ANNEXES

RSNL1990 CHAPTER P - 38

PUBLIC INQUIRIES ACT

Amended:

CHAPTER P-38

AN ACT RESPECTING PUBLIC INQUIRIES

Analysis

Short title

1. This Act may be cited as the *Public Inquiries Act.*

RSN1970 c314 s1

Commissions of inquiry

2. (1) Where the Lieutenant-Governor in Council considers it expedient to make an inquiry into a matter connected with the peace, order and good government of this province, or the conduct of a part of the public business, or the administration of justice, or into the industries of this province, or into other matters which he or she considers to be for the public good, the Lieutenant-Governor in Council may by Commission under the Great Seal appoint the person or persons, called the commissioner or commissioners, that he or she may select to hold the inquiry.

(2) The Lieutenant-Governor in Council may by the commission indicate to the commissioner or commissioners the scope of the inquiry, and may confer upon him or her or them the power to summon witnesses, and to require the witnesses to give evidence orally or in writing upon oath or affirmation, and to produce the documents and things that

may be considered necessary to the full investigation of the matters referred to in the commission.

RSN1970 c314 s2

Powers of commissioners

3. (1) The commissioner or commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence that is vested in a court of law in civil cases; and a false statement made by the witness on oath or affirmation shall be an offence punishable in the same manner as perjury.

(2) A witness shall not be excused from answering a question upon the ground that the answer to the question may tend to criminate the witness, or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of a person.

(3) Where a witness objects to answer upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of a person, and where but for this Act or the *Canada Evidence Act* the witness would have been excused from answering the question and although the witness is because of this Act or the *Canada Evidence Act* compelled to answer the answer so given shall not be used or receivable in evidence against the witness in a criminal proceeding taking place later, other than a prosecution for perjury in the giving of the evidence.

RSN1970 c314 s3

Assistance to commissioners

4. The Lieutenant-Governor in Council may engage the services of the counsel, accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants that may be considered necessary to help the commissioner or commissioners in the inquiry.

RSN1970 c314 s4

Delegation by commissioners

5. (1) The commissioner or commissioners may with the consent of the Lieutenant-Governor in Council authorize and appoint the accountants, engineers, technical advisers, or other experts, or other qualified persons, to inquire into a matter within the scope of the commission that may be directed by the commissioner or commissioners.

(2) A person so appointed shall have the same powers which a commissioner has to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(3) A person so appointed shall report the evidence and their findings to the commissioner or commissioners.

RSN1970 c314 s5

Executive Council

Newfoundland and Labrador

Certified to be a true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Administrator on
2005/10/03

OC2005-507

JUS/DM
TW/DM
TB/DM
AG
Deputy Clerk
File

MC2004-0376. JUS2004-026.

Under the authority of section 2 of the Public Inquiries Act, the Lieutenant Governor in Council is pleased to revise the time frame for Commissioner Antonio Lamer to complete the Inquiry and deliver his final report containing his findings, conclusions and recommendations to the Attorney General on or before December 31, 2005.

Robert C. Thompson

Clerk of the Executive Council

COMMISSION OF INQUIRY

THE RIGHT HONOURABLE ANTONIO LAMER, P.C., C.C., C.D.

NICK AVIS, Q.C.
SENIOR INQUIRY COUNSEL (HEARINGS)

ED RATUSHNY, Q.C.
SENIOR INQUIRY COUNSEL (ADVISORY)

RULING ON THE TERMS OF REFERENCE

1. BACKGROUND:

As I have stated previously, when I accepted appointment to this Commission, I had advised the Government of Newfoundland and Labrador that other professional commitments precluded me from commencing public hearings until September of this year. That did not pose a problem since substantial preparation by the staff over the spring and summer was required in any event, to be ready for the hearings.

The status of each of the three individuals who were subjected to the criminal proceedings in question is distinct. Mr. Parsons not only was acquitted but his factual innocence was acknowledged and he was compensated. Mr. Dalton was acquitted but it has not been acknowledged that he is factually innocent. Mr. Druken was not even given the opportunity to be acquitted, let alone acknowledged to be factually innocent.

The public hearings did commence on September 23 and we were able to complete one of the five subject areas described in the Terms of Reference. This term related to the delay in the Dalton appeal of his murder conviction.

However, it was apparent to me and to many of the counsel with standing, that the remaining items in the Terms of Reference raised a number of questions that should be resolved if we are to proceed expeditiously and effectively. Therefore, the week of October 28 was scheduled for the purpose of hearing the views of all parties in relation to the meaning and scope of the Terms of Reference.

As I have emphasized on a number of occasions, a Commission of Inquiry is a captive of its Terms of Reference, subject to additional constraints imposed by the law, including the law of the Constitution. It follows that the scope of a Commission's mandate is determined not by the Commissioner, but by the Government. The constitutional limitations arise, not only from the separation of powers between the federal and provincial levels of government in relation to the

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criminal law power and the administration of justice, respectively, but also as between government and the judiciary.

At the outset of the first phase involving delay in the Dalton appeal, both Mr. Dalton and his counsel urged me to inquire into his factual innocence. Mr. Dalton was acquitted by a jury and therefore, is entitled to an irrebuttable "presumption" of innocence. However, he seeks a finding of "actual" innocence, in other words, a finding that he did not commit the crime in question or, in this case, that no crime occurred. Otherwise, he asked, on what basis is this Commission to determine whether he should be compensated, and if so, in what amount?

A similar issue arises in relation to the items of the Terms of Reference related to Mr. Druken. However, it is even more complicated. Unlike Mr. Dalton, Mr. Druken has never been acquitted of the murder in question. The proceedings against him were discontinued by a "stay of proceedings". Mr. Druken is also entitled to be presumed innocent but, unlike Mr. Dalton, there is nothing in law to prevent Mr. Druken from being charged with the same offence. In this respect, his presumption of innocence is not irrebuttable but is similar to that of all other members of the public. His status, again, raises serious difficulties in determining whether he should be compensated, and if so, the basis on which such compensation should be determined.

These and other issues related to the Terms of Reference are addressed under the headings which follow.

2. SCOPE OF TERMS 1(a) and 1(b):

Term 1(a) requires the Commissioner:

> To inquire into the conduct of the investigation into the death of Catherine Carroll, and the circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons for the murder of Catherine Carroll.

Term 1(b) is identical except the names of the victim and the accused are replaced by the names "Brenda Young" and "Randy Druken" respectively.

The aspect of these terms referring to the "investigation" does not appear to raise concerns. However, the aspect of the "criminal proceedings" does. In this respect, I had asked Mr. Avis to ensure the exploration of the concerns that may arise when a Commission engages in a consideration of similar issues to those that have already been the subject of criminal trials and appeals. With that consideration in mind, how is the phrase "criminal proceedings" to be interpreted?

The first question to be addressed is the meaning of the phrase "circumstances surrounding". It is of interest that the Terms of Reference in the Morin inquiry simply use the phrase "into the criminal proceedings" while those in Sophonow also include the preface "circumstances surrounding". It has been suggested that this phrase qualifies the scope of the examination of the criminal proceedings and precludes an examination of what occurred "in the face of the Court". This view is reinforced by the ordinary meaning of the word "surround", which implies being "outside".

The Report of the Morin Inquiry clearly indicates that the Commissioner had no hesitation in reviewing matters that had occurred in a trial even though they may have been ruled upon by the trial judge. Nor is there any suggestion in the Sophonow Report that the phrase "circumstances surrounding" limited the examination of the criminal proceedings in question. Indeed the Commissioner there appeared quite willing to address the role of a trial judge. However, it was "not necessary" for him to do so since that had been done by the Manitoba Court Appeal. The Commission did "...agree with and endorse their findings pertaining to the conduct of those trials".

This approach is reinforced by the breadth of the phrase "criminal proceedings". It does not commence with the trial but with the laying of a charge. Restricting this inquiry to matters outside of the criminal proceedings would leave very little to be examined. Potentially important issues such as the relationship of the prosecution to the police, and the prosecution disclosure to the defence, would be precluded.

Term 7 of the Terms of Reference authorizes the Commissioner to rely upon "...any transcript or record of pre-trial, trial or appeal proceedings before any Court...". This also supports an interpretation that is not limited to matters "outside" of the actual criminal proceedings.

Finally, to interpret the phrase "criminal proceedings" so restrictively would undermine the very purpose of this inquiry. Its basic task is to determine "what happened" in these two cases and "why", in order to inform the public and to identify areas where improvements might be made to the administration of justice in Newfoundland and Labrador. To carve out significant areas of "what happened" as being "out-of-bounds" would undermine that basic purpose.

As a result, the phrase "circumstances surrounding" must be interpreted as expanding rather than limiting the examination of the criminal proceedings in question. This permits an examination of both the actual criminal proceedings and any additional matters which may have affected those proceedings.

It follows that all aspects of the criminal proceedings may be examined provided such examination is required by the purpose for which this Commission has been created. More is said about this under the heading, Constitutional Issues. However, this limitation with respect to "purpose" is important. This inquiry cannot be a "fishing expedition" to re-open every potentially contentious issue that might arise. The issues to be explored must be relevant to the central purpose. In this respect, I adopt, as a guideline in assessing relevance, the standard proposed by Mr. Avis, namely, is the conduct or issue in question "serious enough to have potentially affected the investigations or the verdicts"?

Item 5 of the Terms of Reference also imposes limits on the scope of the inquiry under Items 1(a) and 1(b). It precludes a "retrial" or findings related to "civil or criminal responsibility". Since these reflect constitutional limitations, they are also addressed under the heading, Constitutional Issues.

3. COMPENSATION IN TERMS 1(c) and 1(e):

Term 1(c) requires the Commissioner:

> To advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation from Government and if so, the appropriate amount of such compensation?

Term 1(e) relates to whether compensation should be given to Ronald Dalton and if so the appropriate amount, but is restricted to being "for the eight years in which he awaited the perfection of his Appeal". It should be noted that in the case of Gregory Parsons, the Government has acknowledged his factual innocence and has already awarded compensation.

The Terms of Reference for this Inquiry are unique in placing the issue of compensation before a Commission without an acknowledgement by the Government of factual innocence. It was submitted by some of the parties that this was an implicit mandate to embark upon an inquiry into factual innocence in the two cases where the issue of compensation has been raised. I am of the view that the current Terms of Reference do not permit an inquiry into the factual innocence of Mr. Druken or Mr. Dalton. For reasons discussed under the heading Constitutional Issues, I believe that a provincial commission of inquiry could be given such a mandate. However, such a mandate has not been given to this Commission.

In the event that this commission of inquiry should be given such a mandate, the Government should recognize that this would entail considerable additional time and resources. While I have not reviewed the evidence relevant to the cases in

question, there is also, always the possibility that, ultimately, such an inquiry could be inconclusive on the issue of factual innocence.

Compensation in cases of factual innocence or wrongful conviction normally is based upon an acknowledgement by the Executive branch of government that a miscarriage of justice has occurred. Factual innocence may be apparent from the evidence and result following a criminal trial. Even in such cases, compensation is not always granted by the Government. Indeed, a factually innocent person may be convicted even where all procedural safeguards have been respected.

The decision to award compensation to a wrongfully convicted person is an Executive decision. It is not made because of any legal obligation. It is an *ex gratia* payment made because it is the view of the Government that it is in the public interest to do so. Attempts have been made to establish guidelines as to when such payments should be made, but ultimately, the decision tends to involve an acknowledgement that the factually innocent person has suffered unacceptable consequences because the criminal justice system did not operate the way it should have.

Counsel for the Attorney General submitted that it still would be possible for this Commission to award compensation to Mr. Dalton for the delay in his appeal, even without a determination of factual innocence. However, as Mr. Dalton himself suggested, there may be a significant difference between awarding compensation for delay to one who is factually innocent and to one who is potentially guilty. Quite frankly, I have great difficulty in determining how compensation can be calculated for Mr. Dalton in these circumstances. Is one or the other status to be assumed? If so, which one? However, I will hear specific submissions related to Term 1(e) when we reach that phase.

Similar concerns arise with respect to potential compensation for Mr. Druken with the added factor that he has not even been acquitted. There appear to be a number of aspects of the criminal proceedings in relation to Mr. Druken, which warrant examination pursuant to Term 1(b). Perhaps the issue of compensation will be clarified after that phase has been completed. However, I presently have the same difficulty with respect to potential compensation for Mr. Druken as I have for Mr. Dalton.

4. CONSTITUTIONAL ISSUES:

The constitutional foundation for a public inquiry of this nature is section 92 (14) of the Constitution Act, 1867, which assigns responsibility for the administration of justice, including criminal justice, to the provinces. The Government of Newfoundland and Labrador considered issues arising from the murder convictions

of Gregory Parsons, Randy Druken and Ronald Dalton to be of sufficient public importance to warrant establishing this Inquiry. Item 5 of the Terms of Reference provides that I am to perform my duties:

> ...without expressing any conclusions or recommendations regarding the civil or criminal responsibility of any person or organization and without permitting the enquiry to become a retrial....

These words express constitutional limitations, which apply to every provincial commission of inquiry that is reviewing criminal proceedings.

Such a commission may review the same subject matter as that of a criminal investigation and trial, but it must do so for a different and legitimate provincial purpose. It examines what mistakes or congruence of circumstances may have led to the results in question. It tells the Government what happened and why and it may make recommendations to avoid pitfalls in future cases. It may review the conduct of police officers, prosecutors and defence counsel, but it does not do so as a disciplinary body. It may review the findings of a trial judge, but it does not do so as an appellate court. As one of the parties stated, a court of appeal does not ask, "what went wrong"? It may do these things for the public purpose described above. It must avoid efforts by any of the parties to "retry" the case in an adversary manner and it must scrupulously avoid making findings which express an opinion as to criminal or civil responsibility in law.

