REPORT TO THE CANADIAN JUDICIAL COUNCIL OF THE INQUIRY COMMITTEE ESTABLISHED PURSUANT TO SUBSECTION 63(1) OF THE *JUDGES ACT* AT THE REQUEST OF THE ATTORNEY GENERAL OF NOVA SCOTIA

AUGUST 1990

REPORT OF THE INQUIRY COMMITTEE

Inquiry Committee

Chief Justice Allan McEachern, Chairman
Chief Justice Guy A. Richard
Chief Justice James Laycraft
Rosalie Abella
Daniel Bellemare

Counsel

Harvey Yarosky, Inquiry Counsel
Edward J. Ratushny, Q.C., Consultant

Gordon F. Henderson, Q.C., Ian Binnie, Q.C. and Ronald Lunau, Counsel for Mr. Justice Hart, Mr. Justice Jones and Mr. Justice Macdonald

Edward Greenspan, Q.C.
Counsel for the Honourable Leonard Pace

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Counsel for the Honourable Ian MacKeigan

Anne S. Derrick and H. Archibald Kaiser, Counsel for Donald Marshall, Jr.

REPORT TO THE CANADIAN JUDICIAL COUNCIL OF THE INQUIRY COMMITTEE ESTABLISHED PURSUANT TO SUBSECTION 63(1) OF THE *JUDGES ACT* AT THE REQUEST OF THE ATTORNEY GENERAL OF NOVA SCOTIA

SUMMARY

By letter to the Canadian Judicial Council dated February 9, 1990, the Honourable Thomas J. McInnis, Attorney General of Nova Scotia, asked that, pursuant to subsection 63(1) of the *Judges Act*, the Council "commence an inquiry as to whether, based upon the conduct which has been examined by the Royal Commission on the Donald Marshall, Jr., Prosecution, and commented upon in its report, the Honourable Ian M. MacKeigan (former Chief Justice and now a supernumerary judge), the Honourable Gordon L.S. Hart (supernumerary judge), the Honourable Malachi C. Jones, the Honourable Angus L. Macdonald, and the Honourable Leonard L. Pace, or any of them, should be removed from office for any of the reasons set out in paragraphs 65 (2) (a) to (d) of the *Judges Act* (Canada)".

Subsequently, on April 5, 1990, the Governor in Council accepted the resignation of the Honourable Leonard L. Pace who had resigned for health reasons.

Then on April 11, 1990 the Honourable Ian M. MacKeigan attained the age of seventy-five years and ceased to hold office under the provisions of section 99 of the *Constitution Act*, 1867.

The Inquiry Committee established pursuant to the Attorney General's request was therefore left with examining whether the Honourable Gordon L.S. Hart, the Honourable Malachi C. Jones and the Honourable Angus L. Macdonald, or any of them, should be removed from office.

The Inquiry Committee unanimously concludes that it does not recommend the removal of the three judges.

August 27, 1990

Allan McEachern, Chairman

Guy A. Richard, Member

James H. Laycraft, Member

Rosalie Abella, Member

Daniel Bellemare, Member

REPORT OF INQUIRY COMMITTEE MEMBERS RICHARD C.J., LAYCRAFT C.J., ABELLA, and BELLEMARE

The mandate of this Inquiry Committee, appointed under ss.63 (3) of the *Judges Act* of Canada, arises out of a request of the Honourable the Attorney General of Nova Scotia dated February 9, 1990 to the Canadian Judicial Council:

> ...to commence an inquiry as to whether, based upon the conduct which has been examined by the Royal Commission on the Donald Marshall, Jr., Prosecution, and commented upon in its report, the Honourable Ian M. MacKeigan (former Chief Justice and now a supernumerary judge), the Honourable Gordon L.S. Hart (supernumerary judge), the Honourable Malachi C. Jones, the Honourable Angus L. Macdonald, and the Honourable Leonard L. Pace, or any of them, should be removed from office for any of the reasons set out in paragraphs 65 (2) (a) to (d) of the *Judges Act* (Canada).

On April 11, 1990, after the establishment of our Committee, the Honourable Ian MacKeigan, then a supernumerary judge and former Chief Justice of Nova Scotia, reached the mandatory retirement age and left the Bench. On April 5, 1990, the Honourable Leonard Pace left the Bench due to ill health. These retirements were verified by Orders in Council filed with us as Exhibits 8 and 9 respectively. Accordingly, this Inquiry Committee has no jurisdiction over them.

We shall hereafter refer to the Royal Commission which inquired into the Donald Marshall, Jr. Prosecution as "the Commission." The judges under Inquiry served on the panel of their court which heard a Reference in 1982 into the conviction of Donald Marshall Jr. on an indictment for murder. We shall refer to them, as either "the Court", or

"the Reference Court".

Under the *Judges Act*, the Canadian Judicial Council must carry out an inquiry when requested to do so by the Attorney General of a Province. Accordingly, this Committee was appointed to inquire, and to recommend to Council, whether the judges named by the Attorney General should be removed from office. The Canadian Judicial Council designated three of its members as members of the Inquiry Committee; the Honourable Minister of Justice for Canada appointed the two members of the Bar.

I THE FACTS

In this Part we shall endeavour to describe the background facts, and we shall also make some comments about them so that their significance may be better understood.

1. In an encounter which took place in the late evening of May 28, 1971 in Sydney, Nova Scotia, between Donald Marshall, Jr. and Sandy Seale with two men then unknown to them, Mr. Seale received stab wounds from which he died. At that time Mr. Marshall and Mr. Seale were each 17 years of age.

2. Mr. Marshall was charged with the murder of Mr. Seale. He was tried by a judge and jury which convicted him of that offence for which he was, accordingly, sentenced to life imprisonment.

3. At the trial, the Crown presented direct eye-witness evidence that Donald Marshall stabbed Sandy Seale on the day in question, as well as other evidence tending to confirm that fact.

Patricia Harriss, then age 14, said that she saw Donald Marshall in the park with one other person and saw no others.

Maynard Chant, then age 15, saw one person hunched over in a bush. He said he also saw, but couldn't hear, two other persons "having a bit of an argument", that he saw one of them take something out of his pocket and drive it toward the left side of the other's stomach, that the attacker was wearing a yellow jacket, that he ran away, and that the attacker also ran. He said that the attacker caught up with him and he recognized him as Donald Marshall; he was wearing a yellow jacket. He said that Donald Marshall had a gash on his arm and told him that "his buddy was over at the park with a knife in his stomach".

John Pratico, then age 16, said he had been squatting in the bush by himself drinking beer. He said that he saw Donald Marshall and Sandy Seale, both of whom he knew, arguing and that Marshall's hand came out of his pocket with a "shiny object" which he "plunged... toward Seale's stomach."

Comment: The Reference Court had evidence that each of these 3 witnesses originally gave statements to the police which did not identify Mr. Marshall as the killer of Mr. Seale, that each was pressured

by police to give evidence which was different than in their original statements, that their inconsistent statements were not furnished to Mr. Marshall or his counsel, and that each of them in fact gave perjured evidence at the trial that led to his conviction.

4. Donald Marshall gave evidence at his trial. He was then 17 years old and giving evidence at his own trial for murder in a language different than his own MicMac language. After describing his movements earlier in the evening he said he met Mr. Seale, whom he hardly knew, and they walked into Wentworth Park where they met some other persons. They were then "called over" to Crescent Street to speak to two other men whom they did not know. Much later, after Mr. Marshall's trial and conviction, these two men were identified as Roy Ebsary and James MacNeil.

Mr. Marshall said the two men asked for, and were given, a cigarette and a light. He asked where they were from; they said Manitoba. He told them they looked like Priests and one of them, he said, responded that they were Priests. They then asked whether there were bootleggers and women in the park and were assured there were. The conversation then took the following turn:

> Q. ... Go ahead.
> A. Told us, don't like niggers or Indians.
> MR. MacNEIL:
> Can't hear the witness, My Lord.

THE WITNESS
We don't like niggers or Indians. Took the knife out of his pocket -
BY MR. ROSENBLUM:
Q. Who did?
A. The older fellow.
Q. What did he do?
A. Took the knife out of his pocket.
Q. Yes.
A. Drove it into Seale.
Q. What part of Seale?
A. Here.
Q. Are you referring to the stomach?
A. Yeah.
Q. Yes. And then?
A. Swung around me, moved my left arm and hit my left arm.

5. In his charge to the jury the learned trial judge suggested to the jury that they give careful consideration to the truthfulness of Mr. Marshall's evidence. Since Mr. Marshall was convicted, it appears that the jury accepted the "eyewitness" evidence that Marshall had stabbed Seale, rather than Marshall's evidence that Seale was stabbed by one of the strangers.

