Nelson Hotel looks forward to hosting your upcoming event.

Sincerely,

Catherine A. Meery
Sales & Functions Coordinator
THE LORD NELSON HOTEL

Encl.

CM/bk

MAR 0 2 1988

COX, DOWNIE & GOODFELLOW

BARRISTERS AND SOLICITORS

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LES D. DOLL

OUR FILE: 8118-1

March 1, 1988

COPY

The Prothonotary
The Law Courts
1815 Upper Water Street
HALIFAX, N.S.

Dear Sir:

RE: 1988 S.H. No. 63241
MacKeigan et al. v. Hickman et al.

Exhibit "H" and "I" to my Affidavit of January 25, 1988 were intended to be the January 5, 1988 letters of Mr. David Orsborn to MacKeigan and Macdonald, JJ.A., respectively. It has been brought to my attention that when we were putting the Exhibits together the Exhibit "I" is correct (the Macdonald letter) but - in some instances at least, and possibly in all instances - the Exhibit "H" (the MacKeigan letter), by inadvertence, repeated the first page of the Macdonald letter.

I regret this confusion, and enclose herewith the first page of the January 5, 1988 letter from David Orsborn to Mr. Justice MacKeigan. This single page is the correct first page of Exhibit "H" to my Affidavit.

Yours very truly,

R. J. Downie

RJD:cmg
Enclosure
cc. Mr. David B. Orsborn
Mr. Jamie W.S. Saunders
Mr. James Bissell
Mr. Douglas Rutherford

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

MAR 1988

MARITIME CENTRE, SUITE 1026, 1505 BARRINGTON STREET, HALIFAX
NOVA SCOTIA, B3J 3K5 902-424-4800

CHIEF JUSTICE T. ALEXANDER HICKMAN
CHAIRMAN

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS
COMMISSIONER

THE HONOURABLE
MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

BY COURIER

January 5, 1988

Hon. Mr. Justice Ian MacKeigan
Supreme Court of Nova Scotia
Appeal Division
1815 Upper Water Street
Law Courts Building
Halifax, Nova Scotia B3J 1S7

Court 19 88 No.
MacKeigan vs. Hickman
This is Exhibit "H" referred to in
the Affidavit of R.J. Downie
Sworn before me this 25th day of
January A.D. 19 88 at Halifax
N. S.
A Barrister of the Supreme Court
of Nova Scotia

My Lord:

As part of its mandate, the Commission is reviewing the 1982 Reference to the Court of Appeal by the Federal Minister of Justice. As a result of this Reference, the Court set aside Mr. Marshall's 1971 conviction and directed that a verdict of acquittal be entered.

The decision in the Reference has been subject to some public criticism for the apparently obiter comments in the last two pages. These comments were directed at Mr. Marshall's responsibility for his predicament and were later referred to frequently by those considering compensation for Mr. Marshall. In addition, a question has been raised concerning the participation in the Reference by Mr. Justice Pace, who was Attorney General at the time of Mr. Marshall's conviction.

After our own review, we are unsure of the record relied on by the Court in reaching its conclusions. It is not clear what affidavits were before the Court - reference is made in the reasons to certain affidavits but the transcript suggests that the affidavits were not in fact before the Court. In addition, we would like to understand why the affidavits (and cross-examination) of the potential police witnesses were not admitted, given the possible importance of these witnesses in determining why 1971 witnesses were now recanting.

PATTERSON KITZ
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BEDFORD, NOVA SCOTIA

March 1, 1988

BY HAND

Mr. John Briggs
Director of Research
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear Mr. Briggs:

Our File No. 9201/1

I acknowledge receipt of your subpoena covering the second batch of 45 cases.

I have requested the files be pulled and will contact you when they are ready for review.

Yours truly,

Catherine M. Hicks

Catherine M. Hicks
Legal Assistant to Darrel I. Pink

CMH/jl

MAR 0 1 1988

DALHOUSIE UNIVERSITY
HALIFAX, N.S.
B3H 1T2

DEPARTMENT OF SOCIOLOGY
AND SOCIAL ANTHROPOLOGY
TELEPHONE: (902) 424-6593

March 1, 1988

Mr. John Briggs
Director of Research
Royal Commission on the Donald Marshall Prosecution
Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear Mr. Briggs:

In keeping with our telephone conversation of February 29, I am writing to notify you that the unavoidable delays we have encountered in our fieldwork, most notably with the RCMP, mean that a final report for the police project can be expected on April 25. This assumes that we will be obtaining consent from the RCMP for our detachment interviews within the next two days.