This leads to a further constitutional issue, which was alluded to above, namely: May a provincially constituted commission of inquiry, (indeed even a federally constituted one), be authorized by its terms of reference to inquire into and report on whether a person who has been tried in a criminal court, is factually innocent? The constitutional hurdle for an inquiry, in such circumstances would appear to be far more difficult to overcome. Presumably such a commission would have to examine the same evidence as well as many of the identical issues as those at the criminal trial.

However, there are important differences. The most fundamental is that a criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.

In contrast, a commission has a very different purpose. It is to provide advice to the provincial Government as to whether all of the circumstances, including a previous wrongful conviction, warrant an official response. This might include the granting of compensation or the making of an apology. This would not involve the

exercise of the criminal law power under section 91(27) of the Constitution Act, 1867. Rather, it would flow from section 92 (14) with respect to the administration of criminal justice.

Moreover, the report of a commission has no legal consequences. It does not make a binding decision and does not affect legal rights. It is merely the advice of a commission to better enable a provincial Government to carry out its responsibilities in a legitimate sphere of its jurisdiction.

This result may be viewed from another perspective. There is no question that a provincial government may decide to make an *ex gratia* payment to a person who has been wrongfully convicted of a crime. In making such a decision, the Government must rely on advice from someone who has thoroughly reviewed the criminal proceedings in question and all other relevant factors. Why then can the Government not rely on a commission, which has legal status and powers, as the vehicle to inquire into the matter and provide such advice?

Thus, while such proceedings before a commission might have the appearance of a "re-trial", they would be for a completely different purpose. They would not be bound by criminal rules of procedure or evidence and could take into account matters inadmissible at the criminal trial as well as additional facts or developments which became known subsequent to the criminal trial.

It must be emphasized that it would not be permissible for such a commission to determine that the person in question was "factually guilty". Such a finding would be attempting to do exactly what only a criminal court may do. Rather, if factual innocence cannot be determined, that is all that should be reported. This may be a fine distinction, but so also may be the distinction between a finding of misconduct and one of criminal responsibility. That distinction was ably articulated by my former colleague, Cory. J in *A.G. Canada v. Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440. Similar care and appropriate language would be necessary where a commission declines to make a determination of factual innocence.

There are, of course, other constitutional limitations upon such an inquiry. For example, the judge who presided at the criminal trial (or any other judge) may not be called to testify before such a commission. There are other legal restrictions imposed by the law of privilege and the Criminal Code provisions related to jurors.

5. CONCLUSION:

I am grateful to all counsel for their submissions in relation to these issues. The parties will observe that I have not adopted some of the submissions made by Commission Senior Counsel (Hearings). That should not be viewed as surprising

but rather as a reflection of the division of responsibilities I have established. Commission Counsel (Hearings) makes submissions in the hearing room, together with counsel for all of the parties and there may be strong disagreement reflected in those submissions. However, once those submissions have been made, I rely only on Commission Counsel (Advisory) to provide legal and constitutional advice and to assist in formulating my reasons.

To summarize my conclusions with respect to the Terms of Reference:

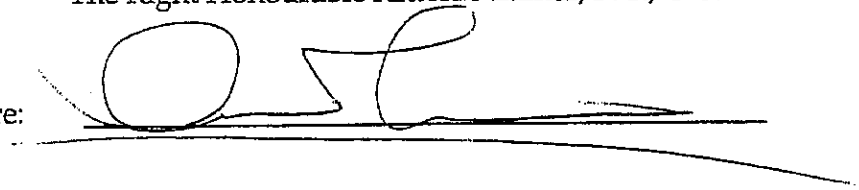
- The next phase of this Inquiry relating to Term 1(a) (investigation and criminal proceedings in Parsons) may proceed on the basis indicated in these reasons;
- The phase relating to Term 1(b) (investigation and criminal proceedings in Druken) may proceed on the same basis;
- The compensation phases in Terms 1(c) and 1(e) may not be possible to address in the absence of determinations of factual innocence.

The current situation with respect to the compensation issues raises serious concerns. There has been no determination by the Government of factual innocence. For this Commission to embark on such a determination would require an amendment to the Terms of Reference as well as substantial additional time and resources. Another possible option might be an amendment to direct this Commission to address compensation on the basis of an assumption of factual innocence.

Finally, I wish to observe that, on the eve of the hearings in relation to these Terms of Reference, a press release was issued by the Premier-elect of Newfoundland and Labrador. It suggested that the Government would be pleased to hear any recommendations I might want to make by way of amendments to the Terms of Reference. I do not consider it to be appropriate for me to make any such recommendations at this time.

The nature and scope of the Terms of Reference are a matter of public policy for the Government, which also involve a consideration of their financial implications. Counsel for the Attorney General participated in the hearings related to the Terms of Reference and I assume the Attorney General has received a copy of the transcript of those proceedings, as I requested. In the event any changes to those Terms are proposed, I trust I will have an opportunity to comment on any such proposals.

The Right Honourable Antonio Lamer, P.C., C.C.

Signature: 

Executive Council

Newfoundland and Labrador

Certified to be a true copy of a Minute of a Meeting of the Committee of the Executive Council of Newfoundland and Labrador approved by His Honour the Lieutenant-Governor on

2005/04/28

OC2005-151

JUS/DM
TW/DM
TB/DM
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Deputy Clerk
File

MC2005-0178. JUS2005-009.

Under the authority of section 2 of the Public Inquiries Act, the Lieutenant Governor in Council is pleased to defer for six months following receipt of Commissioner Lamer's report on the administration of justice, the following phases of the Terms of Reference of the Lamer Commission of Inquiry:

i) for the Commissioner to advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation from Government and if so, the appropriate amount of such compensation; and

ii) for the Commissioner to advise on whether Ronald Dalton should receive financial compensation from Government for the eight years in which he awaited the perfection of his Appeal, and if so, the appropriate amount of such compensation.

Robert C. Thompson

Clerk of the Executive Council

NLIS 3
May 5, 2005
(Justice)

Government to await Commissioner Lamer's report
before proceeding with compensation phase of inquiry

Minister of Justice and Attorney General Tom Marshall today announced that government will await Commissioner Lamer's report on the administration of justice before proceeding with the compensation phase of the Lamer Inquiry. There will be a period of not more than six months following receipt of Commissioner Lamer's report during which government will review the commissioner's findings.

"Commissioner Lamer's report will be focused on the administration of justice and provide insight and information to help strengthen our criminal justice system in the province. At the same time, Commissioner Lamer has expressed concern over his ability to recommend compensation without some direction from government on factual innocence. In the case of Mr. Druken, we would like to have the benefit of Commissioner Lamer's report before deciding how to proceed," stated Minister Marshall.

With respect to Ronald Dalton, Minister Marshall stated, "Government will await Commissioner Lamer's findings of why Mr. Dalton spent eight years in prison awaiting an appeal. This report will provide an answer to what role, if any, government played in this delay, and provide insight to the possibility of compensation for Mr. Dalton. In addition, having given the matter careful consideration, we are satisfied, as was the previous administration, that the circumstances of Mr. Dalton's arrest and prosecution do not call for a public inquiry. As such, there will be no change in the original terms of reference."

"Commissioner Lamer has expressed concerns regarding the circumstances under which Gregory Parsons accepted compensation. Government will assess Commissioner Lamer's report before deciding whether or not further compensation should be provided to Mr. Parsons," added Minister Marshall.

The Lamer Inquiry, announced in March 2003, is a public inquiry into alleged miscarriages of justice in the cases of Gregory Parsons, Randy Druken and Ronald Dalton. Specifically, the inquiry has a mandate to review the investigations and circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons and Randy Druken. The inquiry was also asked to review why Ronald Dalton's appeal of his murder conviction, took eight years before his appeal was heard by the Court of Appeal. The inquiry is scheduled to conclude in June 2005. The report is expected on or before December 31, 2005.

"We look forward to the final submission by Commissioner Lamer, and have the utmost confidence that the recommendations will improve the administration of justice in the province," added Minister Marshall.

Media contact: Heather MacLean, Communications, (709) 729-6985, 690-2498

2005 05 05 3:30 p.m.

Commission of Inquiry into the conduct of the investigations into the deaths of Catherine Carroll and Brenda Young and the circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons and Randy Druken, the delay in the appeal of Ronald Dalton, issues of compensation with respect to Randy Druken and Ronald Dalton, and any related systemic issues.

RULES OF PRACTICE AND PROCEDURE

1. Definitions

1. *The Commissioner* means The Right Honourable Antonio Lamer, P.C., C.C., C.D.

2. *Inquiry Counsel (Advisory)* means Ed Ratushny, Q.C.

3. *Inquiry Counsel (Hearings)* means Nick Avis, Q.C. or, if he so designates in writing, Ed Ratushny, Q.C. or Rosellen Sullivan.

4. *Inquiry counsel* means any one of Ed Ratushny, Q.C., Nick Avis, Q.C. or Rosellen Sullivan.

5. *Counsel* means counsel for any person, organization or office with standing for a particular phase of the Inquiry.

6. *A person, organization or office with standing* means any person, organization or office granted standing by the Commissioner for a particular phase of the Inquiry.

7. *Documents* mean every kind of printed or hand-written matter regardless of the means of creation, storage or reproduction, electronic images, tape recordings, videotapes and photographs. Documents include, without limiting their definition, affidavits, witness statements, correspondence, notes, transcripts, legislation, regulations, books, reports, pleadings, diagrams, plans, decisions or orders of any court, board, tribunal, commission or inquiry, and images or descriptions of exhibits.

8. *The list of documents* is a list of documents potentially relevant to a particular phase of the Inquiry and is subject to ongoing revision by the Commission.

9. *The public record* means any document that is already generally available to the public, any exhibit filed at the hearings or at the hearing of an application, and includes any document on the list of documents that the Commissioner directs to become part of the public record.

2. General

1. The Commissioner may depart from these rules when he considers it appropriate to do so.

2. These rules may be amended by the Commissioner and all counsel will be notified of any such amendments.

3. Directions may be provided by the Commissioner to supplement these rules and all counsel will be notified of any such directions.

4. All proceedings of the Inquiry will be dealt with as informally and expeditiously as possible but in accordance with the principle of fairness.

5. The Commissioner may postpone any date set for any hearings or application or the doing of any thing. Inquiry counsel shall notify all counsel and any person, organization or office affected by the postponement, of the new date.

3. Notice and Service

1. Notice shall always be in writing.

2. A subpoena issued pursuant to these rules and the *Public Investigations Evidence Act* shall be served personally.

3. Unless otherwise specified, anything that has to be served, except a subpoena, must be served on all counsel and Inquiry Counsel (Hearings).

4. Unless otherwise specified and except for a subpoena, service or notice may be personal, by registered mail or facsimile or e-mail. Service or notice after 5 p.m. shall be deemed to be the next business day.

4. Terms of Reference and Phases of the Inquiry

The Inquiry will be divided into 6 distinct phases dealing with the 6 terms of reference in the Order in Council. The 6 phases will be heard in the following order:

Phase I	Term 1(d):	Delay in the Dalton appeal.
Phase II	Term 1(a):	Carroll investigation and Parsons criminal proceedings.
Phase III	Term 1(b):	Young investigation and Druken criminal proceedings.
Phase IV	Term 1(e):	Dalton compensation issues.
Phase V	Term 1(c):	Druken compensation issues.
Phase VI	Term 4:	Systemic issues.

5. Hearings

1. The Commission will hold public hearings at:

PO Box 8700, Atlantic Place
3d Floor, 215 Water Street,
St. John's, NL, A1B 4J6

or such other place as the Commissioner directs on dates to be determined by the Commissioner including the following dates in 2003 and 2004:

23 September to 26 September. (Dalton 1(d))
1 October (Submissions Dalton 1(d))
28 October to 29 October (Submissions/Applications)
9 December to 12 December (Parsons 1(a))
15 December to 16 December (Parsons 1(a))
20 January to 23 January (Parsons 1(a))
26 January to 30 January (Parsons 1(a))
3 February to 5 February (Parsons 1(a))
4 May 2004 - 7 May 2004 (Parsons 1(a))
10 May 2004 - 14 May 2004 (Parsons 1(a))

Parsons 1(a) will resume on 26 October 2004 until finished. Druken 1(b) will then commence the first sitting day of the next scheduled week.

26 October 2004 to 29 October 2004 (Parsons 1(a))
1 November 2004 - 2 November 2004 (Parsons 1(a))
16 November 2004 - 19 November 2004 (Druken 1(b))
22 November 2004 - 25 November 2004 (Druken 1(b))
6 December 2004 - 10 December 2004 (Druken 1(b))
13 December 2004 (Druken 1(b))
17 January - 21 January 2005 (Druken 1(b))
24 January - 25 January 2005 (Druken 1(b))
27 January 2005 (Druken 1(b))

Oral Submission in Parsons 1(a) and Druken 1(b) will commence

27 April 2005 - 28 April 2005

Systemic Phase

6 June 2005 - 7 June 2005
9 June 2005 - 10 June 2005
[Amended 5 June 2005]

2. Notice of dates of subsequent hearings will be provided in a timely manner.

3. Unless otherwise directed by the Commissioner hearings will commence at 10:00 a.m. and conclude at 5:00 p.m. or later, if required, except Fridays in which case hearings will commence at 9:30 a.m. and conclude at 12:30 p.m. sharp. There will be a mid-morning break of approximately 15 minutes, a lunch break from 1:00 p.m. to 2:00 p.m., and an afternoon break of approximately 15 minutes. **[Amended 26 April 2005]**

4. The dates set for hearings are intended for the evidence of witnesses only.

5. Due to the scope of the Inquiry, the number of witnesses involved, the anticipated number of counsel and the deadline for completion of the Inquiry, it will not be possible to accommodate the schedules of counsel. Inquiry Counsel (Hearings) will however make every effort to accommodate witnesses.