6. About ten days after Mr. Marshall was sentenced, and while his appeal was pending, James MacNeil went to the police in Sydney to tell them that Mr. Ebsary, not Mr. Marshall, had killed Mr. Seale. Mr. MacNeil was interrogated and a statement was taken from him. While Mr. MacNeil described the incident in some respects differently than did Mr. Marshall, he then, and at the Reference hearing, said that it was Mr. Ebsary who stabbed Mr. Seale. Neither Mr. Marshall nor his counsel was informed of Mr. MacNeil's statement to the police though a Notice of Appeal had been filed and the appeal was pending in the Nova Scotia Court of Appeal.

Comment. We have been careful in our consideration of the role of the Reference Court in this case to restrict ourselves to the record the judges had before them. They knew that Mr. MacNeil had gone to the police and that he had been given a polygraph test with inconclusive results. The Reference Court did not know, as did the Commission, what had been done with MacNeil's statement or the explanation, if any, for the incredible failure to advise defence counsel of this evidence. MacNeil's statement supported the version of events told by Marshall at trial and it contradicted the "eye-witnesses" who had testified that only Marshall and Seale were present when Seale was stabbed. Whatever the reason, or whoever bore the responsibility, the failure to disclose this vital evidence to defence counsel and to the court had a fundamental role in all the tragic events which followed. Disclosure of this evidence would surely have led, at least, to a new trial and the monstrous imprisonment of an innocent man could have been avoided.

7. Although a serious error was made at trial regarding the admissibility of some important cross-examination of John Pratico, it was not raised at Mr. Marshall's appeal. The appeal was heard and dismissed by a three judge panel of the court which did not include any of the members of the Reference Court.

8. Because of new information supplied by defence counsel, the case was reopened in 1982. As there was then a considerable body of other evidence connecting Mr. Ebsary to the murder, including the

discovery of the murder weapon, and fibre evidence, the Honourable Jean Chretien, then Minister of Justice, pursuant to para. 617 (b) of the *Criminal Code*, ordered a Reference to the Appeal Division of the Supreme Court of Nova Scotia.

9. The Reference was heard by the Honourable Chief Justice MacKeigan and Justices of Appeal Gordon L.S. Hart, Malachi C. Jones, Angus L. Macdonald, and Leonard L. Pace. A panel of the court which did not include Mr. Justice Pace, but did include the other judges of the Reference Court, agreed to a request from Mr. Marshall's counsel to hear fresh evidence from seven witnesses, including Mr. Marshall and Mr. MacNeil, but refused a Crown motion also to hear evidence from some police witnesses.

10. Before the Reference hearing, Mr. Marshall was interviewed by police officers in Dorchester Penitentiary on March 9, 1982. He gave the police a signed statement ("the Dorchester statement"), describing the events of the evening in detail.

In the statement, Mr. Marshall said he had returned to Sydney from Halifax in the early evening of May 28. He was wearing a borrowed yellow jacket. Later on he met Mr. Seale and proposed that they make some money by "rolling" someone. Mr. Seale agreed and they went looking for some person. They met and talked briefly with Patricia Harriss and her friend. They then met and talked to the two strangers later identified as Ebsary and MacNeil. The statement continued:

> We talked about everything women booze about them being priests and hinted around about money. The two guys started to walk away from us and I called them back. They then knew we meant business about robbing them. I got in a shoving match with the tall guy. Sandy took the short old guy. I don't remember exactly what was said but I definitely remember Ebsary saying I got something for you and then stabbing Sandy.
> I let go of the guy I had and Ebsary came at me. He swung the knife at me and I held the knife off with my left hand. The knife sort of caught in my jacket and I pulled free and ran and felt blood running from the cut. I can't describe the knife and Sandy fell and stayed there.
> .....
> I definitely did not stab Sandy Seale. I saw Ebsary do it. When questioned about this I did not mention that Sandy and I were robbing these two as I thought I would get into more trouble. I never told my lawyers or the Court I just thought I would get in more trouble. I felt bad about Sandy dying as it was my idea to rob these guys. I knew Sandy but not real well and it's too bad he died but I didn't kill him, Ebsary did. I am willing to take a polygraph test to prove I am innocent. I did not stab Sandy. I gave the police a statement when it happened and a week later I was picked up by MacIntyre. He didn't question me very much he said he had two witnesses to say I did it and locked me up.

Comment. At the Reference hearing Crown counsel sought to cross-examine Mr. Marshall on this statement. Counsel for Mr. Marshall objected, and the questions of inducement and voluntariness were raised but the cross-examination was permitted, and the statement was admitted without a *voir dire*.

The law in Canada since *Ervin v. The Queen* (1978), 6 C.R. (3d) 97 (S.C.C.) is that no statement given to a person in authority should be admitted into evidence without the court first investigating its

admissibility on a *voir dire.* We regard this cross-examination, and the admission of the statement without its admissibility being tested on a *voir dire*, as a legal error on the part of the Reference Court.

It was not suggested that a legal error in the admissibility of evidence could be judicial misconduct. Rather, Ms. Derrick, counsel for Mr. Marshall, argued that it was misconduct for the Court to use that inadmissible evidence after making the mistake of admitting it. With respect, a legal error in the admissibility of evidence cannot be elevated to misconduct by the use of that evidence. The original error in admitting the evidence is neither erased nor compounded by using it; that follows inevitably from its admission. A court is bound to weigh all the evidence it has admitted in reaching a verdict. The use of inadmissible evidence is subsumed in the original error. Once the Dorchester statement was admitted into evidence, therefore, the fundamental error had been made, and the Court acted predictably when it took it into consideration.

11. Before the Reference Court, Mr. Marshall expanded considerably the evidence he had given at trial in 1971. He said that he had met Mr. Seale in the park and asked him if he would like to make some money. Asked by counsel how this was to be done he said "bumming it, breaking into a store probably, take it off somebody". Later in the park, he said, two men called to them asking for a cigarette and a light. They had a conversation with the two men which lasted 15 or 20 minutes:

> ...I introduced myself to them. They introduced themselves to me and we shook hands and we just had a conversation. I was talking more to the older guy first when we first met. And I asked him where he was from and he--what he did for a living and well, I asked him if he was a priest because he looked like a priest to me. He asked where the bootlegger's were and if there was any women in the park. I told him yes because I was familiar with the park and every time I'm there, there is females there. And at that time he invited us to his house. He pointed to his house where he lived and he invited us to his house for a drink. We told him no.
> Q. Did he give you a specific address as to where the house was located?
> A. He pointed to a house. He never give me an address only he pointed to a house. He told me he lived there.

Comment. This was the first disclosure by Mr. Marshall that the two unknown men in the park had pointed toward the house where one of them lived and invited them for a drink.

Mr. Marshall was asked to say what were the differences between his testimony before the Reference Court and his testimony at trial in 1971. He said:

> A. In 1971 I did not mention anything about hitting somebody or robbing somebody or something like that. I did not mention that.
> Q. Why didn't you speak of that?
> A. The robbery didn't happen. It wasn't even an attempt of a robbery. I wasn't dealing with a robbery and I was afraid that one way or the other they would put the finger at me saying--one way or the other they would have found a way--in my opinion, they would have found a way to put it on me whether I told them or not.
> Q. To put what on you?
> A. Attempted robbery. Maybe the murder probably-- the robbery would have probably tried to cover up for the murder.

> Q. Do you recall who the solicitors were who or the lawyers who acted for you at the 1971 trial?
> A. C.M. Rosenblum and Simon Khattar.
> Q. And were they aware of what--at the time in 1971, were they aware of what you said in court today?
> A. No.

Mr. Marshall was extensively cross-examined on the question of a robbery being in progress during the encounter and was asked questions by the Court. He maintained, however, that while he and Mr. Seale had intended, if necessary, to "roll" someone, they had not done so nor attempted to do so, though he said he had not heard what Mr. Seale said to Mr. Ebsary before they grappled together. During the cross examination he was confronted with the Dorchester statement and was asked whether that statement could be taken as truthful. He responded "yes". He said:

> A. I'm not denying the fact that I was out for money. This is what happened but as far as I'm concerned I never ever heard anybody mention anything about money when I was with them.

12. Mr. James MacNeil also gave evidence on the Reference. He made it abundantly clear that Mr. Ebsary killed Mr. Seale, and he therefore exonerated Mr. Marshall of murder. He also, however, gave the following evidence:

> A. Then we went up and we went up to like the top of the hill. Like I said we were crossing over the street and we were--we were approached by this coloured youth and this Mr. Marshall. At that time I remember I recall that Mr. Marshall put my hand up behind my back like that, eh, and I remember I

> kinda like panicked because I--in a situation like that, you get 'stensafied' or something like that but I remember the coloured fellow asking Roy Esabary [sic] for money. He said, like, 'Dig, man, dig,' and he said, 'I got something for you,' and then he--I just heard the coloured fellow screaming and everything was so you know, like 'tensafied' and every darn thing and I seen him running and flopping. I seen him running and flopping.

13. During the Reference, Crown counsel abandoned his attempts to call the evidence of police witnesses, acceding to the objection of Defence counsel. Thus the Reference Court did not have before it the full circumstances leading to the wrongful conviction and imprisonment of Mr. Marshall, nor all of the persons involved.

