RG 44 vol. 284 #2

NOTES
FOR
FINAL
SUBMISSION!

25	We conclude that Mr. MacIntyre's evidence on this point cannot be accepted.
29	Having analyzed the contents of the R.C.M.P. telex (Vol. 26, page 90), and considering the evidence given at this Inquiry, we conclude that the information contained in the telex could only have been provided to the R.C.M.P. by MacIntyre.
30	Further, as noted earlier we conclude that MacIntyre told Constable Wood early in the morning on Saturday, May 29, before Sandy Seale had died, that Marshall was probably responsible, and that the incident happened as a result of an argument between Seale and Marshall.
30	In our opinion the evidence establishes that MacIntyre concluded early on May 29, 1971 that Donald Marshall, Jr. stabbed Sandy Seale.
33	It is our view that MacIntyre cannot be believed when he says that he did not know Patterson, nor know where Patterson lived.
54	It is our view that MacIntyre and Urquhart employed reprehensible techniques and conduct in their questioning of Patricia Harriss and that they coerced her to give a statement which they knew she did not believe, and one that in fact was completely different than she wanted to give.
61	MacIntyre's evidence, concurred in by Urquhart, that every word that was uttered at Louisbourg was taken down and is contained in Chant's second statement is not capable of belief, in our view.
63	We are of the opinion that MacIntyre formed a theory on the morning of May 29, 1971 and then set out to find evidence to support his theory. We believe his actions in obtaining the untrue second statements from Pratico, Chant and Patricia Harriss are to be condemned, and constitute malicious conduct by a senior Police Officer.
65-66	If Your Lordships conclude that the evidence given at Marshall's Trial by Pratico, Chant and Harriss was put in their mouths in the first instance by MacIntyre, we urge you to go further and to recommend that consider-

ation be given to laying charges against John MacIntyre for obstruction of justice, together with any other charge which may be supported by the conclusion which Your Lordships reach.

69-70 We do not conclude that it was department policy in 1971 for prosecutors to disclose contradictory statements to the defence in the absence of a request to do so. We are, however, of the view that this was the law at the time and that it should have been department policy to require such disclosure by Crown Prosecutors.

70 ...we conclude that in preparation for Trial their [Defence Counsel] conduct fell below the standard which one could expect of a reasonably competent practitioner in Sydney at that time.

71 In the defence of a murder case, where as here, there were no financial restraints placed on the conduct of the defence (4693), it is simply unacceptable for no independent inquiries to be made by defence counsel.

74 ... Mr. Justice Dubinsky's misinterpretation of s.11 was so basic that it should have been picked up by defence counsel and argued on Appeal.

79 We agree with this conclusion.

86 It is our conclusion that the investigation carried out by Inspector Marshall was done incompetently.

88 ... we cannot conclude with any degree of certainty that Inspector Marshall's report was ever transmitted to anybody in the Attorney General's Department.

90 It is our conclusion that the failure to disclose to defence counsel the fact that Jimmy MacNeil had come forward with information concerning Roy Ebsary was a breach of a fundamental obligation to disclose on the part of the Attorney General's Department, whether that fault be placed on the doorstep of the local Crown Prosecutor or of the Halifax Office.

90-91	... we do not support the view that there is a duty on the Appeal Court to identify and raise issues of its own volition and accordingly, we do not criticize the Court which heard Marshall's Appeal for failing to identify the error of the Trial Judge.
91-92	We do not criticize the assumption of Correction Services Canada that persons incarcerated in institutions are guilty.
96	The 1982 R.C.M.P. investigation headed by Sergeant Wheaton and Corporal Carroll was in our view conducted competently.
110	... the Decision insofar as it attacks the behaviour of Donald Marshall, Jr., is not supported by the evidence before the Court and that such comments are gratuitous and unnecessary to support the decision to acquit Donald Marshall, Jr.
115-116	... we have concluded that Donald Marshall, Jr., was not responsible for his own conviction. The Reference decision found that he was in large measure responsible. We have concluded and urge Your Lordships to conclude that this finding of the Appeal Court was completely unsupported by the evidence and is wrong.
121	In our view Coles, a person who by his own admission had no expertise in the criminal law, should not have taken it upon himself to urge Edwards to present a No Crown position to the Court of Appeal.
124	... it was a serious failure on the part of the Attorney General's Department to allow Edwards to make the argument that Marshall was to blame. It was also in our view wrong for Mr. Edwards to put before the Court a position which he believed to be untrue.
130	In our view, Coles' attitude, as expressed in his memo of October 25, 1983, is characterized by lack of information and is illustrative of his refusal to consider the wrongful conviction of Donald Marshall, Jr., to be a serious issue.

136 ... being fair to Donald Marshall, Jr., was not a concern of the Attorney General's Department.

136-137 In our view, it is not acceptable for a person who has been wrongfully convicted of a crime to be required to pay legal fees in order to prove his innocence and to negotiate compensation for that wrongful conviction.

137-138 Because of the findings of fact which we have urged upon Your Lordships in connection with:

1. the conduct of John MacIntyre and William Urquhart;

2. the failure by the representatives of the Attorney General's Department to disclose the information they had concerning the fact that Jimmy MacNeil had come forward in 1971, (prior to Marshall's Appeal), and

3. the 1971 R.C.M.P. investigation.

we believe that a further look at the question of compensation would be in order.

139 ... that the Department [Attorney General's Department] was prepared to give the benefit of every doubt to Thornhill and MacLean.

140 In our view, this press release was misleading.

141 This test is not in our view the normal test that is applied with respect to this type of decision, and such a test should not be adopted.

143 In MacLean, we are also of the view that the opinion provided by Coles to Giffin was misleading insofar as it purported to represent the views of Gale.

145 In our view, Gordon Coles' conduct must be condemned. There is no indication that the Attorney General's Department responded thoughtfully and positively to requests being

made by Marshall through his counsel. It is simply impossible in our view to argue that Marshall was treated fairly by the Attorney General's Department.

147-148 In our view, the lack of independent initiative to conduct an investigation into the suspected illegal conduct of Billy Joe MacLean between November, 1983, and April, 1985, is unacceptable practice on the part of the R.C.M.P.

148 ... in our view, that the major reason why the R.C.M.P. eventually concluded that they were not going to proceed with the laying of charges in the Thornhill matter was the fact that they knew that the Attorney General's Department was opposed to such a course of action.

153 ... with respect to the 1971 behaviour of Donald Marshall, Jr., we are of the view that his failure to advise anyone of an attempt to obtain money from Ebsary and MacNeil was not a factor which contributed to his wrongful conviction.

CITY OF SYDNEY POLICE DEPARTMENT

CONTINUATION REPORT

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C O P Y

1971
May 31st, 6:30 P.M.

Statement of George Wallace McNeil, 18 yrs., 91 Bungalow Road and Roderick Alexander McNeil, 17 yrs., 84 Bungalow Road, Coxheath.

We left the dance at St. Joseph's Hall, Friday hight, 11:40 P.M. We walked through the park and seen 2 men hanging around. Description as follows:

1 man - grey haired; grey or white top coat - 5-9 - W. 180 lbs. hair flat on his head no wave - straight back - round fat face trampish looking - late 50's

2nd man - tall 6 ft. or better or thin average size - dark hair - late 30 ~~in~~ early 40 yrs - thin face. brown jacket - short.

They spoke to a fellow and girl sitting on a bench closest to the railroad tracks as you came over the hill. They asked them for a cigarette. The grey haired fellow said he had ~~just~~ a dollar. We kept on home. We called at Fatima at a school dance on the way home.

Q. Did you know Sandy Seale
A. Yes, to see him

Q. You seen him at the dance hall that night
A. yes

Q. He was there when you left
A. Yes. He was outside of the hall - all the tickets were sold early.

Q. Would you know them again
A. We don't know.

Signed: George McNeil
Sandy McNeil

Submission

TODAY IS THE 90TH DAY OF HEARINGS FOR THIS COMMISSION. 11~~2~~3 WITNESSES HAVE GIVEN EVIDENCE, SOME OF THOSE ON MORE THAN ONE OCCASION. AS YOU KNOW, THERE ~~ARE~~ is ~~TWO~~ one TOPIC~~S~~ WHICH ~~WERE~~ was NOT COVERED AS FULLY AS WE WOULD HAVE WISHED. WITH ~~THOSE~~ that EXCEPTIONS WE ARE CONFIDENT THAT ALL EVIDENCE WHICH WAS AVAILABLE TO ASSIST YOUR LORDSHIPS IN DISCHARGING YOUR MANDATE HAS BEEN PRESENTED.

AT THE OUTSET I MUST STATE THAT ALL PARTIES, AND THEIR COUNSEL, HAVE COOPERATED FULLY WITH COMMISSION COUNSEL AS WE GATHERED INFORMATION AND PRESENTED EVIDENCE TO THE COMMISSION. THE HEARINGS WOULD HAVE TAKEN MUCH LONGER HAD IT NOT BEEN FOR THIS ASSISTANCE AND I WANT TO EXPRESS OUR THANKS TO ALL OF THOSE PARTIES AND THEIR COUNSEL.

ALSO, ON BEHALF OF ALL COUNSEL, I WOULD LIKE TO THANK YOUR LORDSHIPS FOR YOUR PATIENCE IN ALLOWING US TO PRESENT EVIDENCE AND QUESTION WITNESSES IN THE

WAY COUNSEL CONSIDERED BEST SUITED THE NEEDS OF THEIR CLIENT. YOU WERE ALWAYS WILLING TO ACCOMMODATE COUNSEL, AND THE WITNESSES, AND TO SIT AT UNUSUAL HOURS WHEN REQUESTED. FURTHER, YOU WERE PREPARED TO QUICKLY RULE ON VARIOUS QUESTIONS PUT TO YOU BY COUNSEL THROUGHOUT THE HEARINGS AND THEREBY AVOID DELAYS AND CONFUSION WHILE DECISIONS WERE AWAITED.

AT THIS STAGE IT PERHAPS WOULD BE USEFUL TO STATE AGAIN OUR UNDERSTANDING OF THE MANDATE WHICH WAS GIVEN TO YOUR LORDSHIPS BY THE GOVERNMENT OF NOVA SCOTIA. SIMPLY PUT, YOU WERE ASKED TO DEAL WITH TWO QUESTIONS.

1. WHY WAS DONALD MARSHALL, JR. WRONGFULLY CONVICTED OF THE MURDER OF SANDY SEALE?

2. WHAT, IF ANYTHING, SHOULD BE DONE TO PREVENT A REOCCURRENCE OF THIS TRAGEDY?

YOUR LORDSHIPS INSTRUCTED YOUR COUNSEL TO GATHER, AND PRESENT, ALL EVIDENCE CONSIDERED RELEVANT BY US TO ASSIST YOUR LORDSHIPS IN ANSWERING THOSE TWO VERY GENERAL, AND EXTREMELY DIFFICULT, QUESTIONS. WITH ONE EXCEPTION WE ARE SATISFIED THAT YOU HAVE SUCH EVIDENCE. AS YOU KNOW THE APPEAL DIVISION OF THE NOVA SCOTIA SUPREME COURT HAS UPHELD THE DECISION OF CHIEF

JUSTICE GLUBE WHO RULED THAT CABINET MINISTERS COULD BE QUESTIONED CONCERNING DISCUSSIONS HELD, AND DECISIONS MADE, ON TOPICS WHICH ARE RELEVANT TO YOUR LORDSHIPS. WITH THE FULL CO-OPERATION OF THE MINISTERS INVOLVED, AND COUNSEL FOR THE ATTORNEY GENERAL, WE WERE ABLE TO PRESENT THAT EVIDENCE THIS MORNING. THE OUTSTANDING ISSUE CONCERNS POTENTIAL EVIDENCE FROM MEMBERS OF OUR APPEAL DIVISION, AND THAT MATTER IS BEFORE THE COURTS. ~~AS YOU KNOW,~~ THE TOPIC INVOLVING THE JUDGES IS RELATIVELY NARROW AND WE DID NOT CONSIDER IT APPROPRIATE TO DELAY THE SUBMISSIONS OF COUNSEL PENDING THE OUTCOME OF THE APPEAL. IF NECESSARY, WE MAY ASK YOU TO RECONVENE AT A LATER DATE TO HEAR EVIDENCE FROM THE JUDGES.

AT THIS STAGE VARIOUS ORAL SUBMISSIONS ARE TO BE PRESENTED IN AN ATTEMPT TO INTERPRET THE EVIDENCE, AND TO PUT FORWARD RECOMMENDATIONS WHICH MAY BE OF ASSISTANCE TO YOU. THE FIRST SUBMISSION WILL BE THAT

OF COMMISSION COUNSEL. FOLLOWING WILL BE SUBMISSIONS ON BEHALF OF THOSE VARIOUS PARTIES WHO WERE GRANTED STANDING WHO WISH TO BE HEARD. AFTER COUNSEL FOR THOSE PARTIES ARE HEARD, A PRESENTATION WILL BE MADE ON BEHALF OF THE CANADIAN BAR ASSOCIATION. THE FINAL ORAL SUBMISSION WILL AGAIN BE BY COMMISSION COUNSEL AND WILL BE RESTRICTED TO COMMENTS ON ANY POINTS WHICH MAY ARISE DURING SUBMISSIONS BY OTHER COUNSEL, AND WHICH HAVE NOT BEEN CONSIDERED DURING OUR INITIAL SUBMISSION.

ROLE OF COMMISSION COUNSEL

THE ROLE OF COMMISSION COUNSEL IS ONE WHICH IS FOREIGN TO, AND NOT COMPLETELY UNDERSTOOD BY, MOST PRACTISING LAWYERS. IT IS LIKELY THE PUBLIC AND THE MEDIA HAVE THE SAME DIFFICULTY AND FOR THEIR BENEFIT WE THOUGHT IT MIGHT BE USEFUL IF WE TOOK A FEW MINUTES TO EXPLAIN THAT ROLE.