6. The hearings shall be recorded and transcriptions created electronically (the Inquiry transcript) which shall be added to the list of documents.

7. The Commission is committed to a process of public hearings but may conduct proceedings *in camera*, direct who may be present and what conditions will be imposed on anyone in attendance. The Commissioner may also refuse permission to televise certain portions of the proceedings. Counsel or Inquiry counsel may apply to have any portion of the proceedings *in camera* or not televised.

8. Any applications, replies, documents, exhibits or transcripts pertaining to *in camera* proceedings shall be marked with the letters IC and shall not form part of the public record unless otherwise directed by the Commissioner.

6. Standing

1. Applications for standing in respect of any given phase of the Inquiry must be served on Inquiry Counsel (Hearings) on the dates specified in any Notice of Hearings published by the Commission or on any date set by the Commissioner of which the applicant has been notified.

2. Dates for the hearing of applications for standing shall be specified in the Notice of Hearings.

3. The Commissioner may deal summarily with any application for standing without a hearing and may direct Inquiry counsel to respond on his behalf.

4. An application for standing must indicate the phases for which standing is sought and the reasons why standing should be granted. The test to be applied is whether or not the applicant has a direct and substantial interest in a given phase of the Inquiry. The application should also address what contribution the applicant can make to the Inquiry.

5. Any applicant for standing may be granted full or limited standing at the discretion of the Commissioner.

6. Any person, organization or office added to an application by Inquiry Counsel (Hearings) or the Commissioner shall have limited standing for the purpose of participating in the application.

7. Any witness not a person with standing and not belonging to an organization or office with standing shall have limited standing for the duration of their testimony and for the purpose of serving an application or a reply in respect of their testimony.

8. Any person, organization or office given notice under rule 13 shall have limited standing for the purpose of exercising their rights under rule 13.

9. An application for standing may be made through Inquiry counsel (Hearings) at any time due to unforeseeable circumstances.

7. Applications

1. Counsel who wish to be heard by the Commissioner on any matter except those arising during the actual hearings, must serve an application. The right to serve an application is not limited to those rules that make specific reference to applications.

2. The Commissioner relies primarily on Inquiry Counsel (Hearings) to marshal, present and test the evidence and expects the co-operation of all counsel to ensure that this is done as fairly and expeditiously as possible. However, as a last resort, if counsel are unable to resolve issues by agreement, any decision of Inquiry Counsel (Hearings) may be the subject of an application to the Commissioner.

3. Inquiry counsel may serve an application and shall be governed by the same rules as apply to other counsel.

4. Inquiry Counsel (Hearings) may direct that any counsel must file an application on any issue by a specified date.

5. Inquiry Counsel (Hearings) may notify counsel that certain evidence is not relevant or certain facts are to be admitted in a particular phase of the Inquiry. The notice shall specify a date by which an application to object must be served. Anyone who fails to bring an application as required is deemed to have accepted that the specified evidence is not relevant or admitted the specified facts in the phase(s) of the Inquiry specified in the notice.

6. The rules regarding applications are intended to ensure that any issues that might affect the evidence to be introduced in a particular phase of the Inquiry are resolved as far in advance of the hearings as possible to allow all counsel to properly prepare and to make optimum use of the times set aside for the hearing of witnesses. It is imperative therefore that applications be brought as soon as an issue is known and cannot be resolved.

7. Applications shall be heard by telephone or video-conferencing on days the Commission is not sitting. The scheduled hearing of evidence will not be modified to accommodate applications except in extreme circumstances. It is imperative, therefore, that applications be served as soon as an issue is known and cannot be resolved.

8. An application must be in writing and may be in the form of a letter. It must concisely state the facts upon which the application is based, the relief sought and include a brief argument. Any supporting documentation or affidavits and any authorities or legislation to be relied upon shall be included and served with the application.

9. The Commissioner or Inquiry Counsel (Hearings) may add any person, organization or office to an application who shall be served with all replies and other documents by counsel serving those replies or other documents, and shall have standing for the limited purpose of participating in the application.

10. All counsel must serve a reply to any application by midday on the 3rd business day after service. A reply shall be in similar form to an application. Failure to reply in accordance with these rules may result in the application proceeding without further notice.

11. Inquiry Counsel (Hearings) may request further information, documents or affidavits, authorities or written argument from any applicant or respondent. The Commissioner may direct that such further information, documents or affidavits, authorities or written argument be provided and

served. Failure to follow the Commissioner's directions may result in the application being dismissed or a given reply not being considered or heard.

12. The Commissioner may deal with any application summarily and without a hearing and may direct Inquiry counsel to respond on his behalf.

13. The Commissioner may direct that an application be set down for a hearing and Inquiry Counsel (Hearings) shall notify the applicant and all respondents of the time, date and place for the application to be heard.

14. If an applicant or respondent wishes to call a witness or witnesses at the hearing of an application they must state this in the application or reply and give reasons. If an applicant or a respondent wishes to cross-examine any deponent of any affidavit filed in an application, they must forthwith notify all counsel and Inquiry Counsel (Hearings). The Commissioner shall decide if any witnesses are to be called and upon what terms.

15. Unless otherwise directed by the Commissioner, in an application the order of examination and argument shall be as follows:

    (1st) The applicant.

    (2nd) Respondents in an order to be determined by Inquiry Counsel (Hearings).

    (3rd) Inquiry counsel.

    (4th) The applicant.

16. Applications that are heard shall be recorded and transcriptions created electronically (the Inquiry transcript) which shall be added to the list of documents.

17. All applications and supporting documents, and any written submissions of counsel directed to be filed by the Commissioner shall be treated as confidential and shall not form part of the public record until they are dealt with by the Commission or the Commissioner directs that they become part of the public record. **[Amended 1 October 2003]**

8. Documents, Materials and Exhibits

1. Images of all exhibits that are real evidence intended to be introduced at the hearings will be created with some verbal description and shall be deemed to be documents.

2. Some documents in the list of documents will list exhibits collected or used in earlier investigations or proceedings together with visual reproductions and/or verbal descriptions of the exhibit. The exhibit itself is deemed to be a document.

3. There shall be full and complete disclosure of all relevant documents by Inquiry Counsel (Hearings) and counsel subject to any restrictions the Commissioner deems necessary and fair.

4. Counsel who wish to have access to the original of any document or exhibit should explain their request in writing to Inquiry Counsel (Hearings).

5. Inquiry counsel may receive or examine documents subject to such confidentiality as they may determine is consistent with the Terms of Reference and the principle of fairness. Documents received from any person, witness, counsel, organization or office shall be treated as confidential by the Commission unless or until they become part of the public record or the Commissioner declares otherwise. This does not preclude Inquiry counsel from using such documents as part of the investigation, including showing them to witnesses, and providing copies subject to the undertaking referred to in rule 8.13.

6. At the commencement of the hearings into a particular phase of the Inquiry a list of documents, which the Commission may rely on or refer to at any time without further notice, will be filed. In the event of additional disclosure or the discovery of additional documents the list of documents may be revised. All documents in the list of documents that are already part of the public record shall be clearly identified as such. The Inquiry transcript shall be added to the list of documents as it becomes available.

7. The documents contained in the list will be electronically stored and one paper copy will be produced and kept by the Commission.

8. Full disclosure by means of computer disc of all documents contained in the list of documents shall be made to all counsel at the earliest opportunity and, with the exception of the Inquiry transcript, no later than the commencement of the phase of the Inquiry in which the materials may be relied upon or referred to.

9. Counsel who wish to have access to or be provided with a paper copy of any document should make a written request to Inquiry Counsel (Hearings). The Commissioner may direct that access be granted or paper copies be made available upon such terms and conditions as he sees fit, including the cost of reproducing the documents.

10. Counsel must at the earliest opportunity provide Inquiry Counsel (Hearings) with a list of any documents and exhibits they believe are relevant to the Inquiry. Originals or copies of any document or any exhibit so listed are to be provided to Inquiry counsel upon request. Inquiry Counsel (Hearings) may add any of these documents or exhibits to the list of documents and tender them as exhibits at the hearings.

11. Inquiry Counsel (Hearings) shall prepare a list and book of exhibits for each phase of the Inquiry and at the earliest opportunity, and no later than the commencement of the hearings of that particular phase, shall provide all counsel with the list of exhibits. The book of exhibits, or the necessary volume of it, shall be provided no later than the commencement of the witness's testimony during which the exhibits are relevant.

12. Counsel who intend to make use of or refer to any document at the hearings that is not in the book of exhibits shall ensure there are a sufficient number of copies of the document for the witness, counsel, all 3 Inquiry counsel and the Commissioner.

13. Anyone who receives disclosure from Inquiry Counsel (Hearings) shall sign an undertaking that the disclosure will be used solely for the purposes of the Inquiry. This undertaking ceases with respect to any particular document once that document is filed as an exhibit. Any document that is part of the public record is not intended to be subject to this undertaking. Documents on the list of documents are not exhibits unless filed at the hearings as exhibits. The Commissioner may direct that any document be released from the provisions of this undertaking and that any document on the list of documents become part of the public record.

9. Interviews and Statements

1. Anyone interviewed by or on behalf of Inquiry counsel may, but need not, have counsel present. All interviews will be recorded unless the witness declines.

2. Anyone may decline to be interviewed and may provide a written statement in lieu of or in addition to being interviewed.

3. Subject to rules 9.4 and 9.5, all statements taken by Inquiry counsel shall be added to the list of documents.

4. Statements on the list of documents may be edited or portions may be selected for use as exhibits.

5. Any statement taken by Inquiry counsel from someone who will not be called as a witness need not be disclosed to counsel or placed on the list of documents.

6. All witnesses shall be provided with a transcribed copy of their statement(s) as soon as possible. Witnesses shall also be provided with a copy of the recording of their statement(s) if requested

10. Calling Witnesses

1. Inquiry Counsel (Hearings) shall at the earliest opportunity provide all counsel with a list of witnesses intended to be called during a particular phase of the Inquiry and in the case of any additional witness, except with leave of the Commissioner, no later than 48 hours before that witness is called.

2. Counsel must provide Inquiry Counsel (Hearings) at the earliest opportunity with the names and addresses of any witnesses they feel ought to be heard. Inquiry Counsel (Hearings) may decline to call any witness whose evidence does not appear to be relevant or will be covered by other witnesses.

3. Witness may be called only with leave of the Commissioner.

4. If at the end of any phase of the Inquiry there are persons who any counsel believes must be heard that counsel may apply for leave to have that person called. The Commissioner may direct that such applications be made orally and forthwith, and upon such other terms and conditions as he deems just and appropriate.

5. Inquiry counsel may subpoena any witness and shall do so when requested by a witness.

6. Witnesses may be called more than once.

11. Testimony

1. All witnesses called to testify are witnesses of the Commissioner and shall be treated with the same courtesy and respect as the Commissioner.

2. Inquiry Counsel (Hearings) shall provide at the earliest opportunity to any witness or their counsel a copy of all documents to be referred to during that witness's testimony.

3. No witness shall be examined or cross-examined on any document that is not in the book of exhibits that has not been disclosed at least 24 hours in advance of that witness's testimony unless the witness consents or the Commissioner directs otherwise. This does not apply to police officer's notes, previous statements, testimony or affidavits in the list of documents.

4. Witnesses shall testify under oath or affirmation.

5. All witnesses without standing are entitled to have counsel present at the hearing while they testify. Counsel may make objections during the witness's testimony and may question the witness.

6. Except with the permission of the Commissioner, no counsel other than Inquiry counsel may speak to a witness concerning that witness's evidence during that witness's testimony. Except with the permission of the Commissioner, Inquiry counsel may not speak to a witness while that witness is being cross-examined by other counsel.

12. Evidence

1. The Commission may receive any relevant evidence which might otherwise be inadmissible in a court of law under the strict rules of evidence, subject to the principle of fairness.

2. Counsel may use leading and non-leading questions with any witness subject to the direction of the Commissioner but are expected not to use leading questions in controversial or disputed areas of evidence.

3. Unless otherwise directed by the Commissioner, the order of examination shall be as follows:

   (1st) Inquiry counsel.

   (2nd) Counsel for any witness who, alternatively, may elect to question in the fifth place.

(3rd) Counsel with a substantial commonality of interest.

(4th) Remaining counsel.

(5th) Counsel for any witness should they so elect.

(6th) Inquiry counsel.

4. Inquiry counsel shall determine and indicate prior to each witness's testimony the order of counsel in the third and fourth places.

5. The Commissioner may strike any question, remark or evidence from the record and direct that the question, remark or evidence not be published in any document or broadcast in any way.

13. Notice of Possible Findings of Misconduct

1. The Commission shall, before making any finding of misconduct against any person, organization or office, notify that person, organization or office of the potential finding unless, in the opinion of the Commissioner, that person, organization or office is aware of the potential finding and has had a full opportunity to respond.

2. Any person, organization or office that receives a notice under rule 13 may apply for leave to adduce evidence in response to that allegation or to have Inquiry Counsel (Hearings) adduce evidence in response to that allegation.

3. Other counsel may cross-examine any witness called in response to a notice under rule 13 only with respect to matters adduced in evidence during examination by Inquiry counsel or counsel for the recipient of a notice under rule 13.

14. Submissions

1. All counsel may make submissions at the conclusion of a particular phase of the Inquiry subject to any restrictions that the Commissioner deems appropriate.

2. The Commissioner will direct when submissions are to be made and whether they are to be made orally and/or in writing.

15. Public and Media Access to Information

Anyone, including members of the media, who wishes to have access to or copies of any information in the possession of the Commission must put their request in writing to Inquiry Counsel (Hearings). Requests will be dealt with on a case by case basis. The Commissioner may set the terms and conditions upon which any person may have access to or copies of any such information.