What happened is explained at page 232 of the proceedings before the Reference Court. The Crown originally intended, on the Reference, to adduce the evidence of a number of police officers including Mr. MacIntyre who was closely connected with the investigation and prosecution of Mr. Marshall. Affidavits required to support the application to have their evidence taken had been prepared.

After hearing the civilian witnesses, however, Crown counsel said "there's no need" to hear the police witnesses, but he proposed instead to edit their affidavits to include only the parts which related to the questioning of the witnesses Chant and Harriss. But counsel for Mr. Marshall opposed the admission of any part of the evidence. He said:

> Well if as my learned friend said it would add nothing to the evidence, I don't frankly see any reason why they should be admitted at all with respect to matters that have gone on before the

Court in the last two days.

Counsel for Mr. Marshall also said in answer to a question from the Court about admitting the edited affidavits: "Yeh, I'm objecting to that because I can't see the relevancy."

With one counsel saying there was no need to hear the evidence, and the other counsel objecting that the affidavits were irrelevant, the Court ruled that it would not admit the affidavits.

14. After hearing a number of witnesses additional to Mr. Marshall and Mr. MacNeil, and the submissions of counsel, the Court delivered a detailed judgment in which it reviewed the evidence, and concluded:

> [75] MacNeil's evidence although unfortunately not adequately tested by rigorous cross-examination by Crown counsel, is clearly evidence that is capable of being believed. Even though the various members of this court may have varying degrees of belief as to some aspects of that evidence, we have no doubt that in the light of all the evidence now before this court no reasonable jury could, on that evidence, find Donald Marshall, Jr., guilty of the murder of Sandy Seale. That evidence, even if much is not believed makes it impossible for a jury to avoid having a reasonable doubt as to whether the appellant had been proved to have killed Seale.
>
> [76] Putting it another way, the new evidence 'causes us to doubt the correctness of the judgment at the trial.' - Reference *Re Regina v. Truscott* (1967), 1 C.R.N.S. 1 (S.C.C.).
>
> [77] We must accordingly conclude that the verdict of guilt is not now supported by the evidence and is unreasonable and must order the conviction quashed. In such a case a new trial should ordinarily be

> required under s. 613(2)(b) of the *Criminal Code*. Here, however, no purpose would be served in so doing. The evidence now available, with the denials by Pratico and Chant that they saw anything, could not support a conviction of Marshall. Accordingly we must take the alternative course directed by s. 613(2)(a) and direct that a judgment of acquittal be entered in favour of the appellant.

15. After that, the Court added a number of paragraphs to its Reasons for Judgment which were described as "an opinion" by MacKeigan C.J.N.S. (as he then was), in his letter of transmittal to the Minister of Justice. These paragraphs state:

> [79] Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside. Any miscarriage of justice is, however, more apparent than real.
>
> [80] In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed perjury for which he still could be charged.
>
> [81] By lying he helped secure his own conviction. He misled his lawyers and presented to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief.
>
> [82] By planning a robbery with the aid of Mr. Seale he triggered a series of events which unfortunately ended in the death of Mr. Seale.
>
> [83] By hiding the facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defence available to him, namely, that during a robbery Seale was stabbed by one of the intended victims. He now says that he knew approximately where the man lived who stabbed Seale and had a pretty good description of him. With this information the truth of the matter might well have been uncovered by the police.
>
> [84] Even at the time of taking the fresh evidence, although he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far

> from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the court ordered him to do so. There can be no doubt but that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction.

II THE ESTABLISHMENT OF THIS INQUIRY COMMITTEE

On February 9, 1990, the Honourable the Attorney General of Nova Scotia wrote to the Right Honourable Brian Dickson, Chief Justice of Canada and Chairman of the Canadian Judicial Council, as follows:

> As you will know, the Government of Nova Scotia received the Report of the Royal Commission on the Donald Marshall, Jr. Prosecution on January 26, 1990. A copy of the seven-volume Report has been forwarded under separate cover, and I would be pleased to make additional copies available.
>
> In the course of its deliberations, the Royal Commission considered the conduct of five judges in the Appeal Division of the Supreme Court of Nova Scotia who heard and decided a Reference of the Donald Marshall, Jr. conviction made pursuant to paragraph 617 (d) [now section 690] of the Criminal Code. The five judges who heard the Reference were:
>
> The Honourable Ian M. MacKeigan
> The Honourable Gordon L.S. Hart
> The Honourable Malachi C. Jones
> The Honourable Angus L. Macdonald
> The Honourable Leonard L. Pace
>
> The decision on the Reference is reported as R. v. Marshall (1983), 57 N.S.R. (2d) 286.
>
> The comments of the Royal Commission respecting the setting up of the Reference and the Reference

decision appear at pages 113 to 127 of volume one of its report. The findings in respect of the Reference decision are reported at page 116 where the Commissioners say:

We find:

1. that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.

2. that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.

3. that the Court took it upon itself to 'convict' Marshall of a robbery with which he was never charged.

4. that the Court was in error when it stated that Marshall 'admittedly' committed perjury.

5. that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.

6. that the Court's suggestion that Marshall's 'untruthfulness...contributed in large measure to his conviction' was not supported by any available evidence and was contrary to evidence before the Court.

7. that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.

8. that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.

9. that the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

10. that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.

(the paragraph numbers have been added for convenience)

At pages 126 and 127 of volume one of the Royal Commission Report, the Commission comments upon the conduct of Mr. Justice Leonard L. Pace who summoned Mr. Dana Giovannetti, a lawyer on the staff of my Department, to his office where he was severely admonished for having raised the issue of bias with respect to Mr. Justice Pace's participation on a panel of judges who were to consider an appeal arising from the conviction of Roy Newman Ebsary for manslaughter. Mr. Ebsary caused the death of Sandford William Seale during the encounter which led to the wrongful conviction of Donald Marshall, Jr.

I am deeply troubled by the Commission's findings respecting the conduct and decision of these judges of the Appeal Division of the Supreme Court of Nova Scotia. It is significant that these findings were made by two Commissioners who are sitting judges at the present time, the Honourable Chief Justice T. Alexander Hickman, of Newfoundland, and the Honourable Associate Chief Justice Lawrence A. Poitras, of Quebec, and a former Justice, the Honourable Gregory T. Evans, Q.C., of Ontario.

It is absolutely essential that Nova Scotians have faith and confidence in the highest court in this Province. If that faith has been shaken by the findings of the Royal Commission, as I believe it has been, it must be restored.

Therefore, as Attorney General of Nova Scotia, and pursuant to subsection 63(1) of the *Judges Act*, I am writing to ask the Canadian Judicial Council to commence an inquiry as to whether, based upon the conduct which has been examined by the Royal Commission on the Donald Marshall, Jr., Prosecution, and commented upon in its report, the Honourable Ian M. MacKeigan (former Chief Justice and now a supernumerary judge), the Honourable Gordon L.S. Hart (supernumerary judge), the Honourable Malachi C. Jones, the Honourable Angus L. Macdonald, and the Honourable Leonard L. Pace, or any of them, should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d) of the *Judges Act* (Canada).

> I will be pleased to co-operate fully with the Canadian Judicial Council in this matter. Transcripts have been made of the evidence taken before the Royal Commission and are available. Please let me know if you require anything further from me.

As a consequence, this Inquiry Committee was established by the Canadian Judicial Council and the Minister of Justice. We appointed Mr. Harvey W. Yarosky of Montreal as our counsel and Professor Edward Ratushny Q.C. of the Faculty of Law, University of Ottawa, as consultant. Mr. Yarosky gave notice of the Inquiry to Mr. Donald Marshall, Jr. and to the Attorney General of Nova Scotia. Both were asked whether there was evidence, other than the record before the Reference Court, which should be called before us. No response was received from Mr. Marshall.

The Attorney General, in response to a request by our counsel to clarify and specify the relationship between his concerns about the Commission findings and paragraphs 65(2) (a) to (d) of the *Judges Act* replied on May 17, 1990. He noted that the Inquiry Committee "will not be dealing with former Chief Justice MacKeigan who has retired or Mr. Justice Pace who has resigned for reasons of health." He also noted that the Commission had used "very strong language which suggests the existence of improper judicial conduct", and reiterated some of its findings. He concluded:

> The findings of the Royal Commission may not themselves constitute a basis for removing one or more of the judges from office, but this strong language compels a review to determine whether improper motivation may be behind any action of the Court.

For reasons which counsel for the Attorney General argued vigorously and successfully, the Royal Commission did not have the opportunity to examine any of the judges regarding concerns of this kind. In my opinion, the Canadian Judicial Council is the appropriate forum in which such concerns can be reviewed.

