

SUBMISSION TO THE ROYAL COMMISSION
ON THE DONALD MARSHALL, JR., PROSECUTION
RESPECTING THE CALLING OF CERTAIN WITNESSES (MEDIA)

This submission is made in support of a request on behalf of John F. MacIntyre that the Commission hear evidence from Michael Harris and Heather Matheson.

A request that these individuals be called to give evidence before the Commission was made orally and in writing, and finally refused by Commission Counsel by letter dated March 10, 1988, a copy of which is attached.

This submission is based on two grounds:

1. The evidence will assist the Commission in assessing the credibility of S/Sgt. Harry Wheaton. S/Sgt. Wheaton consulted with media representatives in the preparation of stories for publication in the media during the course of his investigation;
2. The mandate of the Commission is sufficiently broad to embrace the limits, if any, that should be imposed by a police force on members of the force, with respect to disclosure to the media of the details of an investigation during the course of an investigation.

On May 13, 1987, in an opening statement to Counsel, the media and the public, this Honourable Commission set out in some detail the scope of the Inquiry:

"In order to make meaningful recommendations to the Government, the Commission must, of necessity, review the actual circumstances of the Donald Marshall case. This includes the murder investigation, the charging of Mr. Marshall, the conduct of his trial and appeal, his years in prison, his eventual acquittal by

the Nova Scotia Court of Appeal, and the process through which compensation was granted to him. The two R.C.M.P. reinvestigations of the murder will also be reviewed."

When I appeared before you a little more than a year ago to argue that John MacIntyre should be granted standing, I submitted that as a consequence of certain evidence anticipated, that Mr. MacIntyre could be in greater jeopardy than any other person called before this Inquiry.

The allegations that you have heard since then certainly bear out that concern.

S/Sgt. Wheaton was not just content to give evidence concerning his recollections of meetings with Mr. MacIntyre, but continued on to advise the Commission of his conclusion with respect to Mr. MacIntyre's credibility:

"Q. Are you suggesting that his testimony is incorrect?

A. I am suggesting, I am not suggesting, I am stating the man perjured himself.

Q. Before this Commission?

A. Before this Commisison.

Q. In respect to the taking of the statement of Patricia Harris and putting it on the floor?

A. That is correct sir, yes."

(Volume 42, pages 7751, 7752)

It is difficult to envisage any proper motive for the following outburst:

"Q. Did you discuss your opinion with

Corporal Davies?

A. Yes I did, as well as Corporal Davies' lawyer, Mr. Boudreau, and asked them, if on behalf of his client, if he would have any problems with me pursuing this matter with the Crown Prosecutor in Sydney and he advised me that he would not, and it was his legal opinion that perjury had been committed.

Q. I see (~~Mr. Orsborne was into it now~~) and was it your opinion as a police officer that a charge should be laid?

A. Yes sir.

Q. Did you lay a charge?

A. Not to date, however, I have had some consultation with the Crown Prosecutor in Sydney and I have submitted a report to my superiors."

(Volume 42, pages 7755 - 7756)

It is apparent that there are fundamental discrepancies between the evidence of S/Sgt. Wheaton and Mr. MacIntyre, discrepancies that could well affect the conclusions this Commission reaches concerning their credibility and what action, if any, should be taken by the authorities in the future, with respect to the possible laying of charges. S/Sgt. Wheaton has acknowledged that his purpose was to assist Michael Harris in the writing of his book, "**Any Way He Wanted**", (Volume 45, page 8206) and apparently had an opportunity to review a rough draft of the book. Mr. Harris in his acknowledgments writes:

"It is impossible to name all of the people who contributed to this book, but it would be graceless not to cite those who were especially helpful.

I would therefore like to thank Caroline and

Donald Marshall, Sr., Oscar and Leotha Seale, Steven Aronson, Felix Cacchione, Harry Wheaton ... All of them gave freely of their time and recollections to help unearth an long buried story and to explain contemporary events that were at times equally impenetrable."

S/Sgt. Wheaton's evidence concerning his meetings, the nature of his communications (as well as the failure to communicate some significant allegations against MacIntyre) and his frankness with Michael Harris could well be affected by Mr. Harris' and Miss Matheson's testimony.

Commission Counsel has gone to a considerable effort and expense to have witnesses give evidence before this Inquiry, whose appearance would appear to be prompted by a motive of discrediting MacIntyre.

I refer in particular to Robert Patterson who was brought from Toronto after he was seen by a Commission investigator (Volume 55, page 1,031) and two of the three Commission Counsel on separate occasions (Mr. MacDonald - page 1032, and Mr. Orsborne - page 1033).

not called
I didn't see him?
I didn't know him?

The extent to which evidence may be adduced before a Commission of Inquiry was discussed by the Ontario Court of Appeal in Re Bortolotti et al and Ministry of Housing (1977) 76 D.L.R. (3d) 408.

Mr. Justice Howland delivered the Judgment of the Court. Chief Justice Estey and Mr. Justice Houlden concurred.

Seven questions were placed before the Court, for our purposes, questions 5, 6, and 7 are pertinent:

"5. Did the Commission of Inquiry properly exercise its jurisdiction or decline jurisdiction in deciding that no

questions could be put to the witness Dinsmore or elicit statements made to her by her neighbours, Mr. & Mrs. Bayes, prior to the execution by Dinsmore of the agreement of purchase and sale or when the Dinsmore property was sold to the Crown in right of Ontario?

6. Did the Commission of Inquiry properly exercise its jurisdiction or decline jurisdiction in refusing to permit counsel for the claimant to lead evidence as to what was said by Mrs. Bayes to Mrs. Dinsmore regarding a conversation between Cusak and Mrs. Bayes?
7. Did the Commission of Inquiry properly exercise its jurisdiction or decline jurisdiction in deciding that the matters referred to in questions 5 and 6 were inadmissible, notwithstanding the conclusion of Commissioner Humphrey that the evidence was in fact admissible and he would have received the evidence> ...