Supreme Court of Newfoundland and Labrador
Court of Appeal

The Honourable Clyde K. Wells
Chief Justice of Newfoundland and Labrador

Chief Justice's Chambers
287 Duckworth Street, P.O. Box 937
St. John's NL A1C 5M3

June 13, 2005

The Right Honourable Antonio Lamer, P.C., C.C., C.D.
Commission of Inquiry
P.O. Box 8700
St. John's, NL
A1B 4J6

Dear Commissioner Lamer:

Re: Delays caused by provision of transcripts in criminal appeals

I have your letter of June 8 concerning the earlier inquiry by Ms. Rosellen Sullivan, one of your counsel, respecting the Court's concern that provision of transcripts may be causing delays in the hearing of criminal appeals.

The Court has, for some time, (including time prior to my becoming Chief Justice) been concerned about the delay involved in the production of transcripts of criminal trials. In the past, judges of this Court have, using the only tool then available to them, ordered expedited production of the transcript concerned. The problem with this, as a solution to delay, is that it only serves to alter priorities. Ordering a transcript for one appellant to be expedited has the effect of introducing a concomitant delay for all other transcripts that were on the list in priority to the one ordered expedited, criminal as well as civil.

As criminal trials have become more lengthy, the time required, and the cost involved, for the production of full transcripts has greatly increased. As well as resulting in excessive delay in the hearing of the appeal, requiring production of the full transcript results in substantial costs that are quite unjustified when, depending on the issues involved in the appeal, only a small percentage of the

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transcript produced is actually used in the course of an appeal. In addition, it is not unusual for an appeal to be abandoned after a lengthy transcript has been produced.

Prior to the 2002 revision, our Criminal Appeal Rules required an appellant to request "the transcript referred to" in the Criminal Code. The text of the then applicable Rule 11 is attached as Appendix "A". It was because of concern about the delay consequent upon such a requirement and about the volume of material being filed that the major change in transcript requirements was made in the 2002 revision of the Criminal Appeal Rules. The text of the current Rule 11, which came into effect on July 1, 2002, is attached as Appendix "B".

As is quite obvious from the difference in the text of the two rules, in making the change, the Court was endeavouring to deal with its concerns by providing that the parties would file with the Court only those portions of the transcript that are necessary to deal with the issues on appeal. The new rule 11 also provides for either party to apply for excision of any portion of transcript unnecessary for determination of the issues on appeal, or for the Court to do so on its own motion.

Rule 11(11) was intended to be somewhat of a veiled hammer that would encourage transcript abridgment. It has not, to my knowledge, been employed by the Court as yet. Apart from any difficulty involved in employing that rule, there has been less need for it in the last two or three years. The lesser need results from two factors: (i) the court reporters in the Trial Division are no longer required to produce civil appeal transcripts; and (ii) replacement of the old trial court recording systems with modern digital audio recording systems. There is, however, occasionally still a delay of up to 9 or 10 months after request for a transcript of a criminal trial in the Supreme Court, before it can be made available. Attached as Appendix "C" is a summary of the Trial Division transcript delay statistics for the past 14 months. This represents a significant improvement over the situation prevailing in earlier years. The improvement is due, I believe, to the new digital audio recording systems and court reporting staff no longer transcribing civil appeals, not to changes in the Criminal Appeal Rules.

I am advised by the Deputy Registrar that in the case of appeals that can be taken directly to this Court from decisions of the Provincial Court, significant

delays are frequently encountered from some but not all of the Provincial Court centres. Steps directly taken to deal with transcript delays in appeals from the Trial Division and any further rule changes or steps to be taken would, of course, be applied to appeals from criminal trials in the Provincial Court.

Your letter specifically asks about "a proposal of [mine] made in a speech concerning transcripts". On behalf of the Court I addressed the transcript delay problem, along with other matters, with the profession through a Benchers meeting in October 2003 and at the mid-winter meeting of the Newfoundland Branch of the Canadian Bar Association in February 2004. On both occasions I advised the groups that the Court was considering amending its rules to deal with its continuing concern about transcript delay. I suggested to both groups that, for both civil and criminal appeals, we were prepared to consider requiring only that the trial court involved provide a disc or tape to counsel for the appellants and counsel for the respondents. The appellant would then arrange for transcription of only that portion of the record which the appellant considered necessary for determination of the issues in the appeal. The respondent would, of course, be entitled to arrange for transcription and filing of any additional portions that the respondent felt were necessary but had not been provided by the appellant. I invited response from the profession to this suggestion.

You have asked for a copy of the speech. I regret I am unable to provide a text because none was prepared. In the case of the comments to Benchers, they were made from a few very cryptic handwritten notes. The talk to the Canadian Bar meeting was more broad ranging and the notes were slightly less cryptic. As well, they were typewritten. They are attached as Appendix "D" in case they may be of value to you.

Thus far there has been very little response. The Canadian Bar - Newfoundland Branch published a summary, prepared by a notetaker at the meeting, which advised their members of the comments and that the Court was looking for feedback. A copy is attached as Appendix "E". The only formal feedback from the CBA related to the proposal that the Court sit periodically in Corner Brook if the profession desired, and that was only received in April of this year. Therefore, I have no basis for confirming that there is resistance on the part of the Bar, as your letter indicates. I have, however, been advised that there has

been some expression of opposition by some members of the Bar appearing before your Commission.

The only concern that the Court has with such a proposal is its impact on prisoner appeals and appeals by self-represented litigants. That concern would have to be addressed before such a proposal could be implemented. The Court has not yet taken any steps to implement the proposal but the matter is still under consideration by the committee.

The matter has also been raised by me, but only by way of general comment, in a meeting of the Court Administration Advisory Board. That board was set up last year for the purpose of facilitating discussions between the Department of Justice and the courts respecting proper provision for the needs of the courts. Requiring the trial court produce only a disc or a tape of the trial record was not addressed as a specific proposal at the time. Rather, it was advice as to the existence of the Court's concern about transcript delay and cost. I would not, as yet, expect a response from that discussion.

I do have some concern that, with respect to appeals from convictions or acquittals for indictable offences, it could be argued that the disc proposal would not satisfy the requirements of section 682(2) of the Criminal Code. On superficial examination, it would seem that providing a disc or tape of the proceedings, together with the exhibits, should satisfy the requirement of section 682(2) that "a copy or transcript of ... the evidence taken at the trial ... shall be furnished to the Court of Appeal, except insofar as it is dispensed with by order of a judge of that court." The Court may, however, have to deal with an argument, in a future appeal, that provision of the disc does not amount to providing a "copy" of the evidence and therefore does not satisfy the requirement of the Code. As a result, it could be argued, an order of the Court would be required in each case. The same concern does not arise with respect to appeals in the case of summary conviction offences as section 821(3) does allow for the rules of the Court to provide for the transcript in an alternative manner to that otherwise specifically provided in that section.

As greater progress is made toward electronic filing, presently under preliminary consideration by the committee, the provision of a disc would seem to be the logical answer in the case of most appeals. However, there remains the

concern about prisoner appeals and appeals by self-represented litigants who may not have the means to readily access the trial record unless it is otherwise transcribed. As the Attorney General presently pays the cost of all criminal appeal transcripts, it may be that the Attorney General would welcome a rule change that required the provision of transcripts only in the case of prisoner appeals or appeals by self-represented litigants. That, however, may be rather difficult to properly control and is a concern that would also have to be addressed.

I regret that I do not have a more definitive solution to the problem that arises because of the delays encountered in the provision of transcripts for criminal appeals. However, the Court intends to pursue further discussion of the foregoing proposals with the profession and the Department of Justice.

I trust that this letter will be helpful in your consideration of the transcript delay problem. If you require it, I would be pleased to provide any further information available to the Court.

Yours very truly,

Clyde K. Wells

Transcripts

11. (1) The charge for every copy of material and of a transcript furnished to a party shall, pursuant to Section 609(4) of the Code, be as from time to time fixed by law.

(2) Except in the case of a prisoner appeal the appellant shall when he files the notice of appeal with the Registrar also file a copy of a letter from him to the reporter ordering copies of the transcript referred to in Section 609(2) of the Code. When completed, the reporter shall forward four copies to the Registrar who shall then advise the parties of the availability of the transcript from the reporter.

Appeal Book—(appeals other than prisoner and sentence appeals)

12. (1) Except in a prisoner or sentence appeal or where otherwise ordered by a Judge the appellant shall, as soon as practicable:

(*a*) file with the Registrar four copies of an appeal book for the use of the Court. The appeal book shall contain, in the following order:

(i) an index,

(ii) the notice of appeal,

(iii) the information or indictment,

(iv) the reasons for judgment, if not included in the transcript of the proceedings,

(v) photocopies of all documentary exhibits if not reproduced in the transcript;

(*b*) serve on the respondent or his solicitor a copy of the appeal book and of the transcript of the proceedings.

(2) The parties to an appeal, or their solicitors, may by written agreement filed with the Registrar, omit part of the transcript of the evidence or material that would otherwise be included in the appeal book or agree to the inclusion in the appeal book of an agreed statement of facts in lieu of a transcript.

(3) If either party wishes to abridge either the transcript or appeal book, or both, as provided for in Rule 12(2) and has not obtained the agreement of the opposite party or parties, he may apply to a Judge who may give directions as to the form and contents of the transcript or appeal book; or both.

Appeal Book—(Sentence Appeals)

13. (1) In sentence appeals the appellant shall, as soon as practicable:

(*a*) file with the Registrar four copies of an appeal book for the use of the Court. The appeal book shall contain, in the following order:

(i) an index,

(ii) the notice of appeal,

(iii) the information or indictment,

Transcriptions

11. (1) Les frais afférents à chaque copie des documents et d'une transcription fournie à une partie doivent, conformément au paragraphe 609(4) du Code, être ceux fixés par la loi de temps à autre.

(2) Sauf dans le cas d'un appel interjeté par un détenu, l'appelant doit, lorsqu'il dépose son avis d'appel auprès du registraire, déposer également une copie d'une lettre qu'il aura adressée au sténographe pour demander des copies de la transcription visée au paragraphe 609(2) du Code. Une fois la transcription terminée, le sténographe doit en envoyer quatre copies au registraire, qui doit ensuite aviser les parties du fait que la transcription du sténographe est disponible.

Cahier d'appel—(appels autres que l'appel interjeté par un détenu et l'appel de la sentence)

12. (1) Sauf dans le cas d'un appel interjeté par un détenu ou d'un appel de la sentence, ou sauf ordonnance contraire d'un juge, l'appelant doit, dès que cela est matériellement possible:

a) déposer auprès du registraire un cahier d'appel en quatre copies à l'usage de la cour. Ce cahier d'appel doit renfermer, dans l'ordre suivant :

(i) un index,

(ii) l'avis d'appel,

(iii) la dénonciation ou l'acte d'accusation,

(iv) les motifs du jugement, s'ils ne sont pas inclus dans la transcription des procédures,

(v) des photocopies de tous les documents déposés comme pièces s'ils ne sont pas reproduits dans la transcription;

b) signifier à l'intimé ou à son procureur une copie du cahier d'appel et de la transcription des procédures.

(2) Les parties à un appel, ou leurs procureurs, peuvent, par une entente écrite déposée auprès du registraire, omettre une partie de la transcription de la preuve ou des pièces qui serait autrement incluse dans le cahier d'appel, ou consentir à l'inclusion, dans le cahier d'appel, d'un exposé convenu des faits en remplacement de la transcription.

(3) Si l'une ou l'autre des parties désire abrégrer soit la transcription, soit le cahier d'appel, ou les deux, comme le prévoit la Règle 12(2), et qu'elle n'a pas obtenu l'accord de la partie ou des parties adverses, elle peut en faire la demande à un juge, qui peut donner des directives quant à la forme et au contenu de la transcription ou du cahier d'appel, ou des deux à la fois.

Cahier d'appel—(appel de la sentence)

13. (1) En appel de la sentence, l'appelant doit, dès que cela est matériellement possible:

a) déposer auprès du registraire un cahier d'appel en quatre copies à l'usage de la cour. Ce cahier doit renfermer, dans l'ordre suivant:

(i) un index,

(ii) l'avis d'appel,

(iii) la dénonciation ou l'acte d'accusation,

[5] N.B. It would appear that the reference to Section 609 in both rules 11(1) and 11(2) is in error and should be to Section 682.

TRANSCRIPTS

11. (1) Subject to this Rule, the parties to an appeal shall file with the Court only those portions of the transcript of the proceedings in the court appealed from that are necessary to enable the issues raised on appeal to be determined.

(2) Except:

(*a*) in a prisoner appeal,

(*b*) in an appeal from a summary conviction appeal court, or

(*c*) where a judge otherwise orders,

an appellant shall file with the notice of appeal a copy of the request for transcript and certificate in Form D requesting the preparation of those portions of the record in the proceedings that he or she believes are necessary to enable the

issues on appeal to be determined and containing certificates stating that the request has been sent to other parties and to the court reporter's office.

(3) The appellant shall, within 15 days after filing the notice of appeal, file with the Registrar a certificate of court reporter in Form E certifying receipt of the request for transcript.

(4) In a prisoner appeal, the Attorney General shall, after receiving a notice of appeal

(*a*) send a request for transcript and certificate in Form D and a certificate of court reporter in the manner set out in Form E, with such modifications as may be necessary;

(*b*) file copies of the completed certificates with the Registrar; and

(*c*) forward copies to the prisoner.

(5) In an appeal from a summary conviction appeal court, the transcript shall, unless otherwise ordered by the Court, consist of

(*a*) the transcript of proceedings in the trial court as it was submitted on appeal to the summary conviction appeal court, and

(*b*) only those portions of the transcript of proceedings in the summary conviction appeal court as may be necessary to enable the issues on appeal to be determined,

and the appellant shall file with the notice of appeal a request for transcript and certificate in Form D and, within 15 days thereafter a certificate of court reporter in Form E, with such modifications as may be necessary, in relation to any portions of the proceedings in the summary conviction appeal court which the appellant believes are necessary to enable the issues on appeal to be determined.