COMMISSION COUNSEL ARE RETAINED BY THE COMMISSIONERS AND ASKED TO LOCATE, ASSEMBLE AND PRESENT IN PUBLIC HEARINGS ALL THE RELEVANT EVIDENCE CONCERNING THE TOPIC UNDER REVIEW. COMMISSION COUNSEL DO NOT ADVOCATE ANY POINT OF VIEW BUT ARE EXPECTED TO PRESENT ALL RELEVANT EVIDENCE. WE ENJOY THE LUXURY OF BEING ABLE TO ASK ANY QUESTION OF ANY WITNESS BECAUSE THERE IS NO ANSWER WHICH COULD BE CONSIDERED HARMFUL TO OUR POSITION. IN ORDER TO MAKE CERTAIN ALL RELEVANT EVIDENCE IS PRESENTED IT SOMETIMES IS NECESSARY TO CROSS-EXAMINE

WITNESSES. WHILE THIS MAY GIVE THE APPEARANCE OF BIAS TOWARD A PARTICULAR POINT OF VIEW, THAT APPROACH MUST BE ADOPTED, WHEN REQUIRED, TO ASSURE THAT COMMISSION COUNSEL DISCHARGE THEIR RESPONSIBILITY. IN THEORY, IF COMMISSION COUNSEL DISCHARGED THEIR RESPONSIBILITY FULLY, THERE WOULD BE NO NEED FOR OTHER COUNSEL TO ASK ANY QUESTIONS. ONE MUST ONLY RECALL THE EXTENT OF CROSS-EXAMINATION CONDUCTED BY OTHER COUNSEL IN THIS CASE TO REALIZE THAT, AT LEAST IN THEIR EYES, WE DID NOT PERFORM OUR TASK AS COMPLETELY AS EXPECTED.

AT THIS STAGE WE ARE THE ONLY COUNSEL WHO REASONABLY CAN BE EXPECTED TO PRESENT TO YOUR LORDSHIPS AN ASSESSMENT OF ALL THE EVIDENCE AND TO SUGGEST THE VARIOUS FINDINGS OF FACT WHICH MAY BE SUPPORTED BY THE EVIDENCE. WE HAVE ATTEMPTED TO BE IMPARTIAL IN ASSESSING THE EVIDENCE, ALTHOUGH NECESSARILY WE HAVE HAD TO MAKE DECISIONS WHICH MAY APPEAR TO PLACE US IN A POSITION

OF BEING ADVOCATES FOR PARTICULAR POINTS OF VIEW.

OTHER COUNSEL WHO WILL ADDRESS YOU REPRESENT CLIENTS AND THEIR TRADITIONAL AND EXPECTED ROLE IS TO DIRECT YOUR ATTENTION TO THE EVIDENCE WHICH SUPPORTS THEIR CLIENT'S POSITION AND TO SUGGEST WAYS IN WHICH YOU CAN INTERPRET EVIDENCE IN FAVOUR OF THEIR CLIENT, EVEN THOUGH THE EVIDENCE, ON THE SURFACE, MAY APPEAR TO BE ADVERSE TO THEIR CLIENT'S INTERESTS.

SIMPLY PUT, THE ROLE OF COMMISSION COUNSEL AT THIS TIME IS TO PRESENT OUR ASSESSMENT OF ALL THE EVIDENCE. IN MANY INSTANCES, IT WOULD NOT BE POSSIBLE TO COMMENT ON THE EVIDENCE WITHOUT AT THE SAME TIME REFERRING TO CONCLUSIONS WHICH WE CONSIDER ARE SUPPORTED BY THE EVIDENCE. EVEN IF IT WERE POSSIBLE, HOWEVER, WE DO NOT CONSIDER IT WOULD BE PROPER FOR COMMISSION COUNSEL TO PROCEED IN THAT WAY. IF WE ARE TO CONTINUE

TO PERFORM THE TRADITIONAL ROLE OF COMMISSION COUNSEL, WE ARE LIKELY TO BE INVOLVED FURTHER WITH YOUR LORDSHIPS AS YOU PREPARE YOUR REPORT. WITH VERY FEW EXCEPTIONS THE TRADITION IN CANADA IS FOR COMMISSION COUNSEL TO BE AVAILABLE TO PROVIDE WHATEVER ADVICE AND ASSISTANCE THE COMMISSIONERS REQUIRE AFTER THE CONCLUSION OF THE PUBLIC HEARINGS. IT WOULD NOT BE FAIR IF WE WERE TO KEEP OUR VIEWS SECRET CONCERNING THE CONCLUSIONS WHICH WE CONSIDER ARE SUPPORTED BY THE EVIDENCE AND TAKE THE OPPORTUNITY AT A LATER DATE IN PRIVATE TO URGE THOSE VIEWS UPON YOU. ACCORDINGLY, WHEREVER WE CONSIDER THE EVIDENCE SUPPORTS PARTICULAR FINDINGS OF FACT, OR CONCLUSIONS, WE WILL IDENTIFY THOSE AND REFER TO THE EVIDENCE WE CONSIDER SUPPORTS OUR RECOMMENDATIONS. ON THOSE OCCASIONS WHERE WE DO NOT HOLD A FIRM VIEW, WE WILL IDENTIFY THE VARIOUS ALTERNATE FINDINGS OF FACT OR CONCLUSIONS WHICH COULD BE SUPPORTED, BUT EXPRESS NO COMMENT BEYOND THAT. WE EMPHASIZE, HOWEVER, THAT

IN PRESENTING OUR SUBMISSIONS WE ARE ACTING AS YOUR COUNSEL AND NOT AS ADVOCATE FOR ANY PARTICULAR POINT OF VIEW, EVEN OUR OWN. ACCORDINGLY, IN MY SUBMISSION TODAY, I WILL NOT REFER TO, NOR COMMENT ON, THE SUBMISSIONS OF OTHER COUNSEL ON POINTS COVERED BY US, OR MAKE ANY ATTEMPT TO CONVINCE YOU THAT THEIR ARGUMENTS MUST BE WRONG AND OURS MUST BE CORRECT.

OUR FORMAL WRITTEN SUBMISSION WAS FILED WITH THE SECRETARY OF THE COMMISSION ON OCTOBER 20, 1988 AND ~~A~~ COPYies OF THAT SUBMISSION HAve been circulated ~~NOW BEEN MARKED AS~~ ________________. I DO NOT PROPOSE TO READ THE CONTENTS OF THAT SUBMISSION TO YOU BUT RATHER TO HIGHLIGHT SOME OF THE MAJOR PORTIONS THEREOF AND TO EXPLAIN IN SOME DETAIL WHY WE ARE URGING YOUR LORDSHIPS TO MAKE CERTAIN FINDINGS AND CONCLUSIONS. IN THE WRITTEN SUBMISSION WE HAVE HIGHLIGHTED ALL CONCLUSIONS WE SUPPORT. I WILL attempt to include ~~BE REFERRING TO~~ ALL OF THOSE CONCLUSIONS IN MY ORAL PRESENTATION.

MAJOR CONCLUSIONS

THE SYSTEM OF ADMINISTRATION OF JUSTICE WHICH PREVAILS IN NOVA SCOTIA, AND MANY OTHER JURISDICTIONS, IS COMPRISED OF MANY PARTS. WHATEVER THE NUMBER OF PARTS BE, HOWEVER, HOPEFULLY THE PURSUIT OF JUSTICE IS THE FOUNDATION UPON WHICH THE SYSTEM IS CONSTRUCTED. JUSTICE MAY BE DEFINED AS BEING FAIR TO ALL PEOPLE AND TREATING PEOPLE RIGHT. CONVERSELY A MISCARRIAGE OF JUSTICE MAY BE DEFINED AS NOT BEING FAIR TO A PERSON OR NOT TREATING A PERSON RIGHT. BY ANY MEASURE, OR BY ANY DEFINITION, THERE WAS A HORRIBLE MISCARRIAGE OF JUSTICE COMMITTED BY OUR SYSTEM IN ITS TREATMENT OF DONALD MARSHALL, JR. TO THIS POINT IN TIME ALL PARTS OF THE SYSTEM WITH WHICH HE CAME INTO CONTACT HAVE FAILED HIM. SOME OF THE FAILURE CAN BE ATTRIBUTED TO CARELESSNESS; SOME TO INCOMPETENCE; SOME TO DELIBERATE ACTS AND SOME BECAUSE PEOPLE JUST DIDN'T CARE. IN OUR

VIEW THE EVIDENCE DOES NOT SUPPORT ANY FINDING THAT WOULD ATTRIBUTE RESPONSIBILITY TO DONALD MARSHALL, JR. FOR HIS WRONGFUL CONVICTION FOR MURDER.

ONCE IT WAS DETERMINED THAT MR. MARSHALL HAD BEEN WRONGFULLY CONVICTED OF MURDER. HE WAS LET OUT OF JAIL RELUCTANTLY; ACQUITTED OF THE MURDER WHICH EVERYONE KNEW HE DID NOT COMMIT, BUT AT THE SAME TIME TOLD THAT IT WAS LARGELY HIS OWN FAULT THAT HE SPENT 11 YEARS IN JAIL; VERY GRUDGINGLY GIVEN COMPENSATION AND TOLD TO PAY HIS OWN COSTS FOR PROVING THAT THE SYSTEM HAD WRONGFULLY CONVICTED HIM. THOSE RESPONSES BY THE VARIOUS PARTS OF OUR SYSTEM OF ADMINISTRATION OF JUSTICE SHOULD BE STRONGLY CRITICIZED.

THE WAY MARSHALL WAS TREATED IS IN STARK CONTRAST TO THE TREATMENT AFFORDED OTHER INDIVIDUALS WHO COME INTO CONTACT WITH THE ADMINISTRATION OF JUSTICE.

SOME KEY PEOPLE IN OUR SYSTEM APPEARED TO GO OUT OF THEIR WAY TO BE UNFAIR TO MARSHALL, YET THEY EXERTED THE SAME DEGREE OF EFFORT TO PROTECT AND PAMPER OTHERS WHOSE ACTIONS APPEARED TO HAVE WARRANTED FURTHER INVESTIGATION OR THE LAYING OF CHARGES. SUCH UNEQUAL TREATMENT OF INDIVIDUALS IN NOVA SCOTIA IS UNFAIR, HENCE UNJUST, AND MUST BE CONDEMNED.

BASED ON OUR ASSESSMENT OF THE EVIDENCE, WHICH I WILL REFER TO IN SOME DETAIL, WE HAVE COME TO THREE FUNDAMENTAL CONCLUSIONS.

1. DONALD MARSHALL, JR. WAS NOT RESPONSIBLE FOR HIS WRONGFUL CONVICTION AND WAS NOT THE AUTHOR OF HIS OWN MISFORTUNE.

2. VIRTUALLY ALL THE INSTITUTIONS INVOLVED IN THE ADMINISTRATION OF JUSTICE IN THIS PROVINCE, AND

THEIR REPRESENTATIVES, WHICH TOUCHED DONALD MARSHALL, JR's LIFE FAILED HIM.

3. ALL INDIVIDUALS HAVE NOT BEEN TREATED FAIRLY BY THE JUSTICE SYSTEM IN NOVA SCOTIA.

THIS COMMISSION, WHICH AFTER ALL IS A PART OF THE ADMINISTRATION OF JUSTICE SYSTEM IN THIS PROVINCE, UNDOUBTEDLY IS CARRYING OUT THE FINAL REVIEW OF THE FACTS WHICH DETAIL MR. MARSHALL'S INVOLVEMENT WITH THE SYSTEM. IN YOUR FINAL REPORT IT IS LIKELY THAT THOUSANDS OF WORDS WILL BE USED TO CATALOGUE THE STORY OF DONALD MARSHALL, JR. AND TO DESCRIBE HOW THE SYSTEM FAILED HIM. WE SUGGEST THAT NO WORDS WILL BE MORE IMPORTANT TO MR. MARSHALL AND HIS FAMILY, HOWEVER, THAN THOSE SIMPLE WORDS WHICH WE URGE YOU TO USE TO TELL HIM THAT HE WAS NOT AT FAULT; THAT HE WAS NOT LARGELY TO BLAME FOR HIS OWN CONVICTION; THAT HE WAS NOT THE AUTHOR OF HIS OWN MISFORTUNE; AND THAT HE WAS NOT TREATED FAIRLY.

WHY WAS MARSHALL CONVICTED

THE PRIMARY REASON FOR CONSTITUTING THIS COMMISSION WAS A DESIRE, EXPRESSED IN VARIOUS WAYS, BY THE PEOPLE OF NOVA SCOTIA TO ATTEMPT TO LEARN WHY DONALD MARSHALL, JR. WAS WRONGFULLY CONVICTED FOR THE MURDER OF SANDY SEALE. EVERYONE NOW KNOWS, AND KNEW AT THE TIME THIS INQUIRY WAS COMMISSIONED, THAT VARIOUS PERSONS WHO GAVE EVIDENCE AT TRIAL RECANTED THAT EVIDENCE AND ADMITTED TO COMMITTING PERJURY. FURTHER IT IS, AND WAS KNOWN, THAT SANDY SEALE WAS KILLED BY ROY EBSARY, AND NOT DONALD MARSHALL, JR. YOU ARE ASKED TO DETERMINE, AMONG OTHER THINGS, WHY PERJURY WAS COMMITTED; AND WHY NO ONE WAS ABLE TO DETECT THE PERJURY AS DONALD MARSHALL WAS BROUGHT TO TRIAL AND CONVICTED. TO ASSIST YOU IN ANSWERING THOSE QUESTIONS I PROPOSE TO REVIEW IN SOME DETAIL THE EVIDENCE SURROUNDING THE OBTAINING OF THE EVIDENCE FROM THOSE PERSONS WHO NOW RECANT THE STORIES

TOLD BY THEM AT TRIAL; AND TO REVIEW THE PERFORMANCE OF THOSE PERSONS WHO SHOULD HAVE BEEN ABLE TO EXPOSE THE PERJURED EVIDENCE.

IN REACHING YOUR CONCLUSIONS, IN OUR OPINION, IT WILL BE ESSENTIAL THAT YOU MAKE FINDINGS OF CREDIBILITY RESPECTING VARIOUS WITNESSES. WHILE COUNSEL ALWAYS SEEK TO AVOID URGING THAT A FINDING OF CREDIBILITY BE MADE, AND THOUGH JUDGES ARE LOATH TO MAKE SUCH A FINDING IF IT IS POSSIBLE TO REACH A DECISION WITHOUT COMMENTING ON CREDIBILITY, IN THIS CASE WE DO NOT BELIEVE IT WILL BE POSSIBLE TO ANSWER THE QUESTIONS WHICH WILL BE PUT TO YOU UNLESS YOU DO ELECT TO ACCEPT THE EVIDENCE OF SOME WITNESSES, AND REJECT THE EVIDENCE OF OTHERS. IN MANY CASES THE EVIDENCE IS DIAMETRICALLY OPPOSED AND IT WOULD NOT BE POSSIBLE TO RECONCILE THE DIFFERENCES BY REFERRING, FOR EXAMPLE, TO THE PASSAGE OF TIME AND CONSEQUENT LOSS OF MEMORY BY THE WITNESSES.