Sincerely,

Richard Apostle

Richard Apostle

RA:de

DALHOUSIE UNIVERSITY
HALIFAX, N.S.
B3H 1T2

DEPARTMENT OF SOCIOLOGY
AND SOCIAL ANTHROPOLOGY
TELEPHONE: (902) 424-6593

March 1, 1988

Inspector Harry Murphy
Royal Canadian Mounted Police
"H" Division
3139 Oxford Street
Halifax, Nova Scotia

Dear Inspector Murphy:

I am writing to request your earliest cooperation in beginning our planned interviews with the detachments indicated in our memorandum of February 12th to Chief Superintendent Docker. I appreciate that you have been away, and that you have also had an illness in your family to deal with. I do, however, have a very tight deadline for submission of a final report, and would appreciate your assistance in commencing the interviews as soon as possible.

Yours sincerely,

Richard Apostle

c.c.:

Mr. John Briggs
Director of Research
Royal Commission on the Donald Marshall Prosecution

RA:de

MAR 0 1 1988

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DEPARTMENT OF SOCIOLOGY
AND SOCIAL ANTHROPOLOGY
TELEPHONE: (902) 424-6593

March 1, 1988

Mr. John Briggs
Director of Research
Royal Commission on the Donald Marshall Prosecution
Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear Mr. Briggs:

This is to notify you that in accordance with my project plan of December 6, I have put in 14 working days during the month of February, 1988, on the police project. I would appreciate receiving compensation for this work.

I have also enclosed receipts for minor telephone and delivery expenses ($198.54) incurred during February, as well as a bill from the typist I have been using for project work ($539.50).

Yours sincerely,

Richard Apostle

Richard Apostle

Enclosures

RA:de

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ALSO OFFICES AT
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February 26, 1988

CONFIDENTIAL

Professor Bruce Archibald
Dalhousie Law School
Weldon Law Building
Halifax, N.S.
B3H 4H9

Dear Professor Archibald:

Marshall Inquiry
Our File No. 9201/1

Further to the request of John Briggs regarding the Currie, Coopers & Lybrand report, I am pleased to enclose a full copy of the report.

I am also enclosing a document which I understand preceded the report and outlined the objectives of the study that was to be undertaken.

The additional documents requested by Mr. Briggs are being sought although I am not certain that any of them exist. When I have this information, I shall advise.

Yours truly,

Darrel I. Pink

DIP/jl
Enc.

c.c. Mr. John Briggs
Mr. R. Gerald Conrad, Q.C.

Ruby & Edwardh
barristers

11 Prince Arthur Avenue
Toronto, Ontario
M5R 1B2
Telephone (416) 964-9664

MAR 0 1 1988

February 22, 1988

Mr. George MacDonald
Commission Counsel
Royal Commission on the Donald
Marshall, Jr., Prosecution
Maritime Centre
Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear George:

I agree that Mr. Marshall is not essential unless that aspect of Junior Marshall's evidence is challenged in some way, which I hardly expect.

Yours very truly,

Clayton C. Ruby

/ms

Office of the Dean

YORK UNIVERSITY

OSGOODE HALL LAW SCHOOL

4700 KEELE STREET, DOWNSVIEW, ONTARIO M3J 2R5

MAR 0 1 1988

February 26, 1988

George W. MacDonald, Esq.
Commission Counsel
Royal Commission on the
Donald Marshall, Jr. Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear Mr. MacDonald,

Re: Donald Marshall, Jr. Commission of Inquiry

Thank you for your letter of February 16th and for the material which arrived under separate cover.

I am happy to accept your invitation to provide you with a legal opinion on the five issues listed on page 3 of your letter. As I mentioned to Mr. Orsborn when we met last week, I will do my best to have the opinion completed by Monday, March 7th, and would expect to be able to deliver it to you by the end of that week.

Thank you for inviting me to provide a response to important constitutional questions that have arisen in a significant Canadian legal matter.

Yours sincerely,

James C. MacPherson
Dean

JCM/P

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February 29, 1988

VIA COURIER

Mr. George MacDonald, Q.C.
Royal Commission on the
Donald Marshall, Jr. Prosecution
Suite 1026
Maritime Centre
1505 Barrington Street
Halifax, N.S.

Dear George:

Our File No. 9201/1

I acknowledge John Briggs' letter to Jamie Saunders dated February 24, 1988 which is further to yours of February 17, 1988. Mr. Briggs' letter was delivered to Jamie and me at a conference on February 26, 1988.

We have requested all the material referred to but in light of the fact that the requests are broader than those originally made, we shall not have the material to you by March 1, 1988. We will endeavour to expedite the process and shall advise when material is available.

Yours truly,

Darrel I. Pink

DIP/jl

c.c. Mr. R. Gerald Conrad, Q.C.