(6) Unless the Court otherwise orders, where an appeal is against sentence only, the transcript shall be limited to

(*a*) the evidence given and submissions made on the issue of sentence; and

(*b*) the reasons for sentence given by the sentencing judge.

(7) Where a party to an appeal receives a copy of a request for transcript and certificate prepared by another party, the receiving party may

(*a*) where he or she believes that additional portions of the transcript of the proceedings are necessary to enable the issues on appeal to be determined, and

(*b*) within 15 days after receipt, or within such longer time as the Court may allow,

deliver a request for further portions of transcript and certificate in Form F to the applicable court reporter's office and to the other parties to the appeal, file a copy of it with the Registrar, and within 15 days thereafter file with the Registrar a certificate of court reporter in Form E, with such modifications as may be necessary, certifying receipt of the request for additional transcript.

(8) A party to an appeal may at any time apply to the Court for an order

(*a*) excising portions of the transcript of the proceedings which have been requested or prepared and which are unnecessary or inappropriate for the determination of the issues on an appeal; and

(*b*) adding such further portions of the transcript of the proceedings as may be determined to be necessary to the determination of the issues on an appeal.

(9) The Court may at any time of its own motion order that the transcript of the proceedings be abridged or amplified.

(10) The parties to an appeal may agree, in writing to be filed in the Court:

(*a*) to substitute an agreed statement of facts in place of all or any portion of the transcript of the proceedings and the exhibits; and

(*b*) to submit a joint request for transcript in Form D and certificate of court reporter in Form E, with such modifications as may be required.

(11) Where the Court concludes that all or any parties to an appeal have not made reasonable efforts to abridge the transcript of the proceedings so that only those portions as may be reasonably necessary to enable the issues on appeal to be determined are filed with the Court, the Court may make any order that it deems appropriate in the circumstances.

(12) When the transcript of the proceedings has been prepared as requested, the court reporter shall forthwith forward the original transcript and three copies, together with the original file, to the Registrar and shall make arrangements for the delivery of copies to the parties to the appeal, or their counsel. The Attorney General shall, in the case of a prisoner appeal, be responsible for service of the transcript on the parties to the appeal.

(13) The Registrar shall, on receipt of the original transcript and copies, notify the parties that the transcript has been received by the Court.

APPENDIX "C"

Recent Criminal Trial Transcript Delay Statistics

Month Ending	Number in progress	Oldest (outstanding less than)
30 Apr 2004	4	7 months
31 May 2004	5	3 months
30 June 2004	4	9 months[1]
31 July 2004	3	4 months
31 Aug 2004	3	5 months
30 Sept 2004	4	6 months
31 Oct 2004	4	7 months
30 Nov 2004	4	8 months
31 Dec 2004	4	9 months
31 Jan 2005	5	10 months
28 Feb 2005	2	9 months[2]
31 Mar 2005	3	5 months[3]
30 Apr 2005	3	6 months
31 May 2005	6	1 month

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[1] This anomaly results from counsel in the appeal for which the trial transcript was filed in May indicating that transcripts of the pre-trial applications were also required.

[2] Oldest outstanding transcript filed 18 February 2005. Notice of abandonment of appeal filed by Federal Crown prosecutor 25 February 2005.

[3] Staff were advised by counsel involved in oldest outstanding request that the matter would not proceed. However, notice of discontinuance still not filed. Court reporters maintain the request on list but, from March onward, it is not used in this summary as oldest outstanding.

TOPICS FOR DISCUSSION
Mid winter meeting
Canadian Bar Association- Newfoundland Branch
Corner Brook, February 6th 2004

Appreciation for the invitation
- Provides requested opportunity
  - Speak to the profession
    - Four matters- important to Court
    - Important to the profession
    - Discussion of which is important to both
  - Where most of practitioners affected by one of the issues are more likely to be present- CORNER BROOK

BEFORE DOING SO appropriate to comment on Court's state
- Number of appeals filed in 2003 up
- Previous five years dropping—same nationally
- Docket
  - Still in excellent condition
  - Could set down one or two in February if necessary
  - Could still set three or four for March
  - Assuming counsel ready
- Decisions outstanding
  - Also in excellent condition
  - Oldest decision outstanding heard mid November
  - Next oldest heard mid December
  - Next oldest heard in mid January
- Explanations—in addition to efforts by judges
  - Some reduction in number of appeals filed
  - Rule changes, including deemed abandoned
  - Practices—especially setting down within two months
  - Co-operation of practitioners
  - Most important—availability of law clerks
    - Great time saver, better research,
    - CRITICAL to maintaining state of docket

Now to the four specific points I want to raise with the profession

FIRST—Location of Court sittings
- Court only ever sat in St John's
- Most convenient—least costly—for Court
- Happy to have it remain that way

However, judges noticed change over recent years
- Appeals originating from Western Newfoundland decreasing
- Statistics—1999=15.4%; 2001=6.6%; 2003=6.8%
- Unsure of reasons, assume
  - Not number of practitioners
  - Western lawyers not less litigious
  - New judges not better than former
  - Not apprehensive about Court of Appeal
- Most likely some other reason or reasons
  - Changed economic factors
  - Cost and inconvenience
- If COST AND INCONVENIENCE is the reason
  - Court is concerned—responsibility to correct
  - Only practical solution
    - Sit in WN to hear WN appeals
    - Court is prepared to do so—NOT seeking to do so
    - Happy to do so, if practitioners
      - Think sitting only in St. John's is a problem
      - Sitting in CB would solve the problem
      - Can work with Court to organize
- Would have to be structured—NOT ad hoc
  - Two, maybe three sittings per year
  - Times certain
    - Perhaps--Mid Fall; Mid Winter and Late Spring
    - Fixed first or last full week of specified months
    - Practitioners and parties could be certain
    - Frequent enough all WN appeals would be heard
    - None (barring emergency) heard in St. John's

Applications for dates only could be heard
On a specified day each month
In St. John's
Closed circuit
Telephone conference call
Other applications not requiring immediate hearing
Heard in CB same week appeals being heard
Emphasize Court NOT promoting such sittings
Rather, concerned about what underlies the statistics
If cost and inconvenience, Court prepared to move to correct
Having advised the profession of the Court's willingness to act
Leave it entirely to profession to respond
Invite Newfoundland Branch CBA
Ascertain wishes of profession in WN
Advise the Court
If hearing WN appeals in CB is the preferred
Work with the Court to implement

SECOND relates to mediation by the Court
Over last few years some successful efforts
Resulted in satisfactory resolution without cost of appeal
Particularly—but not exclusively—in family matters
Emphasize entirely voluntary—Court NOT promoting
Rather, Court is prepared to offer the service to parties
Court considering Practice Note to outline
Inviting reaction from profession
Court would not propose mediation, entirely optional
Parties would have to initiate request
Counsel could do so by contacting Chief Justice
Would suggest either of two stages of proceedings
Stage one—as soon as possible after filing Notice of appeal
This can save costs of transcripts, facta etc.
Stage two—after perfection of the appeal
Court would welcome response from the profession

THIRD Changes to civil rules
- Committee of Court doing another full review
- Considering comprehensive Court of Appeal rules
- No longer one numbered rule of *Rules of Supreme Court*
- Separate Part, BUT still part of *Rules of Supreme Court*
- However, would be comprehensive, in appeal context
  - May result in significant duplication
  - BUT benefit from being stand alone for appeals
- TD would then not have to be concerned about impact on CA
  - When formulating rules for TD purposes
- Still in preliminary stage
  - Consultation with profession before implementing

However, would mention, now, two changes being considered
- ONE, Rules, civil and criminal, relating to ordering transcripts
  - Presently
    - Civil rule requires filing letter undertaking to request transcript within 10 days or undertaking to apply to Court for order dispensing with transcript
    - Criminal rule requires filing with notice of appeal copy of letter requesting relevant portions of transcript AND within fifteen days, a certificate from the court reporter confirming receipt of the request
  - Two significant adverse consequences
    - Inordinate delay and inordinate cost
    - Delay of a year not uncommon, occasionally more
    - Very expensive for Government to produce—Criminal
    - Very expensive for parties to produce—civil
  - Frequently
    - Appeals abandoned after transcript produced
    - Tiny portion of the transcript used in the appeal
  - There has to be a better system
  - Court considering changing rules to require
    - Trial court involved produce DISC or TAPE
      - To counsel for appellants and respondents

Parties produce portion of transcript they wish
Would require procedure to resolve disputes
BUT overall speedier and less costly appeals
Acknowledge this is very substantial change
Inviting consideration and response by profession

TWO, Converting present court practice re custody appeals
Into a formal rule
Presently, after 30 days of inactivity
Registrar, at my direction, contacts counsel
Requests information as to intentions
Attempts to speed matter along
Not really satisfactory
Considering special rule for custody matters
Enabling Registrar to bring application
If 30 days of inactivity
For any other reason she thinks necessary
Instead of waiting six months (ordinary civil appeal)
Again, acknowledge, significant change
Invite profession's consideration and response

FOURTH Offer explanation for delay in following up
On my tentative reply on November 21st 2003
To your letter of October 28th 2003
Respecting CA Practice Note No. 2001-3
Relating to use of electronic versions of law reports
Explain
Citations Court must use in write decisions
Must be able to read report actually cited
Unreliability of electronic versions
Requires access to reports actually cited
Solution was to require
Copies of Nfld & PEIR reports for NL cases
SCR, CCC or DLR citations for other national cases
However, Government cancelled our subscriptions

For CCC and DLR
If counsel do not provide copies of those cases
Judges, or law clerks, have to go outside to obtain
The contract of one of the law clerks ended early January
The request to advertise for her replacement
Made October 23, 2003
Has not yet been approved
The position, as of now, is still frozen
I am hopeful we will get the critically important subscriptions reinstated
I am also hopeful we will soon receive approval to fill the vacant law clerk position
The purpose of discussing this today is
To explain my long delay in following up
My interim reply to your October request
To ask for your understanding
AND ANY HELP YOU CAN PROVIDE

Thank you, again, for your invitation and your courtesy

Report of Chief Justice Wells' Address to the CBA

Chief Justice Wells addressed the CBA - Newfoundland and Labrador Branch at our Mid-Winter Meeting at Marble Mountain Resort on February 6, 2004. The Chief Justice addressed several issues, including the status of the Court of Appeal's docket, and contemplated changes to the Court of Appeal's rules. Chief Justice Wells also addressed the CBA's letter regarding the Court of Appeal's practice note regarding the Court's preference that practitioners not use electronic versions of case reports in their Court of Appeal filings. What follows is a summary of the Chief Justice's remarks.

Status of the Court of Appeal's Docket

- Presently, the court has a full complement of judges, with no supernumeraries.
- Chief Justice Wells noted that the number of appeals filed with the Court has been dropping off for the previous 5 years, although last year, the number of appeals filed was up 20% over the previous year.

  Chief Justice Wells noted that possible reasons for the overall decrease may include the increasing costs of litigation, as well as the general lessening of Charter litigation as the Courts have addressed many Charter issues.
- The Chief Justice noted that the Court of Appeal's Docket is in reasonably good shape, and has improved significantly over the past several years. Parties attending at the Court on an applications day can expect their appeal to be heard within that month or the following month.
- In terms of outstanding decisions, Chief Justice Wells advised that as of the date of his address, the Court had only three outstanding judgements for cases that had not been heard in February, 2004.

  Chief Justice Wells advised the reasons for the Court's success in diminishing the delay in release of reserved judgments include the rules changes that introduced a "deemed abandonment" rule. The Chief Justice advised that while up until this point in time, the Court has relaxed the requirements for reinstating appeals that were deemed abandoned, practitioners can expect that the Court's approach in the future will see the rules more strictly applied.

  The cooperation of the bar was also noted as being a factor in assisting the Court to clear the backlog of cases.

  In the Chief Justice's view, the singly biggest factor that has allowed the Court to greatly reduce the delay in releasing reserved judgments has been the addition of 2 law clerks to the Court of Appeal four years ago. The presence of the clerks greatly reduces the need for judges to do research. Chief Justice Wells noted that as the law clerks are usually recent law school graduates, their research skills are very up-to-date, and they can perform very effective and efficient research. Chief Justice Wells noted that the law clerks have been an important resource for the Court.

After completing this overview of the status of the Court of Appeal, Chief Justice Wells then addressed four specific points he wished to bring to the Bar's attention.

Four points to address with the profession:

1. Location of Court Sittings

   The Court of Appeal has only ever sat in St. John's. The Court has never had requests to sit anywhere else. In recent years, the Court has noticed a decrease in the number of appeals originating in Western Newfoundland and Labrador. In 1999, for instance, 15.4% of appeals originated in Western Newfoundland, while in 2003, only 6.8% of appeals originated there. Chief Justice Wells surmised that part of the reason for the decrease could be the cost and inconvenience of attending at the Court of Appeal in St. John's. If cost and inconvenience are factors in accessing the Court of Appeal, the Court must do something about it.

   The Court is concerned about this particular issue and suggests that one practical solution may be to have the Court sit in Western Newfoundland to hear appeals, if practitioners wish. Such sittings would not be on an ad hoc basis, but would occur at specific times in the year. The Court has only ever sat in St. John's and the Court is not seeking to make a change but are prepared to do so. Chief Justice Wells indicated that the Courts would leave it entirely to the profession to respond and invite members of the CBA - NL Branch to advise the Courts if hearing Western Newfoundland appeals in Corner Brook is preferred then the profession should work together with the Courts to have it implemented.

   In addition, the Chief Justice noted that it may be costly and inconvenient for counsel outside of St. John's to appear in the Court of Appeal on applications days in order to obtain hearing dates. The Chief Justice suggested that the court consider an alternative process to set dates, for instance, by teleconference.