I believe public confidence in the Appeal Division of the Supreme Court of Nova Scotia was shaken by the findings of the Royal Commission. That confidence can be restored by the knowledge that there is a forum for review of judicial conduct, and by the completion of that review by distinguished jurists. In the course of its inquiry, the Committee will have the opportunity to identify which of the reasons, if any, set out in paragraphs 65(2)(a) to (d) of the *Judges Act* (Canada) are applicable in the circumstances.

You have asked whether, in my opinion, there is any evidence, other than in the record that was placed before the Court of Appeal on the Reference, that should be placed before the present Inquiry Committee. Except for the evidence from judges who participated in the Reference, I do not think there is other evidence which I would suggest for consideration. Specifically, I have considered whether transcripts or exhibits from the Royal Commission should be considered and I have concluded that there is no evidence or exhibit respecting the remaining three judges which should be brought to your attention.

I remain willing to co-operate with the Inquiry Committee, and I would be pleased to hear from you if there is anything further you may wish from me.

(emphasis added)

Yours very truly,

(signed)

Thomas J. McInnis

The applicable sections of the *Judges Act* state:

65. (2) Where in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled

> from the due execution of the office of judge by reason of
>
> (a) age or infirmity,
> (b) having been guilty of misconduct,
> (c) having failed in the due execution of that office, or
> (d) having been placed by his conduct or otherwise, in a position incompatible with the due execution of that office
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office...

We were directed by the Canadian Judicial Council:

> that the Inquiry be held in public except when in the Inquiry Committee's view the public interest and the integrity of the judicial process require that it be held in private.

We have not found it necessary to hold any of our hearings in private except for one matter concerning a possible representation conflict on the part of counsel for the judges which counsel for Mr. Marshall asked us to hear in private. We decided that that matter was wholly unrelated to the matters in question on this Inquiry. We held our public hearings in Halifax on June 4, 5 and 6, and July 10 and 11, 1990.

The Committee first considered what evidence, if any, should be called. Our counsel submitted:

(a) that, apart from possible testimony of the Reference judges, their conduct should be "judged" only on the evidence they had before them at the time of the Reference Appeal;

(b) that there is a serious constitutional question concerning the propriety of judges being required to testify about the preparation of their judgments. He recognized that the Supreme Court of Canada in *MacKeigan v. Hickman* (1989) 61 D.L.R. (4th) 688, left open the possibility that judges might be required to testify in some circumstances, but urged that we should not do so in this case. At Volume 1, p. 41 of the transcript of proceedings before us he said:

> I add that one of the principles that emerges throughout any discussion of this subject in the precedents is that one should not compel a superior court judge to explain why he delivered a certain judgment except in the most extreme and compelling circumstances.

(c) that the only evidence he proposed to adduce was that of the Registrar of the Appeal Division of the Supreme Court of Nova Scotia, Mr. Smith, who produced and identified the record of the Case on Appeal on the Reference which was admitted as evidence in this Inquiry.

In response to Mr. Yarosky's submission, we replied at Transcript, Volume 1, p. 51 that we did not propose to rule on the question of whether the judges should be compelled to testify until we had the advantage of having the admissible evidence analyzed by all interested parties, and we accordingly reserved our decision on that important question.

We then proceeded to hear the submissions of counsel for all

interested parties who undertook extensive and helpful analyses of the evidence and relevant authorities. Counsel were able to agree on the contents of the record before the Reference Court.

III THE JUDGES AS WITNESSES

While there may well be some exceptional circumstances when judges could be required to give evidence, we do not think that *MacKeigan v. Hickman* (supra), goes so far as to decide that judges are compellable to give evidence about the deliberative or decisional process.

In this case, one fundamental point stands out. The complaint against the judges is not about their disposition of the Reference for they acquitted Mr. Marshall and there cannot be any question about the correctness of that decision. Rather, the question before us relates to the way in which they expressed themselves in a subsidiary part of their Reasons for Judgment. It was not argued before us that improper motives led to the six impugned paragraphs. Ms. Derrick, for Mr. Marshall, did urge that it was serious judicial misconduct for the judges to use the language they did in the last six paragraphs of the Reference judgment, but she did not allege improper motivation.

The questions which might be expected to be put to the judges in this case, would go specifically into the decisional process of an appellate court, with improper motivation not in issue. To require the judges to testify would be to take our Inquiry into their private

deliberations about, and composition of, Reasons for Judgment. That course would, in effect, ask them "Why did you say this?" or "Why did you phrase this sentence this way instead of that way?" or "Why didn't you say something else?" or perhaps "What did your colleagues say about..." given topics.

Apart from the fact that these questions would be asked almost 8 years after the judgment was written, it would be entirely inappropriate to submit judges to such interrogation. In our view such questions would strike at the very heart of judicial independence.

The rule that judges should speak, or explain themselves, only once, through their judgments, is a wise and salutary one, based on the long experience of the common law. We see no compelling reason to depart from it in this case particularly since our mandate is to compare what was said by the Court with the record before it, a task which makes it neither necessary nor appropriate to require the judges to give evidence in this proceeding.

IV THE TEST FOR REMOVAL

While there appears to be no single articulated standard against which to measure the conduct of judges when their removal is at issue, certain common assumptions about the process appear to be accepted in the literature and jurisprudence.

First, it is accepted that the judicial role, involving as it does the requirement to make decisions free from external interference or influence, demands the independence of the judges. (S. Shetreet and J. Deschenes (eds), *Judicial Independence: The Contemporary Debate* (1985) at p. 393; cited with approval in *the Queen v. Beauregard* [1986] 2 S.C.R. 56 at 69-70, per Dickson C.J.). It is for this reason that British judges were first granted security of tenure during good behaviour in 1688, a security guaranteed by para. 99(1) of the Canadian Constitution, and regarded as "...the first of the essential conditions of judicial independence..." (*Valente v. The Queen* [1985] 2 S.C.R. 693 at 694 per Le Dain J.)

Judicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal (*Sirros v. Moore* [1974] 3 W.L.R. 459 at 467, per Lord Denning M.R.). In consequence of this duty, judges are free to express their views of the cases before them in a forthright way.

This duty does not immunize judges from fair criticism, whether of a public or judicial nature, nor does it imply that judges do not err. (A.M. Dobie, *A Judge Judges Judges* 1951, Washington University Law Quarterly 471 at 472); rather, it guarantees that the expression of opinions honestly held by judges in their adjudication of the relevant law, evidence or policy in a specific case will not endanger their tenure. However, once a case has been decided, the judgment comes,

appropriately, under the critical scrutiny of lawyers, academics, the public, and the media.

Judges must accept this criticism under the restriction that they are not free to answer it. They are expected to speak only through their Reasons for Judgment, and thereafter never to explain their judgments.

Secondly, it is acknowledged that "the removal of a judge is not to be undertaken lightly" (*Valente*, supra at 697). The misconduct alleged and demonstrated must be of sufficient gravity to justify interference with the sanctity of judicial independence. In his classic work, *Judges on Trial*, Professor Shetreet defined the test when Parliament would interfere to remove a judge. He said at page 272:

> Unless it can be attributed to improper motives or to a decay of mental power, a mistake in fact or in law or any error of judgment will not justify the interference of Parliament. These matters are within the province of the appellate courts; and Parliament will not assume the role of a court of appeal.

Thus this Inquiry Committee, which is the first step in the Canadian parliamentary process for removal of a judge does not function in this case as a court of appeal reviewing the findings of either the Reference Court or the Royal Commission.

Thirdly, it is also acknowledged that judicial independence has attained entrenchment in our constitution not merely, or even mainly, for the benefit of the judiciary. It is also a fundamental benefit to the

public served by the judiciary. (S. Shetreet, *Judges on Trial* 1976 at 276; *Valente*, supra at 172; *MacKeigan v. Hickman* supra 696 and 707). Public confidence in the independent and impartial administration of justice is, in effect, the first proposition in the syllogism which has as its second proposition the need for independent and impartial judges, and as its conclusion the independence of the judiciary. Any test which attempts to formulate when the removal of a judge is appropriate must necessarily include and balance the public interest as well as judicial independence.

Based upon these considerations, and in response to the characterization of the problem by the Attorney General of Nova Scotia as being "whether improper motivation may be behind" the language used, our counsel, Mr. Yarosky, proposed the following test designed specifically for the circumstances of this case:

> Are the errors alleged by the Royal Commission, if established, so gross as to demonstrate a bias which is so pronounced that it renders the judges incapable of duly executing their office?

We were guided and greatly assisted by this formulation, but we are more inclined to adopt a test for this case which may have wider application. Everyone holds views, but to hold them may, or may not, lead to their biased application. There is, in short, a crucial difference between an empty mind and an open one. True impartiality is not so much not holding views and having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge was biased, in our view, thus becomes less instructive an exercise than whether or not the

judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind.

Nor does Mr. Yarosky's test allude specifically to public confidence in the administration of justice. The standard, in our view, must be an objective one based in part, at least, on conduct which could reasonably be expected to shock the conscience and shake the confidence of the public as opposed to conduct which is, and often must be, unpopular with part of that public.