The Commission of Inquiry is charged with the duty to consider, recommend, and report. It has a very different function to perform than that of a Court of law or an administrative tribunal or an arbitrator, all of which deal with rights between parties ... It is quite clear that a Commission appointed under the Public Inquiries Act (1971) is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege ... The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject matter of the inquiry ... In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject matter of the inquiry ... In deciding whether evidence is reasonably relevant, it is necessary to scrutinize carefully the subject matter of the inquiry as set forth in Order in Council 2959/76. This is the

governing document. The subject matter of the inquiry is broad and somewhat unusual in its nature ..."

After referring to the subject matter of the Inquiry, Mr. Justice Howland went on to say:

"The foregoing test of relevancy means that the gates will be open quite wide in the admission of evidence. All the evidence admitted will not of course be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendation and report.

If evidence is reasonably relevant to the subject matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts ... In my opinion, the Commission declined jurisdiction in not admitting the testimony referred to in questions 5 and 6."

The comments of Mr. Justice Beetz, on behalf of a unanimous Court, in Bisailon v. Keable (1983) 2 D.L.R. (4th) 193 at page 210 are apposite:

"It seems to me that the power to inquire into a specific event incidentally but necessarily includes the power to inquire into the actions of persons involved as well as prior and subsequent events which have some connection with the event in question."

Mr. Justice Morrison of the Nova Scotia Supreme Court, Trial Division in Re Hawkins and the Halifax County Residential Tenancies Board (1974) 47 D.L.R. (3d) 117 stated at page 125:

"It would seem therefore that by Sections 3 and 4 of the Public Inquiries Act, the Halifax County Residential Tenancies Board and each

member thereof was given the power of a Judge of the Supreme Court of Nova Scotia with regard to the production of documents, the enforcement of attendance of witnesses, and the compelling of witnesses to give evidence."

Civil Procedure Rule 32 provides, in part, as follows:

- "32.01(1) The Court may grant an Order for examination on oath or affirmation of any person, at any place, before a judge, officer of the Court, or other person.
- (2) The Court under paragraph (1) may, on such terms as the Court thinks just including directions as to discovery before the examination, grant
- (b) where the person to be examined resides outside the jurisdiction and in the country with a government that allows a person in that country to be examined before a person appointed by the Court, an Order in form 32.01(B);
- (c) where a person resides in any other country, an Order in form 32.01(C) that shall authorize the issue of a letter of request in form 32.01(D) to the judicial authorities of the country to take, or cause to be taken, the evidence of the person in that country."

Mr. Justice Hallett, of the Trial Division of the Nova Scotia Supreme Court, considered the onus on an applicant under this Section in a situation involving a civil trial before the Supreme Court. (Sun Alliance Insurance Company v. Thompson (1982) 57 N.S.R. (2d) 225). The same considerations do not of

course apply, it is submitted, to evidence to be taken before a public inquiry.

The Commissioner's attention is respectfully addressed to the following evidence of S/Sgt. Wheaton:

Volume 44, page 7986:

"Q. In the event that Ms. Matheson is of the opinion that she undertook not to reveal you as the person she interviewed, will you now advise her through this Commission that you do so release her from any such undertaking?

A. Yes, I would advise Miss or Mrs., whichever it is, Matheson that she is certainly at liberty to give evidence if I am her source, I don't know.

Q. She's at liberty and free as far as you are concerned to discuss any aspect of that interview that she had with you.

A. Yes sir that is correct.

Q. And would you give that undertaking and would you give that release to any other media persons that you may have talked to from '82 onwards?

A. Yes sir. ...

(Volume 44, page 7986).

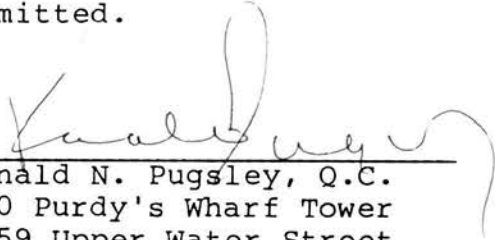
In summary, it is respectfully submitted that:

1. Mr. MacIntyre stands in considerable jeopardy as a consequence of the allegations of several witnesses but primarily S/Sgt. Wheaton;
2. Attacking the credibility of S/Sgt. Wheaton by contrasting his evidence with the evidence of others

with whom he came in contact is a legitimate technique in an attempt to impair his credibility. The failure of S/Sgt. Wheaton to communicate critical circumstances allegedly surrounding the actions of MacIntyre, to the journalists, is noteworthy;

3. The Civil Procedure Rules in force in the Province of Nova Scotia provide for the mode in which the evidence may be taken;
4. The evidence sought to be adduced could assist the Commission in its deliberations with respect to the limits to be recommended to be placed upon investigating officers during the course of a criminal investigation.

All of which is respectfully submitted.



Ronald N. Pugsley, Q.C.
900 Purdy's Wharf Tower
1959 Upper Water Street
Halifax, Nova Scotia
Counsel for John MacIntyre

MAY 19, 1988

Use Gfoka & Itanus
before we start your evidence.
no first hand evidence of
N.B. to Commission

MacIntyre not on T.C.I.A.
extent of discussion & media
not of N.B.

by way of statutory declaration
on such specific questions

difficult to be satisfied by
collateral - of N.B.
for MacIntyre only.
not to brood issues
with which we are
concerned.

Practical concern outweighed relevance

Robert Patterson.

Do not agree journalistic privilege

No strong position. Unfortunate

No one called to inspect only