2. Mediation Services

   The Court is moving towards offering mediation services where parties wish to avail of it. Such mediation services may

be made available to parties now by contacting the Chief Justice, but the Court is looking at a more formal process. Mediation services should be available at an early stage in the proceeding, and may be available even prior to the filing of the transcript from the court below, if the parties choose. This would be an entirely voluntary process, and would be introduced on a more formal basis only if parties and the profession want to see it happen.

The rationale for this move is to address the growing cost of litigation, and the growing number of self-represented litigants.

The Court is contemplating a Practice Note on this issue, but for now, parties can contact the Chief Justice's office.

3. Reassessment of the Rules for the Court of Appeal

Approximately one year ago, Chief Justice Green was involved in an effort to restructure the Family Court Rules. One of the obstacles faced in this rule restructuring was the fact that the rules are used generally by the Court of Appeal. Proposed changes to the rules had repercussions for the Court of Appeal.

It was agreed at that time that it may be preferable to have stand-alone Court of Appeal Rules. The Court is in the preliminary stages of looking at this, and plans to have widespread consultation prior to any rule changes.

Chief Justice Wells invited an early response from profession on the following rules issues:

a) Transcripts

Chief Justice Wells noted that the present wait for transcripts can result in inordinate delays, especially in criminal cases. Chief Justice Wells noted that obtaining transcripts can sometimes take as long as a year or eighteen months. This can become a factor in Askov applications.

The Court also noted that the cost of transcripts can be significant for litigants, especially when you consider that appeals are sometimes abandoned, and judges often do not need to read every word of transcripts in deciding an appeal. Chief Justice Wells noted that it seems unnecessary to produce 3200 pages of transcript when counsel will only be referring to 23 of those pages.

The present transcript approach increases time delays, and increases costs to litigants and to government. There must be a better approach.

One alternative suggestion: when parties file their Notice of Appeal, the Court below would produce a copy of the disc or tape of the proceedings to all parties, and counsel could have transcribed only those parts of the recording that the appeal require.

The Court is looking for feedback from the profession on this or alternate suggestions regarding transcripts.

b) Custody Appeals

The Court is looking at converting its present practice with respect to custody appeals into a rule. The present practice is that if 30 days pass with no action on a custody appeal, the Deputy Registrar calls counsel involved to inquire as to the reason for the delay. The Court would prefer the Rules be changed to allow the Deputy Registrar to bring the matter forward, either after 30 days or upon becoming aware of information affecting the case. The Court has a particular responsibility to children, and delays in custody cases are unacceptable.

The Court is seeking the profession's input on this issue, and is open to alternate suggestions.

4. Electronic Case Reports

Chief Justice Wells began with an apology and explanation for delay in responding, fully to the CBA's letter regarding the Court of Appeal's practice note addressing the use of electronic versions of case reports.

Chief Justice Wells noted that the Court must use official or semi-official citations in its judgements. Electronic citations are not generally acceptable unless the decision has not yet been otherwise reported, in which case the court can use the uniform citation.

The difficulty for the Court is that it cannot, in writing its decisions, cite an official report if the court has not seen that report. Often, there are differences between the electronic report and the official report. Sometimes, even paragraph numbers differ. The court needs a high level of confidence in the accuracy of its citations, and quotations.

Up until recently, the Court believed it could address this by allowing counsel to use paragraph references to electronic versions of cases from various reporters, including the NLPEIR, the SCC (SCR's), the DLR's, and CCC. The Court of Appeal had copies of the actual reporters in the court's library, and could check the reporter where necessary. Unfortunately, Government has cancelled the Court's subscriptions to the DLR's and CCC's, although the Department of Justice library presently has current subscriptions to both reporter series. Chief Justice Wells advised that he is awaiting a reply from the Department of Justice and is hopeful a solution can be found. (Chief Justice Wells has since advised that the cancelled subscriptions have been reinstated.)

Chief Justice Wells also noted that one of the law clerk's terms expired on January 7. In October, the Court requested approval to advertise for the position, but the request was denied. The Court was advised that hiring was frozen. The Court then inquired as to whether the clerk's contract could be extended (as has occurred with clerks in the past) but was advised that the contract renewal was frozen too. Since January, then, the Court of Appeal has had only one clerk. Chief Justice Wells has written to the Department about this, and is hopeful there will be a resolution soon. (Chief Justice Wells now advised that filling the vacancy in the clerk's position has also been approved.)

The Chief Justice concluded his remarks by advising that the purpose of his speech was to advise as to initiatives the court is considering, to seek the profession's input, and to explain the delay in responding to the CBA's letter regarding the use of electronic cases. The Court is facing some external pressures as outlined in the Chief Justice's remarks, and any assistance or input the CBA and its members can provide would be welcomed.

Information provided to the Commission by Supreme Court of Newfoundland and Labrador (Judicial Centre- St. John's) Court Reporters office with respect to the preparation of transcripts.

- In 1988 the positions of court clerk and court reporter were two separate positions. During trials, one court clerk and one court reporter would be present in court. The court reporter was solely responsible for transcribing and shorthand.

- At that time, there were 12 court reporters on staff, one supervisor and 11 persons who were dedicated to transcription only.

- In 1988 additional transcriptionists were hired and overtime was approved for staff to assist with the preparation of transcripts.

- In 1990, a new tape recording and transcribing system eliminated the use of court reporters in the court room.

- From 1991- 2003 the positions of court reporter and court clerk were combined so that the same individuals performed the functions of both positions and were responsible for both clerking duties and preparation of transcripts.

- In 2003 there are 8 court reporters, including the assistant deputy registrar, on staff. One of the 8 was contracted for, and dedicated solely for the preparation of one specific transcript. Five are responsible for both clerking and transcribing. One person is dedicated to the digital recording system.

- In 2002- 2003, a digital recording system was installed. The public accessibility of this system can negate the need for some transcripts thereby decreasing the waiting period for other transcripts. This decrease is mainly evident in civil cases.

- Civil transcripts, if needed, are often prepared by outside agencies as criminal transcripts are given priority and therefore their waiting time is quite lengthy.

- During the summer months when court is not in session, more time can be devoted to transcripts however, most staff are also taking annual leave at this time.

- When a judge orders an expedited transcript, staff are instructed to concentrate on the transcripts and it takes priority over other duties. If there are several orders for expedited transcripts at one time, either one is prepared after another or a number of staff prepare them simultaneously.

- Expedited transcripts are prepared first and others are prepared in order of the date a request was received by the court reporters office. They are prepared when the court reporter is not in court performing clerking duties.

- Currently, there are 12 outstanding criminal trial transcripts to be prepared and or completed. Two of the 12 have been started, one of which is the specific case referred to above which has its own transcriber assigned to it. The second is a transcript of a 32 day trial for which a request was made on October 30, 2002. Transcription of this case was commenced recently.

- The use of the digital recording system has no impact on the time it takes to prepare a transcript. Generally, each day in court requires 3 to 4 days of transcribing by someone doing it full time and to the exclusion of any other duties.

Information provided to the Commission by the Provincial Court of Newfoundland and Labrador with respect to the preparation of transcripts.

- In 1989 a Court Reporter Overload System was implemented to deal with the backlog in transcript requests.
- Between 1989 and 1996 there were 6 persons throughout the province dedicated to transcript preparation through the Court Reporter Overload System.
- In 1996, those 6 positions were terminated due to budget cutbacks.
- Since 1996 there have been no positions dedicated to transcript preparation. Transcripts are prepared by court clerks when they are not performing clerking duties. Until recently staff worked overtime, for time off in lieu, to prepare transcripts. However, this is no longer the practice because staff have been accumulating overtime but unable to use it. To date, the unused overtime hours equates to 2.5 full time staff persons.
- In 2002-2003, a digital recording system was installed at Provincial Court, however, this has no impact on the time required for transcript preparation.
- Preliminary Inquiry and trial transcripts required for appeal are given priority.
- Until recently, Orders for Expedited transcripts are done before any others. However, the court has been unable to abide by the last two Orders due to staff shortage.
- Currently, there are two positions in judicial centres outside St. John's for court clerks that are vacant and will not be filled in the foreseeable future and a request for 2 full time staff in St. John's has been denied.
- Provincial Court currently has 43 outstanding transcripts awaiting preparation. These 43 outstanding transcripts total 56 days of court proceedings. Generally, it takes 4 days to transcribe one day in court.

February 15, 1994

Sgt R. Morgan
NCO i/c Identification Section
Royal Nfld Constabulary
St. John's, Nfld

Re: R vs Gregory Parsons
First Degree Murder

Sir:

Over the past three years, I have been directly involved with this file and during the course of the trial, a number of issues have been identified and need to be addressed. Some are obvious, more are common sense, and others have been commented on by the various experts that have been called as witnesses to testify at the trial.

These matters directly relate to problems that surfaced during the investigation, and identify deficiencies in our section that caused some of these problems.

The two main concerns were:

1. Why did the police not find any footprints of the suspect on the blood-covered floor?

2. We had one photograph that depicted bloodstains differently than the others but when all the photos were entered as evidence, the court was told they all accurately represent the scene as the photographer saw it. How could this be allowed to happen and how can we prevent it from recurring in the future?

Other concerns were the lack of fingerprints found anywhere in the house, problems identified in our photo processing quality controls, and lack of supervision and planning in our approach to the crime scene.

1 No footprints found in the bathroom by the crime scene investigators.

Footwear lifters
overlays

- There should always be footwear impressions of the person responsible somewhere on the floor, especially in this case where there was a blood transfer medium everywhere. Although the scene was severely contaminated, there should still be partial impressions remaining. After all, most positive footwear identifications aren't made with complete footprints.

Bloodstain enhancement

Footwear enhancement.

- No elimination fingerprints or footwear impressions were ever taken from the people at the scene including firemen, medical attendants, police officers and civilians. There weren't even any impressions made of the footwear seized during the course of the investigation.

Books
Reference Publications
Chemicals.

- This section has never put any effort into developing impressions in blood. There is no reference material available to the technicians. There is no one with any training in bloodstain analysis, or detection and enhancement of bloodstains. Other than the recently obtained luminol, there are no chemicals or equipment available for detection and enhancement of bloodstains.

Scales
Measuring Devices
Med Format.
Protective Clothing
Flashes
Tripods

- We only have bits and pieces of equipment available to record a bloodstain scene for consultation. We don't have **all** the required equipment if the bloodstain analysts are unavailable from Halifax and advise us to record it ourselves and forward the photos for an interpretation. We should have a kit prepared and ready for usage at short notice.

Nikkor 105 micro
4v (Lumalight)
200w Directional Flood.
200w quartz or 5500°K
200w flood controlled beam
DC voltage operated

- A photo flash records more bloodstain detail than the naked eye can see under normal light conditions. In this case, it made us look bad and neglectful. This only stresses the need for a kit with different light sources (light temperatures and intensities) to use in searching major crime scenes. This kit should also be prepared and ready for usage at short notice.

- A 105 micro lens could have prevented some of the problems photographing the scene. It would have permitted Sgt Tilley to take his closeup photographs without having to take as many steps in the bathroom. This lens is also recommended by the Canadian Police College for photographing assault victims because you don't have to get inside their personal space to take close-ups.

Coveralls
Boots covers
Mask
Gloves.

- Officer Protection Suits are being used by all other police forces when investigating crime scenes where there is any amount of bloodletting. These suits consist of disposable coveralls with hoods, disposable high top boots, rubber gloves and small particle masks.

2. The problems with the photographs arose when one photograph that was a photographic anominaly we entered as an accurate representation of the scene.

- Are photos really an accurate representation of the scene? No. Because of the difference in light temperature, it actually shows different detail. This opens a legal argument because in order to have photographs admitted into evidence, we have to be able to state that they are an accurate representation of the subject as it appeared.

  The photographs weren't scrutinized before they were entered. If they were, the abnormal photo which has caused most of the problems would have been disregarded by the photographer and there would not have been a problem. This is probably due to a number of reasons; the high number of photos, lack of available time, transfer of the photographer, manpower restraints, etc. In this case, the photographer played no part in selecting which photos to present in court.

3. Processing problems arose when similar photographs were entered, showing different densities, colorations, and contents.

Replacement photo

- Extra photos had to be prepared and the RNC Identification Section couldn't provide them in time due to the short notice and manpower restraints. Consequently, some of the same photographs were reprinted at Foto One. They use a different processing method therefore they had slightly different formats and coloration.

Sunlight Balanced Light System

- Our photo lab processing area uses florescent lighting which is not the proper lighting to visually inspect and analyze photographs and negatives during processing to correct for proper densities and colour balance.

Control strips

- Control strips aren't being used or retained for future reference. Should a question arise in court about the quality of the processing, they can be pulled from file and the issue satisfied without having to call experts.

Policy

- Exhibits should be seized at all major crime scenes to show predominant colours, eg. carpet, flooring, paint from walls, or wall paper. This way, the photos can be colour balanced to be as accurate as possible.

Full frame
Meg Carriero

- Certain photographs should be printed "full frame" showing the sprockets, edge, negative number and film type. This eliminates the suspicions of hiding things at crime scenes by cropping the photographs. It also shows the court which negative was printed when there are more than one exposure of the same negative. Provided the photographs are properly composed, full frame photos look better for technical type photographs and seem to have a greater impact on the court and jury.

4. There was only one partial fingerprint found at the scene.

- There should have at least been prints of the deceased, seeing she lived there. There were also firefighters, medical attendants, civilians and police officers present, some of them had to leave fingerprints somewhere. Although the house was quite clean, this seems to indicate a some type of a problem.

Spray chemicals
Fuming

We should have a look at the techniques we use to fingerprint major crime scenes and give consideration to methods other than fingerprint powders.

- Fingerprint techniques used at all major crime scenes should be selected to ensure the greatest probability of results, not the least amount of damage we will do to the scene.