The test we would propose to apply, as applicable to this case, is an alloy of these many considerations and takes the following form:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

V THE ISSUES ON THIS INQUIRY

In view of the way the issues were argued before us, we find it unnecessary to discuss the Commission's specific criticisms of the judgment of the Reference Court. We say this because, in our view, the serious criticisms of the Reference Court by the Commission may be merged into a single, comprehensive question which may be stated as follows:

> Was it misconduct justifying removal from office for the Court to characterize the conduct of Mr. Marshall as it did having regard to all the circumstances it knew from the record which it had before it?

It will be convenient to describe the development of this issue in the arguments of counsel:

a) **Counsel for Justices, Hart, Jones and Macdonald:** Counsel for these three judges took the position that the Commission was quite wrong in its criticisms of them and that they made no error of any kind. Their counsel argued that there was evidence which obviously persuaded the judges that Mr. Marshall did not murder Mr. Seale, that there was no evidence upon which a jury would properly convict him on a re-trial, and that he should therefore be acquitted. Counsel went on to say, however, that there was also evidence, including the evidence of Mr. Marshall, which entitled the judges to conclude:

> i) that Mr. Marshall had indeed been engaged in an attempted robbery;
>
> ii) that he withheld crucial evidence from the police, and from his own counsel, about where Mr. Ebsary lived which, if disclosed, would probably have led to his acquittal;
>
> iii) that Mr. Marshall had not told the truth,

particularly "the whole truth"; and

> iv) that having reached these conclusions on evidence before them they were entitled, and, indeed required, forcefully and directly, to say what they honestly thought should be said about a party whose actions had affected the case before them, and who had given evidence. Of course, it went without saying that they might be criticized for their decision. It might prove to be an unpopular decision. Nevertheless, it was their function to disregard such considerations and to say what they thought should be said. For performing this duty, they should not be subject to the unprecedented inquisition in which we are now engaged.

b) **Counsel for the Honourable Ian MacKeigan:** Basically, counsel for Mr. MacKeigan associated himself with the argument advanced by counsel for the three judges just mentioned.

c) **Counsel for the Honourable Leonard Pace:** Counsel for this former judge took a different position. He argued that it was not necessary to attack the findings or conclusions of the Royal Commission. Instead, he argued, what must be realized is that it is possible for persons of goodwill to reach different conclusions even on the same evidence, although he pointed out that the Commission had been able to

conduct a much more thorough and searching investigation into all aspects of the prosecution of Mr. Marshall than had the Reference Court. While the jurisdiction of the Reference Court was limited, the mandate of the Commission enabled it to review the conduct of the police officers and lawyers at Mr. Marshall's trial and the conduct of the police afterwards. The Commission thus had much information that was not before the Reference Court.

Counsel argued also that regardless of which of the Commission or the Reference Court was right in its different characterizations of Mr. Marshall's conduct and evidence, there was ample evidence which the Reference Court heard, or had before it, which entitled the Court to say what it did about Mr. Marshall. From this point on counsel for Mr. Pace made the same submissions as counsel for the three judges.

d) **Counsel for Mr. Marshall:** Ms. Derrick argued that the *obiter* statements in the judgment of the Reference Court warranted their formal censure though, on Mr. Marshall's instructions, she did not argue that the judges should be removed from office. Stressing the need for public confidence in an impartial judiciary, Ms. Derrick characterized the *obiter* statements as sufficiently ill-founded to cause that confidence to be seriously impaired. In examining the record before the Reference Court, she thoroughly developed her submission that much of the condemnatory language against Mr. Marshall had no authoritative evidentiary basis and was gratuitously derogatory of a man the Court conceded had spent more than ten years imprisoned for a crime he did

not commit.

e) **Commission Counsel:** Our counsel urged us to find, as is obvious, that there had indeed been a "real and horrible" miscarriage of justice. He argued that this was the case whether Mr. Marshall did or did not attempt a robbery, or whether he withheld evidence or told less than the whole truth. Counsel reminded us that Mr. Marshall was wrongly convicted of murder, served more than 10 years in prison on perjured evidence, and that evidence helpful to him was suppressed both before and after his conviction and appeal. This, he said, was apparent on the record before the Reference Court. In these circumstances, counsel argued, the language chosen by the judges, particularly that the miscarriage was "more apparent than real," and that Mr. Marshall's untruthfulness "contributed in large measure to his conviction" was insensitive in the extreme, and incomprehensible. It amounted to serious legal error bordering on grounds for removal.

Counsel went on to say that to single Mr. Marshall out for criticism, without also identifying and attributing blame to those who were really responsible for this miscarriage of justice, was clear evidence of serious insensitivity.

It seems to us that during the course of argument in this case, the emphasis shifted from error demonstrating bias to allegations of a lack of fairness in the way the Court characterized the conduct of Mr. Marshall.

We wish at the outset to state our strong disapproval of some of the language used by the Reference Court in its comments about Mr. Marshall. In reviewing the record before the Reference Court, we cannot help but be struck by the incongruity between the Court's legal conclusion that Mr. Marshall's conviction in 1971 was "unreasonable" and "not now supported by the evidence" and its *obiter* observations that nonetheless "any miscarriage of justice" was "more apparent than real". Surely it cannot be seriously argued that the conviction of an innocent person, let alone one who was at the time an adolescent, who was then unfairly incarcerated for more than ten years, was anything but a blatant miscarriage of justice.

The wrongful conviction and imprisonment of any person constitutes a <u>real</u> miscarriage of justice; it cannot be termed "more apparent than real". This is especially so when the conviction is based upon perjured evidence obtained with the complicity of the agencies of the crown. The miscarriage is greater still when crown agencies, subsequent to conviction but while an appeal is pending, receive conclusive or practically conclusive evidence of innocence but do not move promptly, or at all, to have the conviction reviewed. The miscarriage of justice, of course, becomes worse each day the innocent person remains imprisoned. There is no formula that it is possible to suggest that can be applied to redress completely more than ten years of wrongful imprisonment or which will accurately reflect the horror of what happened to Mr. Marshall. We have no difficulty in assuming that any

reasonable person, knowing the circumstances adduced in evidence before the Reference Court, would regard some of its language to be at least inappropriate.

Nevertheless, in making findings of credibility, the Court was within its jurisdiction. It was entitled to believe or disbelieve any of the witnesses before it, including Mr. Marshall. Accepting part of Mr. MacNeil's evidence, the Court concluded that an attempted robbery had been in progress. There was evidence before the Court from which this finding could honestly be made. We do not say that this is what happened, or that another court would have so concluded.

In disbelieving part of Mr. Marshall's testimony, the Court concluded, from the evidence, that his "evasions" had unleashed the tragic consequences he experienced and that he had thwarted his own defence. The Court also apparently concluded that Mr. Marshall would probably not have been convicted if he had told his lawyers, as he did not, where the real murderer could be found. And the Court concluded that Mr. Marshall was at least an unsatisfactory witness who did not tell the truth. It is not for us to substitute our own opinion about the findings of credibility made by the Reference Court. We are left to conclude that those findings led the Court to the impression which found expression in the *obiter* paragraphs.

The real question, however, is whether inappropriate language, even grossly inappropriate language, constitutes judicial misconduct in the

circumstances of this case, keeping in mind that the Reference Court was entitled in the performance of its judicial duty to analyze the evidence and to comment upon it.

What we must observe is that in the six *obiter* paragraphs the Court focused upon Mr. Marshall to the exclusion of the other destructive factors which had a role in the wrongful conviction. A court is entitled to comment on the evidence before it and upon the conduct of the parties or witnesses. Nevertheless, by referring exclusively to Mr. Marshall, the six paragraphs give the impression that the Court was ignoring the grossly incorrect conduct of other persons and concentrating on the victim of the tragedy.

The Court may have been reluctant to criticize those who were not before it, but it had the choice of noting that fact. Any criticism, if at all, due Mr. Marshall would be mild indeed compared to that due to those who had given perjured evidence, to those who had induced the witnesses to give it, to those who had failed to disclose prior inconsistent statements of witnesses and to those who suppressed the evidence of an eyewitness to the murder.

Whatever its intention in choosing to refer only to the person it acquitted, there can be no doubt that the impact of the Court's derogatory *obiter* statements created the strong impression that it was not responsive to the injustice of an innocent person spending more than ten years in jail. Although the Court's mandate was to determine

whether or not Mr. Marshall's conviction was sustainable and not to investigate all of the circumstances surrounding it, as it would have been obliged to do under para. 613(c) of the *Criminal Code* (now para. 690(c)), in taking it upon itself to comment in *obiter* on these surrounding circumstances, the Court ought to have referred to the other factors apparent in the material before it.