WE ARE COGNIZANT ALSO OF THE COMMENTS FREQUENTLY MADE BY APPEAL COURT JUDGES WHO CRITICIZE TRIAL DIVISION JUDGES FOR SAYING THEY DO NOT BELIEVE A WITNESS WITHOUT GIVING EXPRESS REASONS FOR REACHING THAT CONCLUSION. IF YOU DO CONSIDER IT NECESSARY, THEREFORE, TO MAKE A FINDING THAT A PARTICULAR WITNESS IS NOT TO BE BELIEVED, EITHER IN TOTAL, OR WITH RESPECT TO A PARTICULAR POINT, WE URGE YOU TO SET OUT YOUR REASONS FOR REACHING SUCH A CONCLUSION.

ON SEVERAL OCCASIONS WE WILL SUGGEST TO YOU THAT THE EVIDENCE OF JOHN MacINTYRE ON PARTICULAR POINTS SHOULD NOT BE ACCEPTED. IN THOSE SITUATIONS WE WILL REVIEW THE EVIDENT CONFLICTS IN THE EVIDENCE AND EXPLAIN WHY WE CONSIDER THE EVIDENCE OF VARIOUS WITNESSES SHOULD BE PREFERRED TO THAT OF MACINTYRE. TO AVOID REPETITION, HOWEVER, IT WOULD BE USEFUL AT THIS STAGE TO REFER

GENERALLY TO ITEMS WHICH HAVE BEEN CONSIDERED IMPORTANT IN OTHER CASES WHEN ASSESSING CREDIBILITY OF WITNESSES. COMMENICNG ON PAGE 15 OF OUR FORMAL SUBMISSION WE HAVE SET OUT A QUOTATION TAKEN FROM <u>WIGMORE ON EVIDENCE</u>. WHILE THE AUTHORS ARE NOT DEALING EXPRESSLY WITH THE QUESTION OF CREDIBILITY, THE REFERENCES THEY MAKE ARE EQUALLY APPLICABLE TO THIS TOPIC. THERE CAN BE NO DOUBT THAT THE DEPORTMENT OF A WITNESS DURING THE GIVING OF TESTIMONY IS OF GREAT ASSISTANCE TO ANYONE ATTEMPTING TO ASSESS THE VERACITY OF A WITNESS. THE WORDS OF JUSTICE RYLAND SPOKEN ALMOST 130 YEARS AGO ARE AS APPROPRIATE TODAY AS THEY WERE THEN. (QUOTE RYLAND ON PAGE 16).

SIMILARLY, THE WORDS OF CHIEF JUSTICE APPLETON BEAR REPEATING.

(QUOTE FROM PAGE 16).

WHEN RECALLING MR. MACINTYRE ON THE WITNESS STAND I SEE A PERSON WHO ATTEMPTED TO EVADE ANSWERING QUESTIONS; WHO WAS PARTICULARLY RELUCTANT TO DEAL WITH MANY MATTERS; WHO WAS CONTRADICTORY AND CERTAINLY LESS THAN PROMPT WHEN ANSWERING QUESTIONS; WHO FIDGETED WITH THE PAPERS IN FRONT OF HIM AND WHO COULD NOT SIT STILL FOR MORE THAN A FEW SECONDS; WHO WAS VERY UNCOMFORTABLE TO BE IN A POSITION WHERE HE HAD TO GIVE EXPLANATIONS FOR HIS ACTIONS OF YEARS AGO.

BEYOND THIS GENERAL IMPRESSION, HOWEVER, THERE WERE INSTANCES WHERE MR. MACINTYRE GAVE EVIDENCE, AND ANSWERED QUESTIONS IN A SEEMINGLY STRAIGHTFORWARD MANNER YET HE WOULD QUICKLY ABANDON THE EVIDENCE OR THE ANSWERS WHEN CONFRONTED WITH OTHER EVIDENCE OR DOCUMENTS WHICH APPEARED TO CONTRADICT HIM. LET ME REFER TO TWO PARTICULARLY VIVID EXAMPLES OF THIS TYPE OF CONDUCT.

(REFER TO TAB 1 OF DOCUMENT BOOKLET)

(a) AFFIDAVIT PREPARATION

(b) PRATICO NOT SEEN FROM MAY 30 UNTIL HE WAS BROUGHT TO MACINTYRE'S OFFICE ON JUNE 4.

IN OUR FORMAL SUBMISSION WE HAVE REFERRED TO SPECIFIC CONFLICTS IN EVIDENCE BETWEEN MR. MACINTYRE AND OTHERS AND HAVE DIRECTED YOU TO THE PAGE REFERENCES IN TRANSCRIPTS WHERE THE CONFLICTING EVIDENCE CAN BE FOUND. IT IS OUR SUBMISSION THAT YOU MUST ULTIMATELY DETERMINE WHETHER YOU ARE GOING TO ACCEPT THE EVIDENCE OF MR. MACINTYRE OR THE OTHER WITNESSES IN MOST OF THESE CASES. WE HAVE REFERRED ALSO TO TWO PARTICULAR CONFLICTS WHICH WE ASK YOU TO REVIEW AND RESOLVE. THE FIRST RELATES TO THE EVIDENCE OF DETECTIVE M. R. MACDONALD. HIS EVIDENCE AND THAT OF MR. MACINTYRE ARE DIAMETRICALLY OPPOSED ON A RELATIVELY MINOR POINT WHICH SHOULD NOT HAVE CAUSED ANY CONCERN. A FINDING OF CREDIBILITY ON THIS POINT IS NOT PARTICULARLY IMPORTANT TO THE MAJOR ISSUES WHICH CONFRONT YOU BUT IT DOES AFFORD A VERY CLEAR OPPORTUNITY TO TEST THE GENERAL EVIDENCE OF JOHN MACINTYRE AND TO DEMONSTRATE HIS REFUSAL TO CONCEDE EVEN THE MOST MINOR POINT IF IT TENDED TO SUGGEST THAT

HE HAD NOT PERFORMED AS EXPECTED. WE SUBSCRIBE TO THE THEORY THAT A WITNESS WHO IS NOT TRUTHFUL ON MINOR ISSUES CERTAINLY WOULD BE PREPARED TO GIVE UNTRUE EVIDENCE WHEN DEALING WITH POINTS OF MAJOR IMPORTANCE AND THAT IS ANOTHER REASON FOR TAKING THE TIME TO REFER TO ISSUES WHICH MAY APPEAR TO BE OF LITTLE IMPORTANCE IN THE OVERALL SCHEME OF THE INQUIRY.

M. R. MACDONALD WAS THE DETECTIVE ON DUTY THE NIGHT SANDY SEALE WAS STABBED. HE CONTACTED MACINTYRE WHO WAS AT HOME AND WAS TOLD BY MACINTYRE TO CARRY OUT AN INVESTIGATION, OBTAIN ANY EVIDENCE HE COULD, OBTAIN THE NAMES OF PEOPLE AND GO AS FAR AS HE COULD THAT NIGHT. MACINTYRE WAS AWARE OF THE PRACTICE OF PEOPLE IN HIS DEPARTMENT, AND MACDONALD IN PARTICULAR, OF KEEPING NOTES OF WHAT THEY DID AS THEY CARRIED OUT INVESTIGATIONS. MACINTYRE MADE A PARTICULAR POINT OF BEING AT THE POLICE STATION ON THE SATURDAY NIGHT AROUND MIDNIGHT TO DISCUSS

THE EVENTS OF THE PREVIOUS NIGHT WITH THOSE PATROLMEN WHO HAD BEEN ON DUTY. YET MACINTYRE SAYS AT NO TIME DID HE EVER SPEAK WITH M. R. MACDONALD TO FIND OUT WHAT HE DID THE NIGHT BEFORE OR TO REVIEW THE NOTES WHICH WERE TAKEN BY MACDONALD.

MACDONALD DID CARRY OUT SOME INVESTIGATIVE WORK THE NIGHT OF THE STABBING, ALTHOUGH ONE CAN HARDLY COMMEND HIM FOR THE QUALITY OF THE WORK HE PERFORMED. ONE OF THE THINGS HE DID, HOWEVER, WAS INTERVIEW JUNIOR MARSHALL AND OBTAIN A FAIRLY DETAILED DESCRIPTION OF THE PERSONS WHO WERE INVOLVED IN THE STABBING AT WENTWORTH PARK. (REFER TO TAB 2 IN DOCUMENT BOOKLET FOR EXHIBIT 38, BEING A PORTION OF MACDONALD'S NOTES).

MACDONALD TESTIFIED THAT HE WORKED THE ENTIRE DAY ON SATURDAY AND MET WITH MACINTYRE AND REVIEWED HIS ACTIVITY OF THE NIGHT BEFORE, AND REVIEWED THE NOTES THAT HE HAD MADE IN SOME DETAIL. MACINTYRE SAID MACDONALD MUST BE MISTAKEN. THE TRANSCRIPT REFERENCES FOR ALL OF THESE VARIOUS FACTS ARE FOUND IN OUR SUBMISSION COMMENCING AT PAGE 23.

WHICH OF THESE STORIES IS THE MOST PROBABLE?

WHICH OF THESE WITNESSES IS THE MORE BELIEVABLE. IS IT REASONABLE TO CONCLUDE THAT MACINTYRE WOULD MAKE IT A POINT TO BE AT THE POLICE STATION AT MIDNIGHT ON MAY 29 TO INTERVIEW THE PATROLMEN WHO WERE INVOLVED THE PREVIOUS NIGHT BUT WOULD NOT HAVE MADE ANY EFFORT TO DISCUSS MACDONALD'S ACTIVITIES. IS IT REASONABLE TO CONCLUDE THAT MACDONALD WOULD DELIBERATELY INVENT HIS EVIDENCE ABOUT HAVING SPENT THE ENTIRE SATURDAY BEING INVOLVED IN THE INVESTIGATION. IT IS OUR OPINION THAT MACINTYRE'S EVIDENCE ON THIS POINT IS TOTALLY UNREASONABLE AND SHOULD NOT BE ACCEPTED.

ROBERT PATTERSON

ANOTHER VERY VIVID CONFLICT OF EVIDENCE EXISTS CONCERNING THE RELATIONSHIP BETWEEN MACINTYRE AND ROBERT PATTERSON. PATTERSON'S NAME APPEARS IN THE STATEMENTS TAKEN BY MACINTYRE FROM DONALD MARSHALL, JR. AND JOHN PRATICO ON MAY 30, 1971. MARSHALL REFERS TO A CONVERSATION BETWEEN PATTERSON AND SEALE AND MARSHALL. (REFER MARSHALL STATEMENT). PRATICO SAYS PATTERSON TOLD HIM IMPORTANT INFORMATION CONCERNING THE TWO PERSONS HE ALLEGEDLY SAW RUNNING FROM THE SCENE OF THE INCIDENT. (REFER PRATICO STATEMENT). THERE IS NO DOCUMENTARY EVIDENCE TO SHOW WHETHER PATTERSON WAS EVER SPOKEN TO BY THE POLICE.

WHEN JOHN MACINTYRE WAS ASKED IF HE SPOKE TO PATTERSON, HE SAID NO, AND EVEN SAID HE DID NOT KNOW PATTERSON, NOR DID HE KNOW WHERE HE LIVED. HE WENT ON, HOWEVER, TO SAY THAT THERE WOULDN'T HAVE BEEN ANY

NEED TO INTERVIEW PATTERSON BECAUSE HE COULD NOT HAVE HAD ANY RELEVANT INFORMATION. (TAB 3 DOCUMENT BOOK).

PATTERSON'S NAME ALSO APPEARS IN STATEMENTS TAKEN FROM HARRISS AND GUSHUE AND HERE AGAIN WHEN QUESTIONED, MACINTYRE SAID HE MADE NO EFFORT TO FIND OUT WHERE PATTERSON LIVED.

THAT EVIDENCE OF MR. MACINTYRE WHEN IT WAS GIVEN DID NOT SEEM CONVINCING TO US. FOLLOWING THE TIME WHEN MR. MACINTYRE GAVE EVIDENCE WE WERE ABLE TO LOCATE MR. PATTERSON WHO NOW LIVES IN TORONTO. IN ADDITION WE OBTAINED COPIES OF THE POLICE RECORDS FOR PATTERSON. (TAB 4 - EXHIBIT 120). IT CAN BE SEEN THAT PATTERSON NOT ONLY HAD A CRIMINAL RECORD BUT THAT HE HAD BEEN ARRESTED BY MACINTYRE ON TWO OCCASIONS IN 1971 PRIOR TO THE STABBING OF SEALE. UNFORTUNATELY MR. MACINTYRE DID NOT HAVE THE OPPORTUNITY TO EXPLAIN HIS

DENIAL OF PATTERSON AFTER THESE DOCUMENTS WERE LOCATED BUT ONE MUST ASSUME HE WOULD CONTINUE TO SAY HE DID NOT KNOW PATTERSON OR KNOW WHERE HE LIVED SINCE THAT IS EVIDENCE HE GAVE ON MORE THAN ONE OCCASION.

WILLIAM URQUHART TESTIFIED THAT PATTERSON WAS WELL KNOWN TO THE SYDNEY POLICE AND THAT HE WOULD BELIEVE PATTERSON WOULD BE WELL KNOWN TO MACINTYRE. THE EVIDENCE GENERALLY LEAVES THE IMPRESSION THAT JOHN MACINTYRE WAS WELL AWARE OF EVERYONE WHO RAN AFOUL OF THE POLICE IN SYDNEY AND THAT IS THE EXPRESSED VIEW OF ASSISTANT COMMISSIONER WRIGHT OF THE R.C.M.P. IN OUR OPINION THE EVIDENCE OF MR. MACINTYRE THAT HE DID NOT KNOW PATTERSON, NOR KNOW WHERE HE LIVED, IS NOT CREDIBLE.

A SECOND QUESTION TO BE ANSWERED CONCERNING MR. PATTERSON IS WHETHER HE WAS INTERVIEWED BY THE POLICE. I WILL RETURN TO THAT QUESTION AT A LATER TIME.

LET ME TURN NOW TO THE MAJOR ISSUES WHICH MUST BE DEALT WITH BY YOUR LORDSHIPS.

IT MUST BE CONCEDED THAT DONALD MARSHALL, JR. WAS CONVICTED OF MURDER BECAUSE OF THE EVIDENCE GIVEN BY THE TWO EYEWITNESSES, PRATICO AND CHANT. IN ADDITION, THE EVIDENCE GIVEN BY PATRICIA HARRISS WAS OF CRUCIAL IMPORTANCE IN THE SECURING OF THE CONVICTION. ALL THREE OF THESE WITNESSES NOW SAY THAT THE EVIDENCE GIVEN BY THEM AT TRIAL WAS NOT TRUE. YOUR LORDSHIPS MUST DETERMINE WHY THESE WITNESSES COMMITTED PERJURY BEFORE YOU CAN ANSWER THE QUESTION WHY WAS DONALD MARSHALL, JR. WRONGFULLY CONVICTED.