Vacuum chamber
Long duration

Tent frame
Heavy Polyethalyne
Coffee warmer
Humidifier (small)

- No consideration was given to fingerprint the remains of the deceased. There was some indication of cleaning up after the fit of rage was over so he had to touch it somewhere.

5. There was no indication of the date and time each roll of film was taken

Photo identifier cards

- Each roll of film should be dated, timed, and contain the file #, location, and a colour chart.

  It would also make it possible to file all the photographic contact sheets chronologically and with no suggestions of error.

6. A 35 mm format camera is not suitable for examination quality photographs.

- For examination quality photographs, a medium or large format camera should be used.

VPH —
VPS 35MM

- For examina ...n quality photograp s, professional film should also be used instead of the bulk purchased, cheeper priced film normally used by this section.

EXTRA FLASH (S)
SLAVE SENSOR(S)

- For examination quality photographs taken with a medium or large format camera, proper lighting techniques must be used. eg. 45 degree lighting from two light sources to provide even exposure and eliminate hot spots.

- A medium format camera should be used for all bloodstain pattern analysis.

MAMIYA
MACRO Z 140 MM
AUTO EXTENSION TUBES
#267
NO 1=45MM
NO2: 82 MM

- At present we don't have a lens for our medium format camera that will allow us to focus at short distances. Some type of "micro" lens and extender is required for technical 1:1 or 1:2 photographs.

7. During this trial, we were requested to provide copies of negatives to the defense.

- If the defense applied to the court to obtain the original negatives, the Judge could rule that we provide them to the defense.

- In this case, we provided copies of reprints or second generation negatives. This satisfied the defense until partway through the trial. They realized there was a loss of a certain amount of detail and increased difficulties processing reprints from these negatives.

2 - It wouldn't be prudent to provide our negatives to the defense so we should research and utilize some method to reproduce accurate copies of negatives. I doubt the defense would make this mistake the next time.

8. Lack of planning, supervision and team effort in relation to the investigation

- The crime scene should be left almost entirely to the Identification personnel. There is no need for anyone else other then the main investigator and the exhibit person to be there. Any evidence from the scene would be entered by the crime scene team.

- The crime scene examination should be done in close consultation with the main investigator. At the start of this case, debriefings were scheduled without notifying Identification personnel. Besides finding direct evidence to link a suspect to a crime, the scene investigation also corroborates or disproves various aspects of statements provided by the witnesses or suspect(s). It can also identify routes for the investigation to follow.

- Examination and recording of this crime scene was basically left to a technician with 6 months identification experience and no major crime scene exposure.

- An Identification supervisor should be appointed and responsible for all major crime scenes, either a Sergeant or a identification technician with an acceptable level of competence. In this case there was a sergeant but once the scene was released, he didn't seem to have any further involvement. He wasn't involved with court preparation nor did he have much evidence to offer. The scene supervisor should be the most experienced of the crime scene team and should be required to enter most of the observations and conclusions concerning the crime scene examination in court. He should co-ordinate the crime scene investigation and be accountable for its success or failure. He should be involved with the court preparation and trial until all the identification evidence is finished.

There was no debriefing at the conclusion of this file to discuss the problems that came up. There was no effort to identify our weaknesses and deficiencies so they could be addressed and their recurrence eliminated.

This report is only a summary of some of the problems which surfaced during this investigation relating to deficiencies within the Identification Section. It is not submitted to assess individual blame but to identify problems, increase our efficiency and prevent future embarrassment to the Royal Newfoundland Constabulary.

Please feel free to discuss any concerns associated to this report with the undersigned at your earliest convenience.

Respectfully submitted,

Cst KPP 322

CONSTABLE KARL PIERCEY
#322

Royal Newfoundland Constabulary
Office of the Chief of Police
Est. 1871

November 4, 2005

The Right Honourable Antonio Lamer, P.C., C.C., C.D.
Commission of Inquiry
P. O. Box 8700
St. John's, NL
A1B 4J6

Dear Commissioner Lamer:

During the testimony of Deputy Chief Robert Johnston on June 6, 2005 he made reference to a policy which was being contemplated to address the police-crown relationship. I wish to advise that a new policy has now been drafted which has been endorsed by both agencies as per the attached letter from Mr. Thomas Mills, Director of Public Prosecutions.

I am pleased to forward a copy to the Inquiry for its consideration.

Respectfully,

Paul Noble

PAUL NOBLE
Legal Counsel &
i/c Professional Standards Bureau

attach.
cc: Executive Committee
Mr. Thomas Mills
Ms. Sharon Thenholm

GOVERNMENT OF
NEWFOUNDLAND AND LABRADOR

Department of Justice
Office of the Director of
Public Prosecutions

November 1, 2005

Deputy Chief Robert Johnston
Royal Newfoundland Constabulary
1 Fort Townshend
St. John's, NL

Dear Sir:

RE: Police-Crown Relationship

Thank you for the most recent draft of this document. I agree with the contents and am grateful for the opportunity to collaborate on this document.

I think it will go a long way towards clarifying the relationship.

Yours Sincerely,

Thomas G. Mills
Director of Public
Prosecutions

TGM/dmo

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POLICE – CROWN RELATIONSHIP

1. General:

The role of police must remain distinct from (while cooperative with) that of Crown Attorneys (both Provincial and Federal). Case law has recognized that both entities operate in an environment of mutual independence. However it is understood that maintenance of cooperative and effective communication between police and the Crown is essential to the proper administration of justice in Newfoundland and Labrador. Despite this, the policing function (investigation and law enforcement) is fundamentally distinct from the prosecuting function. The following chapter provides members of the Royal Newfoundland Constabulary with direction regarding their official dealings with both Provincial and Federal Crown Attorneys.

2. Responsibilities of the Police and Crown in Investigations:

Although it is appropriate and necessary that police shall seek legal opinions from Crown Attorneys, it must be emphasized that these opinions are understood in proper context. It is neither the role nor function of the Crown to direct police operations in any manner.

a) In Newfoundland and Labrador, the police have exclusive responsibility for the conduct of investigations up to the laying of charges in court (while pre-charge screening by Crown Attorneys occurs in other provinces, it does not occur in this province. Consequently, care must be taken when looking at authorities, practices, and case law from other provinces). In the investigative stage the Crown will only be in an advisory role. In these circumstances the advice provided by a Crown Attorney will be limited to legal advice on specific legal issues only. The Crown Attorney will not provide advice on investigative strategy or any other such issues. Under no circumstances will any investigative decisions be abrogated to the Crown prior to the laying of charges. All charging decisions rest with the police.

b) Once a charge has been laid full responsibility and control of the case rests with the Crown. All decisions, including whether or not to proceed with a prosecution, become the exclusive domain of the Crown. The role of the police at this point is simply supportive, at the discretion of the Crown Attorney. The Crown Attorney may request that further investigation take place and that in the absence of that further investigation the Crown Attorney may decide not to prosecute.

c) In certain circumstances, particularly in complex or challenging investigations (e.g., undercover investigations, wiretap investigations), the Director of Public Prosecutions may be called upon through the Commanding Officer of the Criminal Investigation Division, to identify a Crown Attorney to provide

specific and ongoing legal advice in an investigation. Generally, a Crown Attorney who has been involved in the investigative phase of an investigation will not be involved in the prosecution once a charge has been laid.

3. Obtaining Legal Advice from the Crown:

Police officers need to be aware of the protocol for seeking legal advice from Crown Attorneys.

a) All requests for legal advice from the Crown shall be in writing where practicable and channeled through the member's supervisor. Only under exigent circumstances shall a member seek legal advice orally. In such cases the request will be provided to the Crown in writing at the first available opportunity.

b) All legal advice from Crown Attorneys, whether oral or in writing, is solicitor – client privileged, meaning that it is not subject to disclosure.

c) All legal advice from Crown Attorneys shall be documented and clearly marked as 'Privileged Legal Advice' and not included in disclosure materials. The existence of such material must be made known to the Crown Attorney handling the case.

d) Individual members of the Royal Newfoundland Constabulary do not enjoy solicitor – client privilege when receiving legal advice relating to their police duties. It is the Royal Newfoundland Constabulary as an organization that represents the 'client' in these circumstances. Only the Chief of Police or his/her designate may waive solicitor – client privilege on behalf of the Royal Newfoundland Constabulary. This means that individual members of the RNC may not waive solicitor – client privilege by their own initiative.

e) As soon as is practical after a charge has been laid, the investigator shall consult the Crown Attorney and RNC Legal Counsel regarding any potential issues with respect to waiver or non-waiver of solicitor – client privilege.

f) Members of the Royal Newfoundland Constabulary may consult with RNC Legal Counsel at any time for general advice, information, or case law. However, legal advice respecting specific investigations must be referred to a Crown Attorney.

4. Police Complaint Investigations:

In cases of police complaint investigations, all requests for information from Crown Attorneys should be directed to the RNC Legal Counsel who will refer the request

directly to the Director of Public Prosecutions. Under no circumstances should the individual investigator make such a request to an individual Crown Attorney.

5. Disputes or Disagreements:

In order to ensure ongoing channels of communication, the Deputy Chief of Police (Criminal Operations), or his designate, shall meet with the Director of Public Prosecutions, or his designate, on a quarterly basis. This RNC - Crown Liaison Committee shall deal with any dispute or disagreement arising from this policy.

Royal Newfoundland Constabulary

Systemic Issues Report and Submissions Commission of Inquiry

May 20,2005

3.10 Polygraph

It has been frequently stated that the polygraph is a valuable investigative tool. From a police perspective there is a great deal of truth to this statement. However, it is not just the results of the test itself which may be considered useful in an investigation.

Most police officers who are identified to undergo training as polygraph examiners are usually selected on the basis of their interviewing skills. This

is because in addition to the actual testing component the polygraph examination also includes significant pre and post polygraph interaction with the examiner. It is the entire process, with an emphasis on the interviews, that can yield much in the way of valuable information to assist police in their investigations.

The process consists of the pre-test, which is the time an examiner spends developing a rapport with the subject focusing on making him or her feel at ease - this typically lasts for about an hour to an hour and half. During this time the subject is asked to give his/her side of the story, the operation of the instrument is explained and the questions to be asked are reviewed. The next phase is the in-test during which the instrument is attached to the subject, the questions are asked and the physiological data is collected.

The third component is the post-test phase. This phase involves an interview between the subject and the examiner. If the results of the test are "no deception indicated" (NDI) then a brief discussion about the process takes place with an opportunity for the subject to ask questions and subsequently the interview is ended. A result of "deception indicated" (DI) will usually be followed up with an interview that is considered to be an interrogation. This entire process is always video taped from the beginning to the end. A polygraph test must never be conducted if video taping is unavailable.

Furthermore, a polygraph examination should never be conducted after an interview or interrogation with an investigator. Nor should an investigator who is trained as an operator fulfill both roles.

We are also mindful of the valuable recommendations in relation to the polygraph found within the Kaufman Commission on the Proceedings Involving Guy Paul Morin (recommendation 113) as follows:

> Police officers should be trained as to the appropriate use of, and limitations upon, polygraph results. Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for full and complete investigation. Officers should be cautious about

making decisions about the direction of a case exclusively based upon polygraph results.

The RNC currently has two experienced polygraph examiners within its ranks. A third member was recently trained. All RNC polygraph examiners have been trained through the Canadian Police College.

The Canadian Association of Police Polygraphists should be utilized as a governing body which can periodically audit results of polygraph examinations to ensure high professional standards and reliable results are maintained.

3.11 Profiling

Offender profiling (also referred to as psychological profiling, criminal profiling, criminal investigative analysis and criminal personality profiling), is the subject of considerable academic debate regarding its value as an investigative technique. There are several major issues being debated, one is whether profiling is an art or a science. Some practitioners of profiling readily admit that what they practice is an art, and that their observations are largely based on clinical judgements. This raises important issues that must be considered by a major case manager who may consider using a profile in a criminal investigation. One issue is whether or not profiling actually works. There has been very little empirical research regarding the validity of profiling methods. Most published accounts of profiling are based on common sense arguments with no reference to empirical data, for example, anecdotes are frequently used to illustrate examples of profiling validity. Empirical research has not been encouraging, as research illustrates that profiler's judgements are no more accurate than lay people; and the accuracy of actuarial approaches appear to be limited to predictions based on simple base rates. Caution needs to be exercised by case managers who incorporate offender profiling into criminal investigation, simply because of the potential for problems that may arise due to the perceived "expert" nature of these reports. At best, an offender profile can only provide ambiguous information to a criminal investigation. Profiles are sufficiently general so that they will match many individuals in a community, and rarely (if ever) would a profile describe a specific offender. Therefore, improperly using a profile to prioritize or eliminate

ROYAL NEWFOUNDLAND CONSTABULARY

R.N.C. FILE# 93-13132

The following is the statement of Cindy Josephine Youne lives at 194 Empire Avenue, St. John's, NF and was born on the 4th day of August 1983.

Statement taken at R.N.C. - H.Q. on the 12 day of June 1993 at 1237 /p.m.

Q. Who do you live with @ 194 Empire Avenue?

A. Mom and Tyrone

Q. What is your mom's name?

A. Brenda Young.

Q. Who is Tyrone?

A. My brother.

Q. How old is Tyrone?

A. He's four.

Q. Do you go to school?

A. Yup, Seventh Day Adventist.

Q. Do you like school?

A. Yes.

Q. What do you like about school?

A. My friends go there. I like some of the homework too.

Q. What are your friend's names?

A. Jennifer Lahey, Ashley Upshall, Naomie Curlet and Martina Coffey.

Q. What grade are you in?

A. Grade four.

Q. Who is your teacher?

A. Mrs. Pearcey. She's the principal.

Q. Can you tell me what time you got up from bed yesterday morning?

A. I got up around 7:00 a.m. and got ready for school.

Q. Who was @ your home?

A. My mom and Randy and Tyrone and me.

Q. Who is Randy?

A. Randy Druken.

Q. How do you know Randy Druken?

A Mom used to go out with him.