We would go so far as to suggest that the Court, in seeming to attribute to Marshall exclusive responsibility for the wrongful conviction, and thereby inferentially exculpating the other persons and factors demonstrated in the record to have played a key role in that conviction, so seriously mischaracterized the evidence before it as to commit legal error. (*Desgagne v. Fabrique de St. Philippe D'Arvida* [1984], 1 S.C.R. 19, at p. 31, per Beetz, J.).

We take it as a presumption, however, that judges ought not to be removed from office for legal error. Having found that the five judges in the collegial decision-making capacity were inappropriately harsh in their condemnation of the victim of an injustice they were mandated to correct, we nonetheless accept the submissions of all counsel that their removal from office is not warranted. While their remarks in *obiter* were, in our view, in error, and inappropriate in failing to give recognition to manifest injustice, we do not feel that they are reflective of conduct so destructive that it renders the judges incapable of executing their office impartially and independently with continued public confidence. The three remaining judges collectively had 58 years of

judicial experience prior to deciding the Reference and have each served since for seven more years. Moreover, the Court did in fact acquit Mr. Marshall and find his conviction unsustainable.

We do not make our criticisms lightly. We are deeply conscious that criticism can itself undermine public confidence in the judiciary, but on balance conclude in this case that that confidence would more severely be impaired by our failure to criticize inappropriate conduct than it would by our failure to acknowledge it.

VI CONCLUSION

While we cannot condone or excuse the severity of the Reference Court's condemnation of Donald Marshall, Jr., and in particular its extraordinary observation that any miscarriage of justice was "more apparent than real", we do not find that the comments can lead to the conclusion that the judges cannot execute their office with the impartiality, integrity and independence the public rightly expects from the judiciary. We therefore do not recommend their removal from office.

Reasons of Chief Justice McEachern

I. INTRODUCTION

While I agree entirely with the Majority of the Committee that our Report should be against any recommendation for removal of the remaining Judges from their offices, I find myself unable to agree with some parts of that Report for the reasons which I shall endeavour to state.

I am able to adopt Parts I to IV inclusive of the majority Report except for the syllogism in their Part IV which I do not consider appropriate for the discussion of legal principles and I do not have the same view as the majority about our responsibility to review the findings of the Commission. I do agree that the Commission was entirely within its jurisdiction, but I do not think that should deter us from examining their findings as requested by the Attorney General.

In fact, my disagreement with the balance of the majority report relates largely to the mandate we have been given, and to the majority's characterization of the language of the obiter dicta comments of the Reference Court after it correctly allowed Mr. Marshall's appeal and acquitted him of the offence of murder. I also think the Report of the Royal Commission and the Majority Report raises an important question regarding the right of judges to say what they really think about the cases they are deciding.

As I shall endeavour to demonstrate, it is of crucial importance that judges speak forthrightly, even bluntly whenever the circumstances require us to do so. This is one of those matters, and I take no comfort from saying what I believe must be said.

The Majority Report, includes no discussion of the scathing criticisms and devastating findings made by the Commission about the judgment of the Reference Court. Before setting out the Commission's findings it will be convenient to mention that the dichotomy between the Court and the Commission arises out of a fundamental difference of opinion regarding the actual circumstances of the encounter between Mr. Marshall and Mr. Seale with Mr. Ebsary and Mr. MacNeil.

Firstly, based largely upon the admissions of Mr. Marshall and the crucial evidence of Mr. MacNeil, the Court concluded that Mr. Marshall and Mr. Seale were engaged in a robbery at the time Mr. Ebsary stabbed Mr. Seale. The Commission found otherwise.

Secondly, based upon the evidence of Mr. Marshall given for the first time at the Reference that Mr. Ebsary told him approximately where he lived, and other evidence, the Court concluded (a) that Mr. Marshall was not a satisfactory witness who did not tell the truth at his trial when he failed to disclose that

he knew where the real killer might probably be found, and (b) that Mr. Marshall's admitted failure to tell even his own lawyer that he possessed this crucial evidence contributed to his conviction. Again, the Commission reached different conclusions on these important questions.

It is central to the view I have of this matter that there was evidence before the Court that permitted it reasonably and rationally to reach the conclusions I have just described.

II. COMMISSIONS 10 POINTS

The Commission said:

> "We find:
>
> 1. that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.
>
> 2. that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.
>
> 3. that the Court took it upon itself to 'convict' Marshall of a robbery with which he was never charged.

4. that the Court was in error when it stated that Marshall 'admittedly' committed perjury.

5. that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.

6. that the Court's suggestion that Marshall's 'untruthfulness...contributed in large measure to his conviction' was not supported by any available evidence and was contrary to evidence before the Court.

7. that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.

8. that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.

9. that the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

10. that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to

negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal."

In addition, the Commission made several further serious criticisms of the Court in the text of its Report which I shall detail in due course.

It is not surprising that these findings and comments of the Commission caused great concern not only to the Attorney-General, but also to the public and to the judges. They are very serious criticisms indeed.

III. OUR MANDATE

It is clear that it was these findings and criticisms that led the Attorney-General to initiate Council's review of the conduct of these judges. That makes it imperative, in my view, that we should come to grips with them. I refer briefly to the Attorney's letters with highlighting and underlining for emphasis

> "In the course of its deliberations, the Royal Commission considered the conduct of five judges in the Appeal Division of the Supreme Court of Nova Scotia who heard and decided a Reference of the Donald Marshall, Jr. conviction made pursuant to paragraph 617 (d) [now section 690] of the Criminal Code. The five judges who heard the Reference were... [the names of the judges are given].
>
> The comments of the Royal Commission respecting the setting up of the Reference and the Reference decision appear at pages 113 to 127 of volume one of its report.

> The findings in respect of the Reference decision are reported at page 116 where the Commissioners say:
>
> [here the Commission's 10 points are quoted]
>
> I am deeply troubled by the Commission's findings respecting the conduct and decision of these judges of the Appeal Division of the Supreme Court of Nova Scotia. It is significant that these findings were made by two Commissioners who are sitting judges at the present time. ...
>
> It is absolutely essential that Nova Scotians have faith and confidence in the highest court in this Province. If that faith has been shaken by the findings of the Royal Commission, as I believe it has been, it must be restored.
>
> Therefore, as Attorney General of Nova Scotia, and pursuant to subsection 63(1) of the Judges Act, I am writing to ask the Canadian Judicial Council to commence an inquiry as to whether, based upon the conduct which has been examined by the Royal Commission on the Donald Marshall, Jr., Prosecution, and commented upon in its report, [the judges] or any of them, should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d) of the Judges Act (Canada)..."

Our counsel wrote to the Attorney asking for particulars of evidence and the Attorney replied in part as follows:

> "In the summary of its findings which appears at page 116 of volume 1 of the Royal Commission Report, the Royal Commission uses very strong language which suggests the existence of improper judicial conduct. The following excerpts will highlight this point.
>
> > ...the Court selectively used the evidence before it...
> >
> > ...the Court took it upon itself...
> >
> > ...the Court's suggestion...was not supported by any available evidence and was contrary to the evidence before the Court.

> ...the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.
>
> ...the Court's gratuitous comments... created serious difficulties...
>
> The findings of the Royal Commission may not themselves constitute a basis for removing one or more of the judges from office, but this strong language compels a review to determine whether improper motivation may be behind any action of the Court.
>
> I believe public confidence in the Appeal Division of the Supreme Court of Nova Scotia was shaken by the findings of the Royal Commission. ..."

While I have no wish to review the findings of the Commission, I know of no way to answer the enquiry of the Attorney General other than to examine those findings in the light of the evidence which was before the Reference Court.

IV. ANALYSIS OF THE COMMISSION'S 10 POINTS

After much anxious consideration I have concluded that most of those findings and criticisms are not valid. I shall discuss them individually.

1. that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.

The Court did not conclude that Mr. Marshall was to blame for his wrongful conviction. What the Court said was that he "helped secure his own conviction" and that, "by his untruthfulness...[he] contributed in large measure to his conviction."

In both cases the Court gave reasons for its conclusions. As outlined in Part I of the Majority Report, there was ample evidence which logically and reasonably permitted the Court to reach those conclusions. In my view the Court made no serious or fundamental error as alleged.

2. that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.

All courts use evidence selectively. One of the most important judicial functions is to decide what evidence to accept and what evidence to reject. Fact finding is largely a process of making choices about what evidence to believe or disbelieve, and what believable evidence to act upon. The Commission's words suggest, and would be read to indicate that the Court should not have engaged in that process.

I think what it meant to convey was either that the Court did not deal with every legal and factual issue which the Commission later thought the Court should have included in its judgment, or that the Court should have made different findings on the evidence.

Viewed this way, this item is repeated in later items which I shall reach in a moment.

I am unable to find where, if at all, the Court used any significant information that was not formally admitted into evidence in order to reach its conclusions. The Commission seems to have been troubled by this question but the only reference to which we were directed, or which I could find, was one relating to an affidavit of Mr. Marshall's former lawyers which was filed with the Court but not actually admitted into evidence. It was not harmful to Mr. Marshall. I also note that at p. 120 of its Report the Commission suggested that the Court should have referred to filed but unadmitted material.