THERE ARE MANY POSSIBLE REASONS WHICH COULD BE ADVANCED AND DURING THE COURSE OF THE NEXT SEVERAL DAYS YOU WILL HEAR VARIOUS THEORIES IN AN ATTEMPT TO ASSIST YOU IN ANSWERING THIS MOST FUNDAMENTAL QUESTION.

IT IS OUR OPINION THAT THE FALSE EVIDENCE OF THESE THREE WITNESSES WAS SECURED THROUGH THE EFFORTS OF JOHN MACINTYRE, ASSISTED BY WILLIAM URQUHART. WE CONSIDER THAT MACINTYRE CONCLUDED EARLY IN THE MORNING OF MAY 29, 1971, BEFORE SANDY SEALE DIED, THAT SEALE HAD BEEN STABBED BY JUNIOR MARSHALL. WITH THIS CONCLUSION PLANTED FIRMLY IN HIS MIND, MACINTYRE CARRIED OUT WHAT CAN ONLY BE DESCRIBED AS A PERFUNCTORY INVESTIGATION, WHICH CULMINATED ON FRIDAY, JUNE 4, 1971, WHEN THE STATEMENTS WERE OBTAINED FROM TWO EYEWITNESSES. WE ARE PREPARED TO ACCEPT THAT MACINTYRE PROBABLY BELIEVED, HONESTLY, THAT MARSHALL HAD COMMITTED THE STABBING, ALTHOUGH WE CANNOT UNDERSTAND WHY HE WOULD HAVE REACHED SUCH A CONCLUSION BASED ON HIS PAST DEALINGS WITH MARSHALL. WE CANNOT ACCEPT THE PROPOSITION, HOWEVER, THAT BECAUSE A POLICEMAN HONESTLY BELIEVES THAT AN INCIDENT HAPPENED IN A PARTICULAR WAY THAT HE HAS THE

RIGHT TO SUGGEST, BADGER AND COERCE WITNESSES TO OBTAIN EVIDENCE WHICH SUPPORTS HIS CONCLUSION.

JOHN MACINTYRE WAS SERGEANT OF DETECTIVES IN 1971 AND WAS IN CHARGE OF THE INVESTIGATION OF THE MURDER OF SANDY SEALE. HE LATER BECAME CHIEF OF POLICE, AND RETIRED WITH HONOUR. WE ARE URGING YOU TO CONCLUDE THAT IN THIS ONE INSTANCE HIS PERFORMANCE AS A POLICEMAN WAS FLAWED TO THE EXTENT THAT IT CONSTITUTED CULPABLE ACTION ON HIS PART. I REALIZE THE SERIOUSNESS OF THIS STATEMENT AND CONSIDER IT ESSENTIAL, THEREFORE, THAT IT TAKE THE TIME TO REVIEW EVIDENCE IN SOME DETAIL IN ORDER THAT YOUR LORDSHIPS, THE PUBLIC, AND MR. MACINTYRE, MAY UNDERSTAND WHY COMMISSION COUNSEL HAVE REACHED THE CONCLUSIONS WHICH ARE SET OUT IN OUR WRITTEN SUBMISSION AND WILL BE REPEATED TODAY.

MARSHALL IS PRIME SUSPECT

EXHIBIT 40 CONTAINS THE NOTES MADE BY CONSTABLE WOOD OF THE R.C.M.P. ON MAY 29, 1971. (TAB 4, DOCUMENT BOOK). HAVING REVIEWED THE EVIDENCE OF MACINTYRE AND MACNEIL ON THIS SUBJECT, WE MUST CONCLUDE THAT IF THE STATEMENT RECORDED BY WOOD WAS IN FACT MADE IT MUST HAVE BEEN MACINTYRE WHO MADE IT. IT IS DIFFICULT TO UNDERSTAND WHY WOOD WOULD FABRICATE THE NOTE AND WE SUGGEST THAT THE ONLY LOGICAL CONCLUSION IS THAT MACINTYRE DID MAKE THE STATEMENT WHICH IS RECORDED BY WOOD.

THE FACT THAT MACINTYRE BELIEVED MARSHALL WAS THE PRIME SUSPECT FROM THE BEGINNING IS FURTHER CORROBORATED BY REFERENCE TO THE TELEX SENT FROM THE SYDNEY DETACHMENT OF THE R.C.M.P. TO HALIFAX EARLY IN THE MORNING OF MAY 30, 1971. (TAB 5 - VOL. 16, PG. 90).

IT IS KNOWN MACINTYRE WAS AT THE SYDNEY POLICE

STATION AT OR ABOUT MIDNIGHT ON SATURDAY. FURTHER, HE SPOKE WITH MARSHALL SEVERAL TIMES ON SATURDAY AND SAID THAT WHILE HE DID NOT TAKE A STATEMENT FROM MARSHALL THAT DAY, THE DESCRIPTION GIVEN OF THE EVENT BY MARSHALL ON THE 30TH WHEN A STATEMENT WAS TAKEN WAS SIMILAR TO THAT HE HAD BEEN TOLD ON SATURDAY.

MACINTYRE ALSO TESTIFIED THAT HE KNEW OF THE EXISTENCE OF THE M.C.I.S. NETWORK AND THAT IT CONTAINED A STORE OF MATERIAL ON CRIMES WHICH HE HAD USED IN OTHER CASES. IN OUR OPINION, IT MUST BE CONCLUDED THAT THE INFORMATION CONTAINED IN THE TELEX COULD ONLY HAVE BEEN GIVEN TO THE R.C.M.P. BY MACINTYRE.

THE OTHER EVIDENCE WHICH POINTS TOWARDS THE EARLY CONCLUSION BY MACINTYRE THAT MARSHALL WAS GUILTY CONCERNS THE CUT ON MARSHALL'S ARM. MACINTYRE WAS SHOWN THAT CUT ON SATURDAY MORNING WHEN MARSHALL PULLED THE

BANDAGE DOWN TO EXHIBIT THE CUT. MACINTYRE SAID HE THOUGHT THE CUT WAS VERY SHALLOW. GIVEN THE FACT THAT THE CUT HAD BEEN STITCHED BY THIS TIME, HOW COULD MACINTYRE HAVE CONCLUDED THAT THE CUT WAS VERY SHALLOW? SUCH A CONCLUSION IS CONSISTENT WITH HIS BELIEF THAT MARSHALL HAD STABBED SEALE, AND THEN TURNED THE KNIFE ON HIMSELF TO DIVERT SUSPICION. (TAB 4).

WE SUGGEST THERE CAN BE NO DOUBT THAT THE EVIDENCE BEFORE THIS INQUIRY ESTABLISHES CONCLUSIVELY THAT MACINTYRE CONCLUDED EARLY ON MAY 29, 1971 THAT DONALD MARSHALL, JR. HAD STABBED SANDY SEALE.

JOHN PRATICO

HIS STATEMENT TAKEN ON JUNE 4 CONTAINS THE FIRST IDENTIFICATION OF JUNIOR MARSHALL AS THE PERSON WHO STABBED SANDY SEALE. (TAB 6). IT SHOULD BE RECALLED THAT MR. PRATICO GAVE AN EARLIER STATEMENT ON MAY 30 AND CHIEF MACINTYRE DID NOT CONSIDER THAT STATEMENT TO BE BELIEVABLE. MACINTYRE VISITED THE PARK AT MIDNIGHT ONE EVENING AND CONCLUDED THAT PRATICO COULD NOT HAVE BEEN TELLING HIM THE TRUTH. BY THIS TIME MACINTYRE HAD ALSO VISITED DR. VIRICK TO DISCUSS MACINTYRE'S THEORY THAT THE STAB WOUND ON JUNIOR MARSHALL'S ARM WAS SELF-INFLICTED.

WHEN FIRST QUESTIONED ABOUT THE TAKING OF THE SECOND STATEMENT FROM PRATICO, MACINTYRE SAID HE HAD NOT SEEN PRATICO FROM THE TIME THE FIRST STATEMENT WAS TAKEN UNTIL PRATICO WAS BROUGHT TO THE SYDNEY POLICE OFFICE ON JUNE 4. AT THAT TIME MACINTYRE WOULD HAVE

TOLD PRATICO HE DID NOT BELIEVE HE WAS GETTING THE FULL TRUTH AND THEN WOULD HAVE WRITTEN DOWN EVERYTHING HE WAS TOLD BY PRATICO. OVER AND OVER AND OVER AGAIN IN THE EVIDENCE OF CHIEF MACINTYRE, HE ADVISED YOUR LORDSHIPS THAT HIS PRACTICE WAS TO TAKE DOWN EVERYTHING OF IMPORTANCE TOLD TO HIM BY WITNESSES AND TO TAKE DOWN VERBATIM WHATEVER WAS SAID DURING THE COURSE OF THE TAKING OF A STATEMENT.

WE KNOW THAT JOHN PRATICO DID NOT OBSERVE DONALD MARSHALL, JR. STABBING SANDY SEALE. EVIDENCE WAS GIVEN BY BARBARA FLOYD AND SANDRA COTIE THAT PRATICO WAS OBSERVED IN THE PARKING LOT AT ST. JOSEPH'S CHURCH HALL FOLLOWING THE DANCE AND AFTER THE STORY OF THE STABBING HAD BEEN CIRCULATED. WHY THEN DID PRATICO TELL MACINTYRE THAT HE HAD BEEN IN THE PARK AND THAT HE HAD SEEN THE STABBING OCCUR IN THE VERY PLACE WHERE SEALE WAS STABBED?

WHEN CONFRONTED WITH THE CONTENTS OF PRATICO'S STATEMENT, MACINTYRE WAS FORCED TO CONCEDE THAT HE MUST HAVE TAKEN JOHN PRATICO TO THE PARK AND HAD DISCUSSIONS ABOUT THE EVENTS OF THE NIGHT OF MAY 28, 1971 AND THAT THIS VISIT AND DISCUSSIONS MUST HAVE OCCURRED PRIOR TO PRATICO GIVING THE SECOND STATEMENT. THERE IS NO EXPLANATION OFFERED BY MACINTYRE WHY HE NEVER AT ANY TIME DISCLOSED THAT HE HAD A DISCUSSION WITH PRATICO PRIOR TO TAKING THE STATEMENT AND THAT THE DISCUSSION WAS DEALING WITH THE EVENTS OF MAY 28 WHICH SUBSEQUENTLY WERE TOLD TO MACINTYRE BY PRATICO AND TAKEN DOWN IN THE FORM OF A STATEMENT.

THE PROCEDURES FOLLOWED IN THIS INSTANCE OF TAKING PRATICO TO THE PARK, DISCUSSING THE EVENTS OF THE EVENING OF MAY 28 AND HAVING PRATICO POINT OUT WHERE HE WAS AND WHERE THE EVENT HAPPENED BEFORE ANY STATEMENT

IS TAKEN, WERE FUNDAMENTALLY DIFFERENT THAN THE PRACTICE MACINTYRE SAYS HE INVARIABLY FOLLOWED. IT MUST BE RECALLED, HOWEVER, THAT ON SUNDAY, MACINTYRE TOOK CHANT TO THE PARK TO REVIEW THE ROUTE TAKEN BY CHANT ON THE FRIDAY NIGHT, AND THIS VISIT OCCURRED BEFORE CHANT GAVE HIS FIRST STATEMENT.

THE CLEAR IMPRESSION WHICH MACINTYRE LEFT IN ANSWER TO THE PRELIMINARY QUESTIONS CONCERNING THIS STATEMENT, AND ON EVERY OTHER OCCASION WHERE HE HAD MADE STATEMENTS CONCERNING THE INVESTIGATION, WAS THAT HE CONFRONTED PRATICO AT THE POLICE STATION WITH THE EARLIER STATEMENT WHICH HE SAID WAS NOT TRUE WHEREUPON PRATICO TOLD HIM THE TRUE STORY.

IN FACT WHAT HAPPENED IS THAT MACINTYRE TOOK PRATICO TO THE PARK. ACCORDING TO THE STATEMENT TAKEN AFTER THE VISIT, PRATICO SHOWED MACINTYRE WHERE PRATICO

WAS STANDING ON THE TRACKS WHEN HE OBSERVED SEALE AND MARSHALL. ON SEVERAL OCCASIONS IN HIS EVIDENCE, HOWEVER, MACINTYRE SAID PRATICO POINTED OUT "WHERE HE WAS SUPPOSED TO BE". (REFER EVIDENCE TAB 7).

AT THE CONCLUSION OF THE TAKING OF THE STATEMENT FROM PRATICO, AND NOTWITHSTANDING WHAT IS IN THE STATEMENT, MACINTYRE WAS UNDER THE IMPRESSION THAT PRATICO WAS IN THE VICINITY OF A BUSH NEAR THE SECOND HOUSE ON CRESCENT STREET, APPROXIMATELY 150 FEET AWAY FROM WHERE THE INCIDENT HAPPENED.

HOW DID MACINTYRE SECURE SUCH A STATEMENT FROM PRATICO? WHY DID PRATICO TELL SUCH A DEVASTATING LIE?

MAYNARD CHANT

HAVING OBTAINED THE STATEMENT FROM PRATICO, MACINTYRE THEN PROCEEDED TO LOUISBOURG TO TAKE A SECOND STATEMENT FROM MAYNARD CHANT. OBVIOUSLY IF PRATICO WAS TELLING THE TRUTH, THE EARLIER STATEMENT GIVEN BY CHANT ON MAY 30 COULD NOT BE ACCURATE, AND THERE WAS A NEED TO RE-INTERVIEW CHANT.

ONCE AGAIN MACINTYRE SAYS THAT HE MADE A PRELIMINARY STATEMENT TO CHANT AND HIS MOTHER THAT MACINTYRE DIDN'T BELIEVE HE RECEIVED THE FULL STORY ON THE FIRST OCCASION AND HE WANTED TO GET THE TRUTH. CHANT THEN BEGAN TO TALK AND MACINTYRE SAYS HE TOOK DOWN EVERYTHING THAT WAS SAID. (TAB 8, CHANT'S SECOND STATEMENT).

VIRTUALLY THE FIRST THING CHANT SAID IS THAT HE NOTICED A DARK HAIRED FELLOW SORT OF HIDING IN THE

BUSHES ABOUT OPPOSITE THE SECOND HOUSE ON CRESCENT STREET. REMEMBER THIS IS WHERE CHANT WAS "SUPPOSED TO BE" BUT NOT WHERE HIS STATEMENT SAYS HE WAS. ONE MUST ASK NOT ONLY HOW CHANT COULD SEE MARSHALL STAB SEALE, AN EVENT WHICH WE KNOW DID NOT OCCUR, BUT ALSO HOW CHANT COULD DESCRIBE SEEING PRATICO IN A PLACE WHERE PRATICO NEVER WAS. MACINTYRE WOULD HAVE YOU BELIEVE THAT THIS MUST BE PURE COINCIDENCE BECAUSE HE NEVER SUGGESTED ANYTHING TO CHANT.

CHANT SAYS MACINTYRE TOLD HIM THERE WAS A WITNESS WHO SAW CHANT THERE ON THE NIGHT OF THE STABBING AND THAT ULTIMATELY CHANT ASKED WORDS TO THE EFFECT "OKAY WHAT DID HE SAY I SAW". MRS. CHANT REFERRED TO THE FACT THAT MACINTYRE TOLD MAYNARD THAT THERE WAS A WITNESS WHO SAW HIM IN THE PARK. THE EVIDENCE OF WAYNE MCGEE ON THIS POINT IS OF INTEREST. (TAB 9).

HERE AGAIN, ONE MUST ASK WHY CHANT LIED; WHY

DID HE SAY HE SAW PRATICO, THAT HE SAW MARSHALL STAB SEALE, THAT MARSHALL AND SEALE WERE ARGUING.

PATRICIA HARRISS

THE STATEMENTS OF PATRICIA HARRIS (TAB 10) MUST BE REVIEWED IN DETAIL. THE FIRST PARTIALLY COMPLETED STATEMENT IS TAKEN IN THE HANDWRITING OF WILLIAM URGUHART. (VOL. 16, PG. 63). THE SECOND STATEMENT COMMENCING AT 12:07 A.M. JUNE 18 IS IN THE HANDWRITING OF MR. MACINTYRE. (VOL. 16, PG. 67).

IT IS WITH RESPECT TO THE HARRISS STATEMENTS THAT THERE IS ANOTHER EXAMPLE OF EVIDENCE FROM JOHN MACINTYRE WHICH WE SUGGEST CANNOT BE TRUE.

REVIEW EVIDENCE TAB 11.

IT WOULD NOT BE POSSIBLE FOR MACINTYRE TO CONCLUDE TAKING THE STATEMENT FROM GUSHUE AT 12:03, MEET WITH HARRISS FOR A TIME WHILE SHE WAS BEING ADAMANT ABOUT TWO PEOPLE BEING PRESENT WITH MARSHALL, TELL

HER HE HAD A STATEMENT SAYING THERE WAS ONLY ONE PERSON PRESENT, SEND HER OUT OF THE ROOM AND HAVE HER COME BACK AND GIVE THE WRITTEN STATEMENT WHICH HE COMMENCED TAKING AT 12:07.

(REFER CONCLUSION PAGE 54 - BRIEF)

FOR THE FIRST TIME IN HIS EVIDENCE, MACINTYRE ADMITTED TELLING A WITNESS THAT HE HAD A STATEMENT FROM ANOTHER PERSON GIVING A DIFFERENT STORY THAN THAT BEING RELATED BY THE WITNESS. IF HE WAS PREPARED TO ADOPT THIS TACTIC WITH HARRISS, DOES IT NOT SEEM REASONABLE THAT HE WOULD DO THE SAME THING WITH PRATICO AND CHANT, BOTH OF WHOM SAID THAT TACTIC WAS USED.

AT THE TIME OF THE TRIAL OF DONALD MARSHALL, JR. THE JURY HEARD EVIDENCE FROM TWO EYEWITNESSES SAYING THAT MARSHALL HAD STABBED SEALE. FURTHER, THEY HAD THE EVIDENCE OF PATRICIA HARRISS THAT SHE SAW JUNIOR

MARSHALL WITH ONE PERSON ON CRESCENT STREET AT ABOUT THE TIME OF THE STABBING. THE TOTALITY OF THIS EVIDENCE HAD TO BE COMPELLING.

REFER TO STATEMENTS FROM DONNIE MACNEIL, LOU MATHESON, THE JUDGE'S CHARGE TO THE JURY, THE APPEAL DIVISION, MACINTYRE ON DISCOVERY EXAMINATION. (TAB 12).

THE COINCIDENCES AND THE SIMILARITIES BETWEEN THE STATEMENTS OF CHANT AND PRATICO ARE TOO MANY. IN OUR SUBMISSION THERE CAN ONLY BE ONE CONCLUSION REACHED AND THAT IS THAT JOHN MACINTYRE FORMED THE OP.INION THAT SEALE AND MARSHALL HAD BEEN IN AN ARGUMENT RESULTING IN THE STABBING OF SEALE; THAT MACINTYRE TOOK PRATICO TO THE PARK ON JUNE 4, 1971 TO SHOW HIM WHERE THE INCIDENT HAPPENED AND WHERE HE WAS SUPPOSED TO BE IN ORDER THAT HE COULD WITNESS THE CRIME; THAT HE SOMEHOW CONVINCED PRATICO THAT PRATICO DID SEE THE EVENT AND TOOK A

STATEMENT FROM HIM TO THIS EFFECT; THAT HE VISITED LOUISBOURG AND THROUGH THE COURSE OF A LENGTHY INTERROGATION DURING WHICH HE WOULD NOT ACCEPT EVIDENCE FROM CHANT THAT CONTRADICTED THE STATEMENT GIVEN BY PRATICO, HE SECURED A STATEMENT FROM CHANT WHEREIN HE ALSO SAID HE WITNESSED SEALE BEING STABBED DURING THE COURSE OF AN ARGUMENT, HAVING SEEN PRATICO IN THE PLACE WHERE HE WAS SUPPOSED TO BE; AND THAT SUBSEQUENTLY HE CONVINCED AN ADAMANT PATRICIA HARRISS TO ABANDON HER EVIDENCE THAT MARSHALL WAS WITH TWO PERSONS, INCLUDING ONE WHOSE DESCRIPTION MATCHED THAT GIVEN TO MACINTYRE BY MARSHALL, AND TO SAY THAT MARSHALL WAS ALONE WITH SEALE. NONE OF THIS EVIDENCE WAS TRUE AND WE DO NOT THINK IT IS REASONABLE TO SUGGEST THAT THE WITNESSES COULD HAVE INDEPENDENTLY ARRIVED AT THE CONCLUSIONS THEY DID. THE ONLY COMMON DENOMINATOR IS THAT MACINTYRE TOOK THE STATEMENT FROM EACH WITNESS AND WE ARE DRIVEN TO THE CONCLUSION THAT THE EVIDENCE MUST HAVE BEEN

SUGGESTED TO THESE WITNESSES BY MACINTYRE.

SIMILAR CONCLUSIONS WERE REACHED BY STAFF SERGEANT WHEATON WHEN HE CONDUCTED THE RE-INVESTIGATION IN 1982. FRANK EDWARDS OBVIOUSLY DIRECTED HIS MIND TO THE SAME CONCLUSION. AT NO TIME WAS MR. MACINTYRE QUESTIONED BY THE R.C.M.P. OR FRANK EDWARDS.

REFER TO EXTRACTS OF EVIDENCE AT TAB 13.

IT IS OBVIOUS THAT NO PERSON IN THE ATTORNEY GENERAL'S OFFICE HAS YET DIRECTED HIS MIND TO THE QUESTION WHETHER THERE ARE ANY CHARGES WHICH COULD BE LAID AGAINST JOHN MACINTYRE IN THIS CASE. THE APPARENT REASON FOR THIS LACK OF ACTION IS THE BELIEF THAT MACINTYRE'S ACTIVITIES, WHILE IMPROPER AND REPREHENSIBLE, ARE NOT ILLEGAL. NO ANALYSIS OF THE AUTHORITIES APPEARS TO HAVE BEEN CARRIED OUT, HOWEVER. THE QUESTION OF MESSRS.

GALE, COLES, EDWARDS AND OTHERS AT THIS INQUIRY WAS DIRECTED TO POSSIBLE CHARGES FOR COUNSELLING PERJURY. THIS QUESTIONING REVEALED THAT NO LEGAL ANALYSIS OF ANY KIND HAS BEEN CARRIED OUT EXCEPT TO ANSWER THE QUESTION WHETHER PERJURY CHARGES SHOULD BE LAID AGAINST THE TEENAGERS WHO GAVE THE FALSE EVIDENCE AT TRIAL.

SINCE NO INVESTIGATION WAS ACTUALLY CARRIED OUT TO OBTAIN ALL OF THE FACTS, IT IS PERHAPS UNDERSTANDABLE THAT NO LEGAL ANALYSIS WAS CONDUCTED TO DETERMINE IF THERE WERE ANY SUPPORTABLE CHARGES. YOUR LORDSHIPS, HOWEVER, WILL BE IN A POSITION TO MAKE FINDINGS OF FACT. IF YOU DO CONCLUDE THAT THE FALSE EVIDENCE AT TRIAL WAS SECURED BY THE METHODS EMPLOYED BY JOHN MACINTYRE, YOU MUST, IN OUR OPINION, GIVE SOME CONSIDERATION TO WHETHER THOSE FACTS MAY SUPPORT CHARGES AND IF YOU CONCLUDE THEY WOULD, YOU MUST RECOMMEND THAT THE ATTORNEY GENERAL'S DEPARTMENT CAUSE THE NECESSARY

INVESTIGATION TO BE CONDUCTED AND CARRY OUT THE NECESSARY LEGAL ANALYSIS TO DETERMINE WHETHER CHARGES WILL BE LAID.

WE HAVE NOT ATTEMPTED TO IDENTIFY ALL POSSIBLE POTENTIAL CHARGES WHICH MAY BE AVAILABLE. WE DO, HOWEVER, CONSIDER THAT SERIOUS CONSIDERATION SHOULD BE GIVEN TO DETERMINE WHETHER THE ACTIVITIES OF MR. MACINTYRE IN SECURING THE EVIDENCE OF PRATICO, CHANT AND HARRISS WOULD CONSTITUTE OBSTRUCTING JUSTICE CONTRARY TO THE PROVISIONS OF SECTION 127 OF THE CRIMINAL CODE. SPECIFICALLY, SECTION 127(3)(a) PROVIDES THAT:

> "... EVERYONE SHALL BE DEEMED WILFULLY TO ATTEMPT TO OBSTRUCT, PERVERT OR DEFEAT THE COURSE OF JUSTICE WHO IN A JUDICIAL PROCEEDING, EXISTING OR PROPOSED, DISSUADES OR ATTEMPTS TO DISSUADE A PERSON BY THREATS, BRIBES OR OTHER CORRUPT MEANS FROM GIVING EVIDENCE."

THE AUTHORITIES APPEAR TO ESTABLISH THAT AN ATTEMPT TO DISSUADE A WITNESS FROM TESTIFYING IN A CERTAIN WAY WOULD BE A VIOLATION OF THIS SECTION. FURTHERMORE, IT HAS BEEN HELD THAT IF "CORRUPT" MEANS ARE USED TO DISSUADE A WITNESS FROM TESTIFYING, THERE IS A VIOLATION OF THE PROVISIONS OF THE CODE NOTWITHSTANDING THAT THE ACCUSED BELIEVED THE EVIDENCE HE WAS SUPPRESSING WAS TRUE OR FALSE.

THE FOLLOWING QUOTATION FROM MR. JUSTICE OSLER OF THE ONTARIO COURT OF APPEAL WAS DELIVERED 80 YEARS AGO BUT REMAINS A SUCCINCT EXPLANATION OF WHAT TYPE OF ACTIVITY IS SOUGHT TO BE CONDEMNED BY THIS PROVISION OF THE CRIMINAL CODE.

(REFER TO QUOTE ON PAGE 65 OF OUR BRIEF).

WHETHER JOHN MACINTYRE HONESTLY BELIEVED DONALD

MARSHALL, JR. STABBED SANDY SEALE IS NOT RELEVANT. THE QUESTION TO BE ASKED IS WHETHER HE EMPLOYED CORRUPT MEANS TO HAVE WITNESSES TESTIFY TO A SERIES OF EVENTS THAT MACINTYRE BELIEVED TO BE THE TRUTH, RATHER THAN THE SERIES OF EVENTS WHICH THE WITNESSES WISHED TO TELL. WHAT CONSTITUTES CORRUPT MEANS? OBVIOUSLY, THE BRIBING OF A WITNESS TO GIVE SUCH EVIDENCE WOULD BE CORRUPT. THE THREATENING OF WITNESSES THAT IF THEY DID NOT GIVE SUCH EVIDENCE, THEY WOULD BE SUBJECTED TO SEVERE CONSEQUENCES, PROBABLY ALSO CONSTITUTES CORRUPT MEANS. THERE IS EVIDENCE BEFORE YOU THAT ONE OF THE TACTICS EMPLOYED BY MR. MACINTYRE IN QUESTIONING WITNESSES WAS TO TELL THEM THEY WOULD BE IN SERIOUS DIFFICULTY IF THEY TOLD THE TRUTH; POSSIBLY COULD GO TO JAIL; WOULD HAVE COMMITTED PERJURY. OBVIOUSLY, THERE WOULD BE NOTHING WRONG OR IMPROPER IN TELLING A WITNESS THAT YOU EXPECT THEM TO TELL THE TRUTH OR THAT YOU DO NOT BELIEVE THEY ARE TELLING YOU THE TRUTH. DO YOU CROSS THE LINE,

HOWEVER, AND ADOPT CORRUPT MEANS IF YOU GO FURTHER AND SAY THAT IF YOU DON'T TELL ME THE TRUTH, YOU ARE COMMITTING PERJURY; OR THAT YOU WILL GO TO JAIL. IS IT CORRUPT MEANS TO SAY TO A WITNESS THAT YOU CANNOT BE TELLING THE TRUTH BECAUSE WE HAVE ANOTHER WITNESS WHO TELLS US SOMETHING DIFFERENT AND IF YOU DO NOT TELL ME THE TRUTH, YOU WILL BE IN SERIOUS TROUBLE.

WHEN DIRECTING YOUR MINDS TO THE QUESTION WHETHER CORRUPT MEANS MAY HAVE BEEN USED IN THIS CASE, I SUGGEST YOU MUST CONSIDER THE EVIDENCE OF ROBERT PATTERSON AND PATRICIA HARRISS AND THE O'REILLY TWINS. MACINTYRE AND URQUHART BOTH SAID NO INTERVIEW WAS CONDUCTED OF PATTERSON. BOTH OF THEM SAID PATTERSON WAS WANTED FOR THE PURPOSES OF GIVING AN INTERVIEW, AND WE KNOW HE WAS READILY AVIALABLE. WAS HE INTERVIEWED? IF YOU CONCLUDE THAT HE WAS, THEN YOU MUST ASSESS PATTERSON'S EVIDENCE AS TO WHAT HAPPENED DURING THE

COURSE OF THE INTERVIEW. HE SAYS HE WAS ASKED TO SIGN A STATEMENT, WHICH HAD ALREADY BEEN PREPARED, WHICH SAID PATTERSON SAW MARSHALL STAB SEALE. HE SAYS HE WAS TOLD BY MACINTYRE THAT THE POLICE HAD OTHER WITNESSES WHO SAID PATTERSON WAS IN THE PARK AND DID SEE THE EVENT. PATTERSON SAYS HE WAS PHYSICALLY ABUSED. IF YOU ACCEPT THE EVIDENCE OF PATTERSON, THERE COULD BE NO DOUBT THAT CORRUPT MEANS WERE EMPLOYED IN THAT CIRCUMSTANCE AND YOU WOULD BE HARD PRESSED TO REJECT THE EVIDENCE OF PRATICO, CHANT AND HARRISS THAT THEY WERE PRESSURED BY THE POLICE TO TELL THE STORY THE POLICE WANTED TO HEAR.