3. that the Court took it upon itself to 'convict' Marshall of a robbery with which he was never charged.

The Court did not 'convict' Mr. Marshall of robbery, nor (because of the quotation marks) do I think the Commission intended to suggest that it did even though that is how these words are likely to be read. Although most legally trained persons know it is impossible to include a robbery count in an indictment for murder (making such a conviction in the circumstances of this case legally impossible), the public may well not understand that nicety. Any public misapprehension in this connection should be corrected.

What the court did was to decide, on ample evidence, particularly that of Mr. MacNeil but also that of Mr. Marshall himself, that Mr. Seale was killed in the course of a robbery.

I do not say that is what actually happened. The Court and the Commission reached different conclusions on that question. But I have no doubt whatsoever that there was evidence before the Court which clearly permitted it to conclude that there had been at least an attempted robbery which was an important part of the narrative the Court was entitled to discuss.

The use of the following descriptive phrases by the Court, namely:

> "By planning a robbery with the aid of Mr. Seale,..." and;
>
> "...that during a robbery Seale was stabbed..." and;
>
> "...he continued to be evasive about the robbery..."

do not support an allegation that "...the Court took it upon itself to 'convict' Marshall of a robbery with which he was never charged."

4. that the Court was in error when it stated that Marshall 'admittedly' committed perjury.

Semantically, the Court was not strictly accurate when it referred to Mr. Marshall's 'admitted' perjury. What happened, as already mentioned, was that Mr. Marshall, who was under oath at his

trial to tell the whole truth, did not disclose that he knew where Mr. Ebsary lived, and other circumstances of the encounter. Mr. Marshall admitted in his evidence that he did not disclose these facts at his trial which was a most important matter leading to many serious consequences. There were substantial differences in the evidence of Mr. Marshall at trial and on the Reference. I doubt if it is necessary to say anything more on this question.

5. that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.

This is part of a larger question relating to the failure of the Court to deal with a number of matters in its judgement which the Commission obviously thought should have been included. For the reasons explained in para. 13 of Part I of the Majority Report, the Court did not have before it the evidence of the police witnesses. Similarly, the Court did not have the evidence of the Crown officers who would have been responsible for such disclosure. The Court did not know who was to blame for this misfortune, or what explanations or excuses all or any of them may have had.

Thus, great injustice may have been done if the Court, without hearing the evidence of such witnesses, had "dealt with" such failure of disclosure. It is a common rule of practice in all courts, and a wise rule, that courts should not deal with such matters without hearing the witnesses. I do not think the Court should be criticized on this account.

6. that the Court's suggestion that Marshall's 'untruthfulness... contributed in large measure to his conviction' was not supported by any available evidence and was contrary to evidence before the Court.

As already mentioned, there was a wide divergence of opinion between the Court and the Commission about the facts of this encounter. The Court, apparently accepting the evidence of Mr. Marshall regarding his conversation with Mr. Ebsary, and Mr. MacNeil's evidence about the robbery or attempted robbery, which was confirmed in part by Mr. Marshall, concluded first that there was indeed a robbery, secondly that Mr. Marshall had not told the whole truth and had harmed his defence at trial, and thirdly that if he had disclosed the fact that he knew where Mr. Ebsary lived, he would probably not have been convicted of this offence.

In my view, there was ample evidence before the Court which permitted it to reach their conclusions. I have already discussed the robbery and untruthful issues. As to the third item, it must be remembered that Mr. Marshall's evidence at trial was that Mr. Seale was killed for no apparent reason by a stranger who said he was a priest from Manitoba who was in the park late at night enquiring about bootleggers and women. This might have been true, but in the dynamics of a jury trial it was a story that might well not be believed, and it was not believed, by the jury who also had the evidence of "eye witnesses" to the contrary.

Timely disclosure of the location of Mr. Ebsary and Mr. MacNeil might well have assisted Mr. Marshall in his defence. It

is true that the police knew the identity of Mr. Ebsary and Mr. MacNeil after the trial and suppressed that information, but it is far from certain that Mr. Marshall would have been charged (or convicted) if that evidence had been known earlier. It was the view of the Commission at p. 121, with which I respectfully agree, that "...defence counsel armed with this new information would in all likelihood have successfully argued for a new trial". This suggests to me the Commission shared the Court's view about the importance of this evidence.

Mr. Marshall did not even tell his own lawyer about this crucial evidence. If he had done so the lawyer would, in the Court's view, likely have located Mr. Ebsary and Mr. MacNeil with consequences that could only have been favourable to Mr. Marshall. Certainly it would have strengthened his defence greatly.

The Commission, on the other hand, found in Mr. Marshall's favour on the questions of robbery and truthfulness, but does not come to grips with Mr. Marshall's failure to tell his lawyer of this evidence.

I do not presume to say which of the Court or the Commission is correct. Each heard the evidence and each was within its jurisdiction in reaching the conclusions it expressed. I am satisfied however that it cannot possibly be said, as the Commission said, that the Court's conclusions were "not supported

by any available evidence and was contrary to evidence before the Court." There was ample evidence before the Court on which any tribunal, acting judicially, could reach the conclusions the Court reached.

7. that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.

Canadian appellate practice does not require or expect Courts to deal with every argument that might be available on the evidence, particularly when the appeal is being allowed on other grounds. Such was the law at the time of the Reference and there was no reason why the Court should have dealt with this question.

It should also be remembered that the error in limiting cross-examination could only have led to a new trial which was of no moment once the Court directed that the absence of evidence required an acquittal.

On this point and many others, the Commission has expressed strong criticisms based upon views of law and practice that do not accord with principles of appellate procedure generally accepted in the common law world. This appears also in connection with the Commission criticisms of the Court's failure to deal with other questions unnecessary to their decision.

8. that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.

I agree with the finding of the Commission that responsibility for the assignment of judges to appeals rested with the Chief Justice. As he is not a person about whom any recommendation may be made, it would not be appropriate to say anything about this question.

9. that the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

This is a characterization of the Court's decision which arises from the context of the Commission's Report at page 124-125 where it is stated:

> "The decision amounted to a defence of the system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.
>
> The Court of Appeal's decision to defend the system is all the more extraordinary in view of its refusal to hear evidence from the police. The police affidavits were not received into evidence and no oral testimony was given by the police. In our legal system, any decision to affix blame or responsibility requires a full airing of the evidence on all sides of the issue; scrupulous adherence to elementary principles of fairness and testing of the evidence by cross-examination provides a sound foundation on which to base a decision."

It is not correct that the Court "refused to hear the evidence of the police." What happened is clearly explained above and need not be repeated. Once the so-called eye witnesses recanted, and with Mr. MacNeil then exonerating Mr. Marshall of murder, there was no need for further evidence. Counsel for Mr. Marshall objected to

the admission of the police evidence on the ground of irrelevancy. For that reason, in accordance with the submissions of both counsel, the Court declined to hear the evidence.

It must also be remembered that the Court heard all the evidence which counsel for the Crown and for Mr. Marshall tendered. It is a principle of law which lies at the root of the adversarial system that Courts, particularly Appeal Courts, do not seek out evidence. That is the responsibility of counsel.

In this case the Court heard all the evidence which was offered and it is difficult to understand how it could be criticized for not hearing evidence that counsel did not tender.

There can be no doubt, as I read the Commission Report that its criticism relates to the **obiter** comments, and not to the judgment acquitting Mr. Marshall. The Commission found the Court's criticisms of Mr. Marshall to be a "defence of the criminal justice system," which is a value judgment the Commission was entitled to make. But it is incomprehensible, to use the Commission's word, to say that in making its comments the Court "ignored the evidence and refused to hear all evidence relative to the issue of responsibility". There was ample evidence to support the Court's views and, as I have said, the Court did not refuse to hear any evidence. There is no defence of the criminal justice system in the judgment of the Court.

What I think the Commission must have intended to say was that the Court should have accepted the Reference evidence of Mr. Marshall that he was not engaged in a robbery because "it didn't happen," and that by only criticizing Mr. Marshall the Court was impliedly exonerating everyone else of responsibility. In my view the Court's words do not permit that construction. I shall have more to say about the Court's criticisms of Mr. Marshall later.

I am uncertain what the Commission meant by "notwithstanding overwhelming evidence to the contrary". I think this was intended to mean that the evidence of blame on the part of others (than Mr. Marshall) was overwhelming.

With respect, there was evidence which permitted the Court to attribute some responsibility to Mr. Marshall. The evidence necessary to fix blame on others, (except the eye-witnesses whose evidence was extensively discussed), was incomplete, and I have already explained why it would have been improper for the Court to attempt that exercise.

In any event, it is a serious exaggeration to say that the evidence against any conclusion stated by the Court was "overwhelming".

10. that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.