(REFER TO THE O'REILLY INCIDENT ON PAGES 55-59).

Remember the two references to the RCMP and fact 1st Harriss statement still in file.

(REFER TO OUR CONCLUSION ON PAGES 65 & 66).

WILLIAM URQUHART

YOUR LORDSHIPS ARE FAMILIAR WITH THE EVIDENCE WHICH ESTABLISHES THAT URQUHART WAS THE PRINCIPAL ASSISTANT OF MACINTYRE IN THE COURSE OF THE CONDUCT OF THIS INVESTIGATION. WHILE HE WAS NOT PRESENT THROUGHOUT ALL ACTIVITIES, HE WAS PRESENT WHEN THE STATEMENTS WERE TAKEN FROM THE THREE KEY WITNESSES.

See evidence re recall of Louisbourg.

(REFER TO PAGES 67 - 68 OF OUR SUBMISSION).

TO THIS STAGE I HAVE DEALT WITH THE ISSUE OF HOW THE PERJURED EVIDENCE WAS OBTAINED. IT MUST ALSO BE DETERMINED WHY NO ONE WAS ABLE TO PICK UP THE FACT THAT THE EVIDENCE WAS UNTRUE.

THE FIRST CHECK AND BALANCE WHICH SUPPOSEDLY EXISTS IS WITH THE CROWN PROSECUTOR. WE ARE SATISFIED THAT DONALD MACNEIL, Q.C. AT LEAST HAD ACCESS TO ALL INFORMATION IN THE SYDNEY CITY POLICE FILES. INCLUDED IN THOSE FILES WERE THE FIRST STATEMENTS TAKEN FROM CHANT, PRATICO AND HARRISS. WE ARE ALSO SATISFIED THAT THE PRACTICE FOLLOWED IN SYDNEY IN 1971 WAS THAT THE CROWN PROSECUTOR WOULD DISCLOSE THE EXISTENCE OF STATEMENTS TO THOSE DEFENCE COUNSEL WHO ASKED FOR THE INFORMATION. THIS PRACTICE WAS CONTRARY TO THE APPLICABLE AUTHORITIES AT THE TIME WHICH WOULD PLACE A POSITIVE OBLIGATION ON THE CROWN TO DISCLOSE THE EXISTENCE OF

CONTRADICTORY STATEMENTS TO THE DEFENCE.

THE NEXT CHECK AND BALANCE IS THAT OF DEFENCE COUNSEL. UNFORTUNATELY, WE WERE UNABLE TO SECURE THE EVIDENCE OF MR. ROSENBLUM BEFORE HIS UNTIMELY DEATH. SIMON KHATTAR, Q.C. DID GIVE EVIDENCE AND ADVISED YOUR LORDSHIPS THAT IN ACCORDANCE WITH THE PRACTICE FOLLOWED BY HIM, AND MR. ROSENBLUM, NO REQUEST WAS MADE OF THE CROWN TO OBTAIN COPIES OF STATEMENTS, AND THE ONLY STATEMENT AVAILABLE WAS THAT OF JUNIOR MARSHALL. OTHER THAN CONDUCTING A COUPLE OF INTERVIEWS OF MR. MARSHALL, IT APPEARS DEFENCE COUNSEL DID NOT CARRY OUT ANY INDEPENDENT INVESTIGATION BUT RELIED ON THEIR SKILL AS TRIAL COUNSEL TO SHAKE THE EVIDENCE TO BE GIVEN BY CROWN WITNESSES. THERE WAS NO ATTEMPT MADE TO CONTACT OR INTERVIEW THE VARIOUS PERSONS REFERRED TO IN MARSHALL'S STATEMENT. THERE WAS NO EFFORT MADE TO INTERVIEW THE KEY EYEWITNESSES. IN SHORT, THERE WAS NO ATTEMPT TO DO ANYTHING OTHER THAN ~~CARRY~~ conduct rigorous CROSS-EXAMINATION OF CROWN

WITNESSES AT THE TRIAL. IN OUR OPINION, DEFENCE COUNSEL OWE AN OBLIGATION TO THEIR CLIENT TO CARRY OUT INDEPENDENT INVESTIGATIONS AND NOT RELY TOTALLY ON THE EFFORTS OF CROWN COUNSEL TO OBTAIN AND PRESENT ALL RELEVANT EVIDENCE.

IN HIS EVIDENCE MR. KHATTAR INDICATED THAT THE INVESTIGATION AND CONDUCT OF THE CASE WOULD HAVE BEEN HANDLED ENTIRELY DIFFERENT BY DEFENCE COUNSEL IF DONALD MARSHALL HAD TOLD THEM THAT HE AND SEALE HAD ACCOSTED EBSARY AND MACNEIL WITH THE INTENT OF TAKING MONEY. CONSIDERING THE FACT THAT THE STATEMENT GIVEN BY MARSHALL TO THE POLICE ON MAY 30 CONTAINS DESCRIPTIONS OF EBSARY AND MACNEIL, AND THAT IT REFERS TO BOB PATTERSON, WHO WAS NOT INTERVIEWED OR CONTACTED BY DEFENCE COUNSEL, WE HAVE SOME DIFFICULTY IN CONCLUDING THAT THEY WOULD HAVE PROCEEDED DIFFERENTLY HAD THEY KNOWN THIS ONE ADDITIONAL FACT. IN OUR WRITTEN SUBMISSION WE HAVE REFERRED TO OTHER MATTERS CONCERNING THE DISCHARGE OF DEFENCE COUNSEL'S OBLIGATIONS.

THE TRIAL JUDGE PRESIDES OVER A CRIMINAL TRIAL AND IS REQUIRED TO MAKE RULINGS FROM TIME TO TIME ON EVIDENTIARY POINTS. DURING THE COURSE OF THIS TRIAL, A VERY DRAMATIC OCCURRENCE TOOK PLACE IN THE CORRIDORS WHEN PRATICO TRIED TO RECANT THE EVIDENCE HE HAD GIVEN AT THE PRELIMINARY INQUIRY. THE HANDLING OF THIS INCIDENT IN THE TRIAL BY THE TRIAL JUDGE WAS BASED ON A COMPLETELY ERRONEOUS UNDERSTANDING OF THE RELEVANT PROVISIONS OF THE CANADA EVIDENCE ACT. EVIDENCE WAS PRESENTED FROM PROFESSOR BRUCE ARCHIBALD WHO CONCLUDED THAT THIS RULING "SIGNIFICANTLY CONTRIBUTED TO THE CONVICTION" OF DONALD MARSHALL, JR.

THE JURY (REFER PAGE 79-80)

1971 RE-INVESTIGATION

EVEN THOUGH JUNIOR MARSHALL HAD BEEN WRONGFULLY CONVICTED OF MURDER, HIS PERIOD OF INCARCERATION WOULD HAVE BEEN LIMITED TO A FEW WEEKS, SERVED IN THE CAPE BRETON COUNTY JAIL, HAD THE R.C.M.P. PERFORMED THEIR EXPECTED FUNCTION IN 1971.

WHEN JIMMY MACNEIL ATTENDED AT THE POLICE STATION IN SYDNEY ON NOVEMBER 15, 1971, HE SPAWNED A SERIES OF EVENTS WHICH IN RETROSPECT CAN ONLY BE CLASSIFIED AS AN EXAMPLE OF COMPLETE INEPTITUDE AT WORK. JOHN MACINTYRE INTERVIEWED MACNEIL AND EBSARY. HE DID NOT BOTHER TO DETERMINE WHETHER EBSARY HAD ANY PREVIOUS INVOLVEMENT WITH THE POLICE, A STEP WHICH WOULD HAVE TAKEN SEVERAL SECONDS AND WOULD HAVE REVEALED THE FACT THAT EBSARY HAD A HISTORY OF KNIFE RELATED OFFENCES. HE DID NOT INTERVIEW EBSARY'S DAUGHTER. HE DIDN'T ASK

VERY BASIC QUESTIONS OF EBSARY'S WIFE AND SON. IN FAIRNESS TO MR. MACINTYRE, HE RECOGNIZED THAT HE WAS BIASED AND THAT HE BELIEVED THE MURDERER WAS IN JAIL.
to Test the validity of
RATHER THAN TAKE CONTROL OF THE INVESTIGATION OF THIS NEW INFORMATION, THERFORE, MACINTYRE REQUESTED THAT ANOTHER POLICE FORCE BE BROUGHT IN. IN OUR OPINION, THIS RESPONSE BY MACINTYRE WAS PERFECTLY PROPER.

NOTHING WE CAN SAY AT THIS TIME COULD IMPROVE ON THE EVIDENCE OF INSPECTOR MARSHALL WHO ACCEPTED FULL BLAME FOR THE INCOMPETENT INVESTIGATION CARRIED OUT BY HIM AND THE FACT THAT HIS LED TO MARSHALL REMAINING IN JAIL FOR APPROXIMATELY 11 YEARS. HE OBVIOUSLY WAS PREPARED TO ACCEPT THE OPINION OF JOHN MACINTYRE CONCERNING THE GUILT OF MARSHALL AND WENT THROUGH THE MOTIONS. WE ARE OF THE OPINION THAT MACINTYRE WAS QUITE VOCIFEROUS AND PERSUASIVE IN TELLING INSPECTOR MARSHALL OF MACINTYRE'S VIEWS. MANY OF THE COMMENTS CONTAINED

IN INSPECTOR MARSHALL'S REPORT COULD ONLY BE BASED ON INFORMATION GIVEN TO HIM BY MACINTYRE, AND THESE STATEMENTS ILLUSTRATE THE VERY FIRM BELIEF OF JOHN MACINTYRE THAT DONALD MARSHALL HAD BEEN CONVICTED PROPERLY OF THE MURDER OF SEALE.

THE PERFORMANCE OF INSPECTOR MARSHALL MUST BE CONDEMNED ALTHOUGH WE ARE NOT IN A POSITION TO SUGGEST ANY STRUCTURAL CHANGES WHICH SHOULD BE MADE TO THE SYSTEM TO PREVENT THE REOCCURRENCE OF SUCH A SITUATION SINCE IN EFFECT INSPECTOR MARSHALL FAILED TO FOLLOW THE MOST BASIC TECHNIQUES WHICH WERE WELL KNOWN AT THE TIME.

WE DO CONSIDER THE FAILURE OF THOSE PERSONS INVOLVED IN THE ATTORNEY GENERAL'S DEPARTMENT AT THE TIME TO REVEAL TO DEFENCE COUNSEL THE FACT THAT JIMMY MACNEIL HAD COME FORWARD, AND THAT A REINVESTIGATION HAD BEEN CARRIED OUT, CONSTITUTED A SERIOUS BREACH OF

THE OBLIGATION TO DISCLOSE RELEVANT INFORMATION TO DEFENCE COUNSEL. HAD THE DEFENCE BEEN AWARE OF THIS NEW EVIDENCE, THERE CAN BE NO DOUBT IT WOULD HAVE AFFECTED THE CONDUCT OF THE APPEAL AND MAY WELL HAVE RESULTED IN THE ORDERING OF A NEW TRIAL. WE CONSIDER THIS FAILURE TO DISCLOSE ~~THE~~ fundamentally important INFORMATION WAS ONE OF THE MOST SERIOUS FAILURES THE SYSTEM COMMITTED IN THE HANDLING OF THE DONALD MARSHALL, JR. CASE.

NOVA SCOTIA APPEAL DIVISION 1971

THE DECISION OF THE COURT OF APPEAL IN THIS INITIAL APPEAL CANNOT BE CRITICIZED. THERE WAS SUGGESTION DURING THE QUESTIONING OF PROFESSOR ARCHIBALD THAT THE APPEAL COURT ON ITS OWN VOLITION SHOULD HAVE NOTICED THE SERIOUS ERROR COMMITTED BY THE TRIAL JUDGE IN HIS INTERPRETATION AND APPLICATION OF THE RELEVANT SECTION OF THE CANADA EVIDENCE ACT. WHILE THERE IS NO ACTUAL DUTY IMPOSED ON APPEAL COURTS TO NOTE AND DEAL WITH ERRORS COMMITTED BY THE TRIAL JUDGE WHICH ARE NOT PART OF THE APPEAL BEING HEARD, IT IS RECOGNIZED THAT APPEAL COURT JUDGES HAVE THE RIGHT TO BRING SUCH MATTERS TO THE ATTENTION OF COUNSEL AND TO ASK FOR ARGUMENT ON THESE POINTS.

IN OUR SUBMISSION WE HAVE REFERRED TO THE ROLE OF CORRECTIONAL SERVICES CANADA AND THE APPROACH

TO THE SYDNEY POLICE IN 1974 BY DAVID RATCHFORD, DONNA EBSARY AND GARY GREEN. WE DID NOT REFER TO THE ATTENDANCE AT THE SYDNEY POLICE BY CONSTABLE COLE IN OR AROUND 1975 AT WHICH TIME HE REVIEWED THE MARSHALL FILE, ALTHOUGH THERE IS NO EVIDENCE TO ESTABISH WHY HE CARRIED OUT SUCH REVIEW. THESE VARIOUS MATTERS WERE REFERRED TO TO DEMONSTRATE THAT THERE WERE A COUPLE OF OCCASIONS BETWEEN 1971 AND 1982 WHEN POSITIVE ACTION BY VARIOUS PEOPLE COULD HAVE RESULTED IN THE EARLIER RELEASE OF DONALD MARSHALL,JR. WE KNOW THAT MAYNARD CHANT TOLD SEVERAL PEOPLE, INCLUDING HIS PARENTS AND MINISTER, PRIOR TO 1982 THAT THE EVIDENCE HE GAVE AT TRIAL WAS FALSE. UNFORTUNATELY, NONE OF THESE PEOPLE FELT ANY OBLIGATION TO MARSHALL TO TAKE WHATEVER ACTION WAS AVAILABLE IN AN ATTEMPT TO SECURE HIS RELEASE.