I have no doubt that the consequences just quoted from the Commission's Report were accurate. What is in question here is the right, and sometimes the obligation, of a Court to state its conclusion regarding the conduct of a party as disclosed by the evidence. As just mentioned, I shall have more to say about this in a moment, but it is my view that we expect our judges to speak directly, even bluntly, so that there will be no misunderstanding of what they mean. It has never been the law that judges should be investigated with a view to possible removal for doing so.

V. FURTHER CRITICISMS OF THE COURT BY THE COMMISSION.

In addition to the foregoing 10 Points, the Commission included some further serious criticisms of the Court within the pages of its Report which the Attorney General expressly referred to the Canadian Judicial Council. I do not think it possible to leave them unmentioned although I shall not discuss them all as they tend to become repetitious.

1. Onus of Proof.

In its comments the Court said

> "[83] By hiding the facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defence available to him, namely, that during a robbery Seale was stabbed by one of the intended victims. He now says that he knew approximately where the man

> lived who stabbed Seale and had a pretty good description of him. With this information the truth of the matter might well have been uncovered by the police."

At p. 120 the Commission said:

> "The Court's characterization of the 'robbery' as being the 'only defence available' to Marshall is curious in the extreme. Surely in our criminal justice system there is no onus on an accused to develop a defence. Surely the onus and obligation on the part of the Crown is to bring forward truthful evidence which, if accepted, will support the conviction. How can an accused be blamed if he is convicted on the basis of perjured testimony?"

With respect, this criticism confuses the onus of proof with the burden of calling evidence at certain stages of a trial. The onus of proving the guilt of the accused beyond reasonable doubt is always upon the Crown which assumes that onus at the start of a trial and it never shifts to the accused.

There is never any obligation upon an accused to give evidence or to adduce evidence. At the end of the Crown's case, however, sufficient evidence may have been presented by the Crown so that the accused is in the position where he may be convicted if he does not call a defence. He is under no obligation to do so, but he runs the risk of being found guilty if he does not.

One never knows at the close of Crown's case, whether the jury has believed the evidence of the Crown, or whether the jury has

been persuaded that the Crown has discharged the onus of proof beyond reasonable doubt. Those are judgments that are made by the defence in the course of nearly every criminal trial.

That was the position in which Mr. Marshall found himself at the close of the Crown's case at his trial. The Crown had called "eye-witness" evidence that said he stabbed and killed Mr. Seale. If Mr. Marshall did not call a defence he was seriously at risk of being convicted. He apparently decided, no doubt on the advice of counsel, that he should call a defence, and he actually gave evidence himself. When the decision was made to call a defence it was crucial that he put forward the best possible defence he could.

His defence was that a stranger had killed Mr. Seale for no apparent reason. This was a defence which rested entirely upon the believability of Mr. Marshall's evidence by the jury. The quality of his defence, both in the cross-examination of the Crown's witnesses, and in his own defence, would have been enhanced considerably, perhaps conclusively, if he could have identified Mr. Ebsary as the killer of Mr. Seale, and if he could have called Mr. MacNeil to support his own testimony that he was not the killer.

The Commission seems to have been of the view that these principles were somehow inoperative because Mr. Marshall was convicted on perjured evidence. The principles I have just described clearly applied during Mr. Marshall's trial. The

correction of an injustice caused by perjured evidence is a completely different process.

What the Court was saying was only that by failing to be more forthcoming about crucial evidence that only he knew about (where Ebsary might be found), and by avoiding the question of robbery which explained Mr. Ebsary's reaction, Mr. Marshall did indeed preclude the development of the best defence which he needed to defend himself against the evidence, perjured or non-perjured, which had been presented by the Crown. The Court made no mistake regarding the onus of proof.

2. The location of Mr. Ebsary and Mr. MacNeil.

Also at p. 120 the Commission said "We can think of no legitimate reason why the Court would blame Marshall for the police's failure to find Ebsary and McNeil."

The Court did not blame Mr. Marshall for the failure of the police to find Mr. Ebsary and Mr. MacNeil. What the Court said was that with a timely disclosure the police "might well have become aware of them."

We do not know precisely what Mr. Marshall told the police during their investigation, but it seems clear that he did not disclose, even to his trial lawyer, that he knew where the person

who killed Mr. Seale could probably be found until he gave that evidence at the Reference.

The foregoing, in my view, is a legitimate reason for the Court to lay some of the responsibility for this misfortune upon Mr. Marshall.

3. Miscarriage of Justice.

At page 125 the Commission said:

> "A fair reading of the judgment indicates that the Court of Appeal found there to be no miscarriage of justice. The conviction was quashed on the basis that it was now unsupported by any evidence (Section 613(1)(a)(i)). It was not quashed on the ground that there was a miscarriage of justice Section 613(1)(a)(iii)). ..."

In my view, the Court did not find there had been no miscarriage of justice. It allowed his appeal and acquitted him. It chose to do so under the then Code s.613 (1)(a)(i), which deals with convictions which are unreasonable and are not supported by the evidence rather than under ss. (iii) which deals with any ground where there was a miscarriage of justice.

It does not follow that the Court did not think there was a miscarriage of justice. As already explained, the Court did not examine the circumstances which led to the obvious miscarriage of

justice and it was probably correct, therefore, in confining itself to the head of jurisdiction upon which there could be no doubt.

4. Criticism of Mr. Marshall's conduct.

Running through the Commission's Report is a recurring theme that the Court ought not to have criticized Mr. Marshall, particularly in the absence of a discussion of the circumstances which led to the perjured evidence, and the suppression of evidence before, during and after his trial.

For the reasons already mentioned, it would not have been proper for the Court to express conclusions on matters which had not been investigated by evidence and argument before them. The question therefore is whether it is improper ("legal error" as found by the majority), for the Court to criticize Mr. Marshall at all.

There has never been any rule of law or practice limiting the right of a judge in court or in Reasons for Judgment from saying what he or she thinks should be said even though he or she may decide for any number of reasons not to criticize others who may also deserve critical mention. This freedom of judges to speak their minds has been recognized as one of the hallmarks of judicial independence and one of the prices society pays for the benefits of a judiciary which says what it thinks should be said.

This judicial right is not a license for abuse. First, if a judge's criticism or comments indicate unfitness to discharge the judicial function then he or she faces inquiry and, in a proper case, removal from office. In this case no suggestions have been made of dishonourable or improper motive on the part of the Reference judges, and no unfitness of any kind was argued except for these few comments. Even counsel for Mr. Marshall made no such suggestion. These men are completely honourable judges who have served with distinction for many years. Justices Hart, Macdonald and Jones served 22, 20 and 16 years respectively on the Court before this matter occurred, and each has served for 7 years subsequently without any similar allegations.

Secondly, once a judgment is delivered, it is "given over," as the cases say, to critical scrutiny by colleagues on the Bench, the bar, the academic community, the public, the media and by the higher courts who have from time to time commented upon or criticized intemperate or injudicious language. To any criticism of their judgments the judges are expected not to reply. Generally speaking, this amalgam of constraints has with very few exceptions kept judicial comments within reasonable and proper grounds.

In this case, while acquitting Mr. Marshall, the judges obviously considered it important to add some comments about his conduct. They considered it proper to point out that he had been engaged in a robbery, that he contributed to his own conviction by

not disclosing, even to his own lawyer, the likely whereabouts of the real murderer, and that he had not been completely truthful at his trial or on the Reference.

I have no doubt some judges would not have made these comments. But if judges are expected to speak openly, directly and bluntly about matters that may be of public interest and importance, then we must be very careful indeed before we dilute that principle.

In my respectful view no principle of law or practice has ever been identified which precluded the Reference Court from saying what it thought should be said about Mr. Marshall's conduct even though it decided it would not discuss the conduct of the other contributors to the miscarriage of justice from which he suffered. In my view it committed no legal error.

VI. THE LANGUAGE OF THE COURT'S COMMENTS.

There can hardly be any doubt that it was inaccurate and inappropriate to describe the miscarriage of justice suffered by Mr. Marshall as "...more apparent than real." Absent capital punishment, it is difficult to imagine anything worse than to be wrongly convicted for murder and imprisoned for nearly 11 years on false, perjured and suppressed evidence.

Having said that, and without intending to minimize its inappropriateness, or to condone it in any way, it must be remembered that this "more apparent than real" is only one unfortunate error of language in a long and otherwise correct legal decision, and it is the only known mis-step of its kind in the long and otherwise distinguished careers of these judges. If there is any principle of proportionality it should surely be applied in their favour. It does not, in my respectful view, call for the retrospective analysis undertaken by the majority. It was a bad mistake in choice of words, but that is all it was.

VII. CONCLUSION.

In view of the foregoing I would answer the Attorney's question in the negative, that is to say that, based upon the conduct (of the judges) which has been examined by the Royal Commission, and commented upon in its Report, no recommendation for their removal from their offices should be made.

In response to the Attorney's second letter, I would reply that there was no improper motivation behind the Court's action.

Respectfully submitted

Chief Justice Allan McEachern.