1982 R.C.M.P. INVESTIGATION

I WILL NOT DEAL IN DETAIL WITH THE RE-INVESTIGATION CONDUCTED BY STAFF SERGEANT WHEATON AND CORPORAL CARROLL IN 1982. WE CONSIDER THE INVESTIGATION, IN THE MAIN, TO HAVE BEEN CARRIED OUT COMPETENTLY AND IT CERTAINLY DID LEAD TO THE EVENTUAL RELEASE OF MARSHALL. WE DO REGRET THE FACT THAT STAFF SGT. WHEATON WOULD NOT MEET WITH US PRIOR TO HIS GIVING EVIDENCE AT THIS INQUIRY AND MUST CRITICIZE HIM FOR HIS ATTEMPTS TO DEAL WITH ISSUES ~~WHICH WERE NOT~~ CONCERNING PEOPLE WHO WERE not BEFORE THE COMMISSION.

SINCE IT WAS THE CONTENTS OF THE STATEMENT TAKEN BY WHEATON AND CARROLL FROM MARSHALL AT ~~THE~~ Dorchester PENITENTIARY WHICH REFERRED TO THE OCCURRENCE OF A ROBBERY, THIS MIGHT BE THE APPROPRIATE TIME TO DEAL WITH THAT ISSUE.

(THE FIRST THING TO CONSIDER IS THE CIRCUMSTANCES SURROUNDING THE GIVING OF THAT STATEMENT). (REFER TAB

14).

I THINK EVERYONE WOULD CONCEDE THAT HAD MARSHALL BEEN CHARGED WITH ROBBERY, THERE IS NO POSSIBLE WAY THIS STATEMENT COULD BE USED AGAINST HIM AS A VOLUNTARY STATEMENT. ON THE OTHER HAND, THERE CAN BE LITTLE DOUBT THAT MARSHALL, IN EFFECT, HAS BEEN TRIED AND CONVICTED OF COMMITTING A ROBBERY.

MARSHALL HAS GIVEN EVIDENCE ON NUMEROUS OCCASIONS AND I DO NOT PROPOSE TO REVIEW ALL OF THOSE CIRCUMSTANCES OR TO SUGGEST WHETHER MARSHALL AND SEALE WERE OR WERE NOT INVOLVED IN THE COMMISSION OF A CRIMINAL OFFENCE. I DO REMIND YOUR LORDSHIPS THAT IN EVIDENCE AT THIS INQUIRY ROY EBSARY SAID THAT HE ~~DID~~ INVITED SEALE AND MARSHALL, WHO HE CONSIDERED TO BE NICE GUYS, TO (Tab.18) HIS HOME FOR A BARBEQUE BEFORE ANY STABBING OCCURRED. ON THE OTHER HAND, ONE MUST CONSIDER WHY EBSARY WOULD

BE ~~ASKING~~ Saying SOMETHING TO THE EFFECT "DO YOU WANT EVERYTHING I HAVE" immediately before stabbing Seale.

ROBBERY REQUIRES THE PROOF OF VIOLENCE OR AN ASSAULT IN THE COURSE OF A THEFT. (SECTION 343 CRIMINAL CODE). IF YOUR LORDSHIPS CONSIDER IT NECESSARY TO DETERMINE WHETHER A ROBBERY WAS IN PROCESS, YOU WILL HAVE TO CONSIDER THE EVIDENCE TO DETERMINE IF YOU ARE SATISFIED THAT SEALE AND MARSHALL USED VIOLENCE. YOU MUST ASK YOURSELF WHY SANDY SEALE, A YOUNGSTER WHO HAD NO PREVIOUS INVOLVEMENT OF ANY KIND WITH THE POLICE, AND WHO WAS A MERE ACQUAINTANCE OF MARSHALL, COULD BE CONVINCED IN A VERY FEW MINUTES TO PARTICIPATE WITH MARSHALL IN A VIOLENT CRIME.

WE WOULD ASK YOU ALSO TO CONSIDER THE STATEMENTS MADE BY FRANK EDWARDS TO MR. JUSTICE NUNN DURING THE THIRD TRIAL OF ROY EBSARY. (TAB 15).

DURING THE COURSE OF THE THIRD EBSARY TRIAL, EDWARDS HAD MARSHALL TELL THE ~~STORY~~ Jury ABOUT MEETING EBSARY AND MACNEIL IN THE PARK; ~~HOW~~ That HE TOLD EBSARY HE LOOKED LIKE A PRIEST; ~~HOW~~ That HE HAD BEEN ASKED IF THERE WERE ANY WOMEN AROUND THE PARK; ~~HOW~~ That EBSARY ASKED SEALE AND MARSHALL TO GO TO HIS HOME; ~~HOW~~ That EBSARY SAID HE WAS FROM MANITOBA; ~~HOW~~ That EBSARY AND MACNEIL WALKED AWAY AND WERE THEN CALLED BACK BY MARSHALL AND SEALE WHEREUPON THE STABBING OCCURRED.

THE ONLY FACT REFERRED TO IN THAT EVIDENCE WHICH IS NOT CONTAINED IN THE MAY 30, 1971 STATEMENT FROM MARSHALL, AND WAS NOT TOLD BY HIM AT TRIAL, IS THE FACT THAT EBSARY AND MACNEIL WALKED AWAY AND WERE CALLED BACK. IS IT REASONABLE TO CONCLUDE THAT HAD MARSHALL INTRODUCED THAT ONE ADDITIONAL FACT ON MAY 30, 1971, NONE OF HIS SUBSEQUENT EXPERIENCES WOULD HAVE HAPPENED.

WE EXPRESS NO FIRM CONCLUSION WHETHER A ROBBERY WAS IN PROCESS. WE DO NOT ACCEPT, HOWEVER, THE SUGGESTION THAT HAD MARSHALL TOLD THE SYDNEY POLICE THAT HE AND SEALE WERE INTENT ON OBTAINING MONEY FROM EBSARY AND MACNEIL, IF THIS IN FACT WERE TRUE, THAT HE WOULD NOT HAVE BEEN WRONGFULLY CONVICTED.

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IN 1982 THE NOVA SCOTIA SUPREME COURT APPEAL DIVISION WAS ASKED BY THE MINISTER OF JUSTICE TO REVIEW THE CONVICTION OF DONALD MARSHALL, JR. THE PROCEDURE ADOPTED REQUIRED COUNSEL FOR MARSHALL TO TAKE THE LEAD (Expand by referring to C.J. intervention) ROLE IN PRESENTATION OF EVIDENCE. VARIOUS APPLICATIONS WERE MADE TO THE COURT TO IDENTIFY THE WITNESSES WHOSE EVIDENCE WOULD BE CALLED AND ULTIMATELY VIVA VOCE EVIDENCE WAS HEARD FROM VARIOUS WITNESSES. FOLLOWING THE INTRODUCTION OF EVIDENCE, THE COURT REQUIRED WRITTEN AND ORAL SUBMISSIONS TO BE MADE ON BEHALF OF MARSHALL AND THE CROWN.

FRANK EDWARDS, ACTING ON BEHALF OF THE ATTORNEY GENERAL, BELIEVED THE CONVICTION OF MARSHALL WAS A MISCARRIAGE OF JUSTICE AND HE WANTED TO HAVE THE APPEAL COURT ACQUIT MARSHALL ON THAT BASIS. DURING THE COURSE OF VARIOUS COURT APPEARANCES, HOWEVER, HE FORMED THE VIEW THAT THE APPEAL COURT WOULD LIKELY ORDER A NEW

TRIAL RATHER THAN ACQUIT MARSHALL UNLESS THEY HAD THE OPPORTUNITY TO PROTECT THE SYSTEM AND BLAME MARSHALL FOR HIS CONVICTION.

TO SECURE AN ACQUITTAL OF MARSHALL, AND CONTRARY TO HIS OWN BELIEF, EDWARDS FILED A FACTUM AND ORALLY ARGUED BEFORE THE APPEAL COURT THAT MARSHALL SHOULD BE ACQUITTED, BUT THAT THE SYSTEM AND THOSE INVOLVED IN IT WERE NOT TO BLAME. (TAB 16).

SUBSEQUENTLY, A DECISION WAS FILED BY THE APPEAL DIVISION. (TAB 17). THE COURT CONCLUDED THAT THE VERDICT OF GUILT COULD NOT BE SUPPORTED BY THE EVIDENCE, WAS UNREASONABLE AND THE CONVICTION MUST BE QUASHED AND MARSHALL ACQUITTED. UNFORTUNATELY, HOWEVER, THE COURT WENT ON TO STATE IN EFFECT THAT THERE HAD BEEN NO MISCARRIAGE OF JUSTICE AND TO STATE THAT MARSHALL CONTRIBUTED IN LARGE MEASURE TO HIS OWN CONVICTION AND

THUS HUNG A MILLSTONE OF GUILT AROUND MARSHALL'S NECK.

REFER TO PAGES 111 - 115 - BRIEF.

AS WE HAVE NOTED THROUGHOUT OUR SUBMISSION, IN OUR OPINION, MARSHALL WAS NOT RESPONSIBLE FOR HIS OWN CONVICTION. WE FIND NOTHING IN THE EVIDENCE ADDUCED BEFORE THE APPEAL DIVISION JUDGES IN THE REFERENCE HEARING TO SUPPORT THE STATEMENTS CONTAINED IN THE FINAL TWO PAGES OF THEIR DECISION. WE WOULD HAVE PREFERRED TO HAVE THE OPPORTUNITY TO QUESTION THE JUSTICES ON THESE COMMENTS AND TO AFFORD THEM THE OPPORTUNITY TO EXPLAIN WHY THEY BELIEVED MARSHALL MUST BEAR A LARGE MEASURE OF BLAME FOR HIS CONVICTION. AS YOU KNOW, TO THIS DATE WE HAVE NOT BEEN ABLE TO PRESENT SUCH EVIDENCE TO YOUR LORDSHIPS. BASED, THEREFORE, ON OUR ASSESSMENT OF THE DECISION, AND THE DOCUMENTS AND TESTIMONY WHICH WERE BEFORE THE COURT, WE CAN ONLY CONCLUDE THAT THE COMMENTS

IN THE FINAL TWO PAGES OF THE DECISION ARE NOT SUPPORTABLE

AND SHOULD NEVER HAVE BEEN MADE.

COMPENSATION

EXTENSIVE EVIDENCE HAS BEEN PRESENTED CONCERNING THE PROCEDURES FOLLOWED IN ARRIVING AT A FIGURE FOR COMPENSATION TO BE PAID TO MARSHALL. PRIMARILY, AN ADVERSARIAL APPROACH WAS ADOPTED AND WITH ALL RESPECT TO HIS HONOUR JUDGE CACCHIONE, IT APPEARS THE ATTORNEY GENERAL HAD THE BETTER ~~ADVOCATE~~ negotiator IN THIS INSTANCE. throughout the compensation phase ~~THE~~ Marshall was confronted with the statement from the Dep. A.G. The DEPUTY ATTORNEY GENERAL WAS ADAMANT THAT THE COMPENSATION WAS TO BE PAYMENT FOR ~~WRONGFUL~~ INCARCERATION AND WAS TO CONSIDER ONLY THE TIME MARSHALL WAS IMPRISONED AND NOT TO REFER AT ALL TO THE EVENTS LEADING TO HIS WRONGFUL CONVICTION. IN EFFECT, MARSHALL WAS TO BE REIMBURSED FOR WAGES HE MAY HAVE LOST AS A RESULT OF BEING IMPRISONED, BUT WAS NOT TO BE GIVEN ANYTHING IN THE NATURE OF DAMAGES FOR HAVING BEEN WRONGFULLY CONVICTED. NOTWITHSTANDING THIS APPROACH BY THE DEPUTY ATTORNEY GENERAL, MARSHALL WAS REQUIRED TO EXECUTE A RELEASE

GIVING UP CLAIM FOR ANY COMPENSATION RELATING TO HIS ENTIRE INVOLVEMENT WITH THE JUSTICE SYSTEM. ~~THIRDLY~~, HE WAS REQUIRED TO PAY FOR HIS OWN COUNSEL WHO WERE NECESSARY TO DEMONSTRATE THAT THE SYSTEM HAD WRONGFULLY CONVICTED MARSHALL.

WE ARE NOT ABLE TO COMMENT ON THE ADEQUACY OF THE COMPENSATION PAID TO MARSHALL. WE DO CONSIDER THAT IT WAS WRONG FOR MARSHALL TO BE REQUIRED TO PAY HIS OWN COUNSEL AND THAT should a similar ~~IN ANY LIKE~~ CIRCUMSTANCE ~~WHICH~~ OCCUR IN THE FUTURE, THE GOVERNMENT OF NOVA SCOTIA SHOULD PAY COUNSEL ON BEHALF OF A WRONGFULLY CONVICTED PERSON AND THE AMOUNT OF SUCH PAYMENT SHOULD NOT ENTER INTO THE COMPUTATION OF THE AMOUNT TO BE PAID TO THE VICTIM. FURTHER, WE CONSIDER IT WAS IMPROPER TO LIMIT THE TIME PERIOD TO BE ASSESSED WHEN CALCULATING COMPENSATION AND THAT MARSHALL SHOULD HAVE RECEIVED PAYMENT OF SOME KIND IN THE NATURE OF DAMAGES FOR THE

WRONGFUL CONVICTION. GIVEN THE CONCLUSIONS WE HAVE URGED YOUR LORDSHIPS TO MAKE, WE ARE OF THE OPINION THAT YOU SHOULD RECOMMEND THAT THE GOVERNMENT LOOK ONCE AGAIN AT THE ISSUE OF COMPENSATION AND DETERMINE IF THE AMOUNT PAID TO DONALD MARSHALL, JR. WAS REASONABLE AND FAIR IN ALL OF THE CIRCUMSTANCES.

Recall Donahoe & Giffin evidence
re expecting C.J. Campbell to
objectively consider appropriateness of award.

THE ATTORNEY GENERAL'S DEPARTMENT - R.C.M.P.

THROUGHOUT OUR SUBMISSION WE HAVE REFERRED TO VARIOUS STEPS TAKEN BY THE ATTORNEY GENERAL'S DEPARTMENT AND ITS EMPLOYEES AND THE R.C.M.P. IN ADDITION TO THE EXTENSIVE REVIEW OF THE EVIDENCE OF THE MARSHALL CASE, WE PRESENTED TO YOUR LORDSHIPS EVIDENCE OF TWO OTHER CASES FOR THE SOLE PURPOSE OF ILLUSTRATING THE MANNER IN WHICH THE ATTORNEY GENERAL'S DEPARTMENT OPERATED AND THE RELATIONSHIP WHICH EXISTED BETWEEN THE R.C.M.P. AND THE ATTORNEY GENERAL'S DEPARTMENT. WE SUGGEST THAT THE EVIDENCE ESTABLISHED CONCLUSIVELY THAT THE R.C.M.P. IN THIS PROVINCE DID NOT DISCHARGE IN ALL CIRCUMSTANCES THE OBLIGATIONS WHICH A ~~SENIOR~~ POLICE FORCE OWE TO THE MEMBERS OF THE PUBLIC. THE R.C.M.P. WERE PREPARED TO BOW TO PRESSURE EXERTED BY THE ATTORNEY GENERAL'S DEPARTMENT.

IN THE MARSHALL CASE THE R.C.M.P. WERE NOT

PREPARED TO LAUNCH AN INDEPENDENT INVESTIGATION OF SUSPECTED CRIMINAL ACTIVITY ON BEHALF OF JOHN MACINTYRE AND WILLIAM URQUHART. THE ONLY REASON FOR THIS RELUCTANCE WAS THE FACT THAT ANOTHER POLICE FORCE WAS INVOLVED AND FUTURE DEALINGS MAY BE RENDERED MORE DIFFICULT. THE PUBLIC OF NOVA SCOTIA HAS A RIGHT TO EXPECT MORE THAN THIS FROM THE R.C.M.P.

IN THE THORNHILL MATTER ALL OF THE MEMBERS OF THE R.C.M.P. WHO LOOKED AT THE DETAILS OF THE CASE, AND THESE INCLUDED ALL OF THE ACKNOWLEDGED EXPERTS WITHIN THE FORCE IN THE FIELD OF COMMERCIAL CRIME, CONCLUDED THAT THE FACTS AVAILABLE SUPPORTED A <u>PRIMA</u> <u>FACIE</u> CASE. and that charges should be laid.

Refer SC 98

IN ATTENDANCE AT THE Key November MEETING WAS THE DEPUTY COMMISSIONER. ONCE THE ATTORNEY GENERAL'S DEPARTMENT TOOK EXCEPTION TO THIS PROPOSED CONDUCT BY THE R.C.M.P., THE DEPUTY Comm. WAS PREPARED TO REVERSE ~~HIS STANCE~~ The decision and ~~AND WOULD NOT PROCEED TO LAY CHARGES~~ decided that no charges would be laid UNLESS HE COULD BE CONVINCED THAT A

CONVICTION WOULD BE ENTERED. NOBODY ELSE IN NOVA SCOTIA IS AFFORDED THAT ~~PREFERENCE~~. THE PUBLIC HAS A RIGHT TO EXPECT MORE FROM THE R.C.M.P.

IN THE MACLEAN CASE, THE R.C.M.P. BELIEVED THERE WAS CRIMINAL ACTIVITY WARRANTING INVESTIGATION. ONCE THE DEPUTY ATTORNEY GENERAL TOOK THE FILE AWAY FROM THEM ~~AND THEN~~ THE R.C.M.P. WAS PREPARED TO SIT BY AND DO NOTHING UNTIL ACTION WAS INSISTED UPON BY THE LEADER OF THE OPPOSITION. THE PUBLIC HAS A RIGHT TO EXPECT MORE FROM THE R.C.M.P.

THERE CAN BE NO QUESTION THAT IN THIS PROVINCE ALL PEOPLE HAVE NOT BEEN TREATED EQUALLY BY THE R.C.M.P. WHEREVER IT IS PERCEIVED THAT INDEPENDENT ACTION BY THE R.C.M.P. COULD HAVE A NEGATIVE IMPACT ON THEIR RELATIONS WITH OTHER AUTHORITIES, THE R.C.M.P. BACKS OFF. WE URGE YOUR LORDSHIPS TO ~~REINFORCE~~ THAT THE

OBLIGATION OWED BY THE POLICE TO THE PUBLIC IS ~~ONE~~ OF INDEPENDEN~~CE~~ AND THAT ONCE A POLICE FORCE GIVES UP SUCH INDEPENDENCE ~~FOR~~ EXTRANEOUS CONSIDERATIONS SUCH AS MORE HARMONIOUS RELATIONS WITH OTHERS INVOLVED IN THE SYSTEM OF ADMINISTRATION OF JUSTICE, THE OPPORTUNITY FOR ABUSE EXISTS AND THE PUBLIC WILL LOSE CONFIDENCE IN THE SYSTEM.

THE ATTORNEY GENERAL'S DEPARTMENT

IT APPEARS THAT IN THE DONALD MARSHALL, JR. CASE WHEREVER THE OPPORTUNITY EXISTED FOR THE ATTORNEY GENERAL'S DEPARTMENT TO TAKE A POSITION WHICH WAS UNFAIR TO JUNIOR MARSHALL, THE OPPORTUNITY WAS SEIZED. THE DEPARTMENT WOULD NOT CONSIDER PAYMENT OF THE ACCOUNT OF STEPHEN ARONSON; THE DEPARTMENT WOULD NOT CONSIDER A POSITIVE RESPONSE TO ARONSON'S and Cacchione's REQUEST FOR INFORMATION; IN THE SUBMISISONS TO THE APPEAL DIVISION THE DEPARTMENT TOOK THE POSITION THAT MARSHALL WAS THE AUTHOR OF HIS OWN MISFORTUNE AND THAT THE SYSTEM SHOULD NOT BE BLAMED; THE DEPARTMENT CONSISTENTLY REFUSED TO CONSIDER A PUBLIC INQUIRY; THE DEPARTMENT RESISTED ANY ATTEMPT TO HAVE AN INDEPENDENT COMMISSION LOOK AT THE TOTALITY OF THE DAMAGE DONE TO MARSHALL WHEN CONSIDERING COMPENSATION; THE DEPARTMENT INSISTED ON THE COMPLETE RELEASE OF ALL CLAIMS OF ANY KIND WHICH MARSHALL MIGHT HAVE, INCLUDING CLAIMS AGAINST THE CITY OF SYDNEY AND ITS POLICE

DEPARTMENT, BEFORE COMPENSATION WOULD BE PAID. AN ANALYSIS OF THE TREATMENT HANDED OUT TO MARSHALL AND HIS ADVISORS REVEALS A DEPARTMENT THAT WAS UNCARING and unfair.

CONTRAST THIS TREATMENT WITH THE ATTITUDE OF THE DEPARTMENT WHEN DEALING WITH THE THORNHILL AND The RCMP denied normal access to Crown/Pros. MACLEAN CASES. IN THORNHILL WITHOUT ANY CONSULTATION WITH THE R.C.M.P., AND WITH A COUPLE OF HOURS NOTICE, THE DEPUTY ATTORNEY GENERAL ADVISED THAT NO CHARGES (4/165/44) WOULD BE LAID; THE DEPUTY MINISTER ISSUED A PRESS RELEASE JUSTIFYING HIS ACTIONS IN THE THORNHILL CASE AND SAID WHAT WAS DONE IN THE THORNHILL CASE WAS NORMAL. (REFER 165/61 THORNHILL DOCUMENTS). THE DEPUTY ATTORNEY GENERAL GAVE LEGAL ADVICE TO THE ATTORNEY GENERAL WHICH IS TOTALLY 165/35,36,37 WRONG. (EXPAND ON THIS). R.v. Wellins p.382 165/103 THE ACTIONS OF THE DEPUTY WERE CONCURRED IN BY HIS SENIOR ADVISORS WHO BELIEVED THAT THE TEST TO BE APPLIED WAS WHETHER THERE WAS ANY "SUBSTANTIAL LIKELIHOOD OF A CONVICTION" WHICH IS A

TEST NOT APPLIED IN ANY OTHER CIRCUMSTANCES whatever.

IN THE MACLEAN CASE, THE DEPUTY ATTORNEY GENERAL SEIZED THE FILE FROM THE R.C.M.P. AND WAS QUITE ANNOYED 173/33 35 THAT THEY HAD BEEN INVOLVED AT ALL; THE ADVICE GIVEN TO THE ATTORNEY GENERAL BY HIS DEPUTY, ALLEGEDLY BASED ON THE ADVICE RECEIVED FROM GORDON GALE, IS MISLEADING; THE DEPUTY ADVISED THAT NO POLICE INVESTIGATION SHOULD BE CARRIED OUT. Why? not for us.

IN ANOTHER CASE INVOLVING SHOPLIFTING IN SYDNEY, THE DEPUTY IN RESPONSE TO A TELEPHONE CALL FROM A SENIOR LAWYER IN SYDNEY, AND AGAINST THE ADVICE OF HIS CROWN PROSECUTOR, AND WITHOUT KNOWLEDGE OF ANY OF THE FACTS, DIRECTED THAT THE CHARGES BE DROPPED.

THE DEPUTY MINISTER EXERTED PRESSURE ON THE R.C.M.P. AND APPEARED TO WANT TO HAVE COMPLETE CONTROL

OF THE ADMINISTRATION OF JUSTICE IN NOVA SCOTIA. HE FAILED TO RECOGNIZE THE DIVISION OF RESPONSIBILITY BETWEEN THE POLICE AND THE ATTORNEY GENERAL'S DEPARTMENT. NOTWITHSTANDING THAT HE HAD NO PERSONAL EXPERIENCE OR KNOWLEDGE OF CRIMINAL LAW, MR. COLES DID NOT SEEK ADVICE FROM SENIOR PEOPLE IN HIS DEPARTMENT AND PASSED ALONG OPINIONS TO THE RESPECTIVE ATTORNEYS GENERAL WHICH WAS INCORRECT. MR. COLES WAS APPOINTED TO HIS POSITION BY THE ATTORNEY GENERAL WITHOUT HAVING HAD ANY EXPERIENCE. HIS DISCHARGE OF THE RESPONSIBILITIES OF THE OFFICE, BASED ON THE EVIDENCE WHICH WE HAVE HEARD, SHOULD BE CRITICIZED. NEITHER DID HE RECEIVE WHAT ONE WOULD CLASSIFY AS INDEPENDENT, OBJECTIVE AND [proper] ~~SEARCHI~~NG ADVICE FROM HIS SENIOR ADVISORS, [*nones] WHO APPEARED TO BE CONTENT TO DO EXACTLY WHAT THEY WERE TOLD, NO MORE, NO LESS.

THE [administration of justice] SYSTEM ~~DID~~ [has] NOT FUNCTION FAIRLY IN NOVA SCOTIA. THE ATTORNEY GENERAL'S DEPARTMENT HAS NOT

OPERATED IN A MANNER ~~IN WHICH~~ where ONE COULD comfortably STAND BEFORE THE PUBLIC OF NOVA SCOTIA AND SAY THAT YOU ~~MUST~~ should HAVE COMPLETE CONFIDENCE IN YOUR SENIOR OFFICIALS. STRUCTURAL CHANGES MAY BE NECESSARY. YOUR LORDSHIPS HAVE COMMISSIONed STUDIES DEALING WITH THIS TOPIC AND IN DUE COURSE MUST DIRECT YOUR ATTENTION TO ~~THE ISSUE AS TO WHAT~~ the CHANGES which SHOULD BE IMPLEMENTED TO AVOID A repetition of the SITUATION WHERE FAVORITISM IS ~~DISPLAYED IN OUR SYSTEM.~~ practiced. ~~and the system is~~

Whether this requires the ~~implementation~~ creation of an Office of D.P.P., or the use of independent prosecutor in sensitive cases, or some other type of system, the result must be a system which not only treats everyone equally, but is perceived to do so.

Rousin

(See our Brief p. 150)

IN OUR SUBMISSION WE HAVE RESTRICTED OURSELVES, IN LARGE MEASURE, TO ~~TALKING ABOUT~~ dealing with THE FACTS OF THE MARSHALL CASE and the other two cases we have considered. FINDINGS OF FACT MUST BE MADE BY YOUR LORDSHIPS IN ORDER TO ANSWER THE QUESTION WHAT WENT WRONG. YOU MUST GO ON, HOWEVER, TO SAY WHAT IF ANY CHANGES MUST BE MADE IN OUR SYSTEM OF ADMINISTRATION OF JUSTICE IN AN EFFORT TO PREVENT A RE-OCCURRENCE OF THIS TRAGEDY, AND TO ~~LET THE~~ enable all PEOPLE OF THIS PROVINCE to BELIEVE THAT THEIR SYSTEM IS FAIR AND JUST. SOME OF THE CHANGES WHICH WILL BE SUGGESTED TO YOU ~~WILL~~ would REQUIRE ~~AN~~ adoption of INNOVATIVE APPROACHES AND FORWARD THINKING. THE PUBLIC OF NOVA SCOTIA, AND ITS GOVERNMENT, AND PROBABLY PEOPLE IN OTHER PROVINCES OF THIS COUNTRY WILL BE LOOKING FORWARD TO READING ~~OF~~ YOUR FINDINGS AND YOUR RECOMMENDATIONS. ~~WHEN CONSIDERING THE FAR REACHING RECOMMENDATIONS WHICH WILL BE URGED UPON YOU, MAY I SUGGEST YOU HAVE IN MIND THE FOLLOWING STATEMENT WHICH WAS CONTAINED IN THE EULOGY~~

If you think an injustice has occurred you must say so. If you think people acted improperly you must say so. If you think those involved in our system have treated people unfairly you must say so.

If you think there has been favouritism practised by people in the system, you must say so.

If you think people or institutions treat suspected criminals differently depending on the race of the accused you must say so. If the system, or parts of it, or persons involved in it, are flawed it is time to stop hiding the facts. It is time to stop protecting people who have not acted properly and have not ~~or~~ discharged the obligations placed upon them.

A 17 year old boy has been robbed of the prime years of his life. ~~His and~~ ~~has been permanently scarred~~ ~~family has been robbed of the~~ We cannot allow that to happen again.

If the prevention of a re-occurrence of this tragedy requires novel, or innovative procedures you must be prepared to recommend their implementation. ~~As you~~

Carry on your deliberations, and consider your recommendations, may I suggest you have in mind the following words delivered by Edward Kennedy in 1968 at the funeral of his brother

~~DELIVERED BY EDWARD KENNEDY IN 1968 AT THE FUNERAL OF HIS BROTHER, BOBBY.~~

~~"SOME MEN SEE THINGS AS THEY ARE AND SAY WHY?~~

~~I DREAM THINGS THAT NEVER WERE AND SAY WHY NOT."~~

We have seen too many headlines which ridicule the justice system in this Province. There have been enough cartoons and jokes. Justice is not a laughing matter. It is serious business. It affects peoples lives and liberty. There are innumerable people in the system who perform their jobs competently day in and day out, ~~Unfortunately the actions of a few have tarnished all. Trust is something which~~ Treating all people equally and fairly.

The tough cases are the ones which test a system, however, and determine if it is solid. When put to the test, our system was shown to be wanting. The actions of a few have tarnished the image of all. The public will not put its trust in a system which treats people differently depending upon their station in life. The system must be fair, and be perceived to be fair. Your task is to restore the the public trust, and their belief that there is a fair, impartial system of justice in Nova Scotia.