Q. Does she still go out with him?

A. No.

Q. How do you know?

A. 'Cause they don't sleep in the same bed or nothing. Whenever he sleeps over, he stays on the couch 'cause he stays on the couch and sometimes when I get up in the morning, that's where he is.

Q. Are there other times when he sleeps somewhere else in your house?

A. No, he just sleeps on the couch.

Q. Did you go to school yesterday?

A. Yes.

Q. Where were Mom, Tyrone and Randy when you were getting ready for school?

A. Mommy was in the chair by the phone watching tv and Randy was sleeping on the couch. Tyrone was in the kitchen having breakfast.

Q. What time did you go to school?

A. 8:30 a.m.

Q. What was your Mom doing?

A. Getting Tyrone ready for Day Care.

Q. How did you get to school?

A. I walked with my friend Ashley. She just lives three houses away.

Q. Do you know what day of the week it was yesterday?

A. Friday.

Q. Where does Tyrone attend Day Care?

A. **Up** by Tim Horton's - Little People's Workshop.

Q. How does Tyrone get to Day Care?

A. Bus.

Q. Does your Mom drive him there sometimes?

A. Maybe if he's sick in the morning and better in the afternoon.

Q. Does you Mom have a car?

A. Yes.

Q. Do you know what kind of car it is?

A. No, but it's white and has rust spots on it.

Q. How many doors does the car have?

A. Two.

Q. What time do you have lunch break @ your school?

A. 12:15p.m.

Q. What did you do for lunch yesterday?

A. I went home for lunch and had a sandwich.

Q. Who was home?

A. Randy.

Q. What was he doing?

A. Watching t.v.

Q. Was he dressed?

A. Yes. I think he had on jeans and a white and black top.

Q. Where was your Mom?

A. Randy said she was out shopping.

Q. Was your Mom's car gone?

A. **Yup.** She normally **parks** on front but sometimes on the back too.

Q. Did Randy say anything else to you?

A. No, just bye and then I went back.

Q. What time did you go back to school?

A. I went back around 12:50 p.m. and played outside and a few minutes after that, the bell rang.

Q. What subjects did you do in the afternoon?

A. Math corrections, health, we played a few games and Mrs. Pearcey read **a** story.

Q. What time did you finish school in the afternoon?

A. Around 3:30 p.m.

Q. After school, what did you do?

A. I came home and put my bag in my room and then went out and played with my friends.

Q. Who was home when you got home from school?

A. Randy.

Q. What was he doing?

A. Watching t.v.

Q. Was your Mom or Tyrone home?

A. No.

Q. Where did you play?

A. Around my door and we were skipping. Then me and Ashley went up by Mary Brown's on Freshwater Road and played with a couple of her friends, Catherine and Nicole. Then we played by the school and then went down by Ashley's house and played for a while. Then we went to the store and came back and Catherine and Nicole had to go home. Me and Ashley skipped and played ball for a while and Mom called me in for supper around 6:00 p.m.

Q. Then what happened?

A. Mom came up around 9:00 p.m. and she started watching a movie in the living room. I had the same movie on in my Mommy's room and it was a movie about a man who left his wife for another lady. The wife came in and started spray painting things and breaking plates and glasses and that.

Q. Did you go out in the living room with your Mom and Randy?

A. No.

Q. Why not?

A. 'Cause I was afraid Mom would put me to bed. I did go out to look @ the Herald and Mommy said my eyes looked tired and she told me to go to bed. I went to bed and then I could hear them putting their boots on out by the bathroom where the closet was. Mom was taking Randy home.

Q. How do you know your Mom was taking Randy home?

A. 'Cause when I got home from school that afternoon, Randy told me he wasn't sleeping over when I asked him if he was.

Q. Did you Mom or Randy come in and talk to you?

A. No.

Q. Did they say good-bye?

A. No.

Q. How do you know that they left?

A. 'Cause I could hear the two of them walking down the stairs to leave.

Q. While the movie was on and your Mom and Randy were in the living room, did you hear them talking?

A. They were talking and saying what was going to happen next in the movie.

Q. Did you hear them say anything else to each other?

A. No.

Q. What did you do after you heard them walking down the stairs?

A. I turned my tv on for a few minutes and there was something on about a PC Election and then I turned my radio on and put a Samantha Fox tape on. I turned my tv off and got in bed and then I fell asleep - it was going on 10:00 p.m.

Q. Did you see or hear your Mom come back?

A. No.

Q. What do you remember next?

A. I heard a big bang and I thought it was the coffee table knocked over because I thought it might be Mom sleepwalking or something. She was saying, "no, no, Cindy, leave me alone, leave me alone" and I could hear another voice say once or twice, "be quiet Brenda".

Q. Did you know who the other voice was?

A. No. It wasn't a familiar voice. I never heard it before.

Q. Was it a woman's voice or a man's voice?

A. It sounded like a man's voice. It sounded like a soft voice.

Q. Are you certain you never heard your Mom return home?

A. I'm sure.

Q. After you heard your Mom talking and the other voice, what did you do?

A. I went back to sleep.

Q. Did you go out to see what the big bang was?

A. No.

Q. How close is your bedroom to where the coffee table was?

A. Not very far.

Q. What do you remember next?

A. Tyrone woke me up shouting out, "Mommy, Mommy". I looked @ my clock and it was 8:39 a.m. and I thought it was weird because Mom normally gets up and unlocks his door and she didn't this time.

I went out to see where Mommy was and the coffee table was tipped over near the kitchen and there was a broken glass by the coffee table. Mommy was lying on her stomach and I just thought she was asleep. I went in and unlocked Tyrone's door and I asked him if I could go in and play with him. He said "yes" and I was going to play but instead I cleaned up the mess on his floor and I told him to stay in his room 'cause I didn't want him to see things tipped over and that.

I went out and Mommy was lying on her stomach and she had a black blanket covering her from her waist down. I could see blood on her shoulder and some blood near her chest dripping down. I took the blanket off and saw some scratches on her legs. I put the blanket down, I knew that she was dead. I went and called 911 and told them I saw my Mom dead on the floor and then I called my Nan. I went to see if the doors were unlocked and the back door was locked and so was the Front one. I waited by the front door for the ambulance to come.

Q. Does your Mom have any other friends that might sleep over?

A. No. just Randy and Lisa and her husband. Lisa LeGrow and his name if "Faouk" Owens.

Q. Does your Mom have a boyfriend right now?

A. No. She said that she didn't want to go out with anyone else.

Q. Why?

A. 'Cause she didn't want to go fighting with anyone else. Her and Randy used *to* fight and argue about silly things.

Q. What do you think happened to your mom?

A. I think maybe she killed herself. I don't know.

Q. How do you think she killed herself?

A. I think a knife.

Q. Why do you think she killed herself?

A. 'Cause she was under a lot of stress. She never had no luck with boyfriends and that and she always had a lot to do.

Q. Did you see anything else on the floor near your Mom?

A. The cushions on the chesterfield were messed around and the coffee table was broken.

Q. Is the statement I read to you the same as you told Cst. Hogan?

A. Yes.

93-06-12 @ 1450 Hrs.

Witness: T.P. Hogan, Cst.

R. Baggs, Cst.

Sgd: Cindy Young

1993 St. J. No. 5240

In the Supreme Court of Newfoundland
Trial Division

BETWEEN:

Her Majesty the Queen

AND:

Randolph Druken

VOLUME LX

Transcript of proccedings heard before Mr. Justice Wells, on the 24th day of January, A.D., 1995.

Mr. Wayne Gorman for the Crown
Mr. William Collins for the Accused

JANUARY 24, 1995

VOIR DIRE BEGINS

THE COURT: Thank you. Now gentlemen I indicated that I would give my decision of the application at this time and I am going to read it now. I haven't copies to give you at the moment because it's got to be proofread as it were, but after its given sometime later this afternoon or at the latest tomorrow morning you will be able to have copies.

The accused is charged with murder and the Crown has applied to have the evidence of a witness at the preliminary inquiry to whom I will refer as M.D. read to the jury as evidence under the provisions of Section 715 of the Criminal Code. The Crown also seeks to play to the jury a sworn video taped interview which the witness made on June 22, 1993.

The issues raised by the application are:

a) if M.D. cannot now give evidence, is there a right either at common-law or under the provisions of Section 715, to play or read the

video interview in addition to the preliminary inquiry evidence;

b) under what circumstances does the use of the word "may" in Subsection 1 of Section 715 authorize a judge to exclude either videotaped or preliminary inquiry evidence, and what constitutes concerns as to its reliability;

c) when may the Court exercise a discretion to exclude all or part of such evidence, should it find that its reception would operate in a way that would infringe upon the accused's right to a fair trial;

d) do considerations of prejudicial effect versus probative value, apply to determination under Section 715.

Evidence was heard in the absence of the jury, and in order to place the matters at issue in context, I will refer also to other evidence heard at the trial. It is

not to be inferred that in so doing I am making findings of fact.

Brenda Young was killed in her apartment in St. John's on the early a.m. of June 13th, 1993. Her death was caused by multiple stab wounds to the chest. Ms. Young's apartment which had until shortly before her death shared with the accused, was in a block of four apartments in a single building. M.D., who may be unable to give evidence now, lived with her husband, her son and grandson in a three bedroom apartment on the ground floor immediately below Ms. Young. Her evidence at the preliminary inquiry and in the sworn videotaped interview says that she was then 62 years old and in poor physical health. On the evening of June 12th, 1993, she was at home and for the most part confined to her bed. A number of visitors, most of whom were family members, came to her home that evening but she was unable to participate in the family gathering and remained in her bedroom.

M.D. was on medication at the time and in addition to her regul - regular medication took a sleeping pill around

9:30 p.m. She awoke at about 12:55 a.m. on the 13th, by which time all guests had left, and she, feeling that her earlier sleeping pill had worn off, took another and returned to her bed at about 1:15 or 1:20 a.m. Her husband was asleep in their bed, her son Patrick had gone to his room and her grandson Patrick, Jr. aged 18, was lying on the chesterfield in the living room watching T.V.

As she lay in bed before going to sleep, M.D. says that she heard the footsteps of two people go up the stairs which led to Brenda Young's apartment. She felt that one of the persons ascending the stairs was Brenda Young. As soon as they reached the top of the stairs she heard Brenda kick off her shoes, which she says she thought to be pumps or shoes with high heels. At the same time she says she heard Brenda say, "don't do that no more Randy, don't do that no more". She said the words were screamed at first, but that Brenda's voice became lower until there was complete silence, after which she heard nothing more and went to sleep.

The significance of the alleged use of the name

"Randy" by Ms. Young is immediately obvious, because if accurate, it leads to the inference that the accused was in the apartment at or about the time that she was killed.

There are nevertheless serious concerns raised by other evidence both at trial and on the voir dire. Some of these are:

a) M.D.'s bedroom was at the back of the building and Brenda Young's front stairs were not over M.D.'s room'

b) there is no evidence that her grandson who was in the living room, or anyone else in the house, heard the voice of Brenda Young or any other person;

c) Brenda Young's next door neighbours in the upstairs apartment were separated from her apartment only by an interior wall. At the time they were awake and watching a movie. Their evidence is that they heard no sound from the adjoining apartment until sometime around 3:00 a.m. when heard a sound like "furniture

being dragged across the floor", either from Young's apartment or from M.D.'s apartment below;

d) a pedestrian passing on Empire Avenue shortly after 1:00 a.m. saw a women who she had seen before, entering the front door of Brenda Young's apartment at about 1:05 or 1:10 a.m. At the same time, a neighbour who was standing in her doorway a few feet away from Brenda Young's entrance, both saw and spoke to Ms. Young whom she knew well, as she entered the front door of her apartment at approximately 1:05 or 1:10 a.m. Both witnesses say that the women whom the neighbour identifies as Brenda Young, was alone;

e) at some time in the early morning of June 13th, Brenda Young's daughter C.Y., who was asleep in her bedroom in the Young apartment, heard a loud bang which she thought was the coffee table being overturned, after which she heard her mother's voice referring to the name "Randy". M.D.'s evidence makes no reference to a bang;

(Voir Dire)

f) the evidence of a "crime scene" expert, is to the effect that there was no evidence of violence or bleeding anywhere except on the living room chesterfield and the living room carpet. The location of these blood stains could lead one to infer that Ms. Young was attacked and died while lying on the her chesterfield and that the body was subsequently moved onto the livingroom floor;

g) there is physical evidence that after entering her apartment, Brenda Young changed into her nightgown and prepared to, or did in fact, lie on the chesterfield where she intended to sleep that night. In addition to changing and preparing for sleep, Brenda Young apparently ate a meal which she had purchased a few moments before at a Wendy's restaurant a short distance from her home.

Evidence of the foregoing matters will be evaluated by the jury along with M.D.'s evidence, should it be read.

(Voir Dire)

The Crown has called Dr. Howard Strong, a fully qualified and experienced psychiatrist. Dr. Strong assessed M.D. in May of 1994 and again shortly before coming to Court and on a third occasion during the voir dire. He has concluded that since May 1994, M.D. has experienced and is suffering from a mental illness, namely frontal lobe dementia and that she is now, and has been since May 1994, psychotic, delusional, and out of touch with reality. Without detailing the full extent of Dr. Strong's evidence as to M.D.'s illness, his evidence is that she is now clinically insane and as such is incapable of giving evidence. His findings are supported by the observations of her husband, her daughter and Constable Barry Randell who attempted to interview her a few days ago.

Of more significance of Dr. Strong's findings with respect to her past medical and psychiatric history. M.D. suffered from severe depression in the 1950's and received electric shock therapy at that time. She has had frontal lobe dementia at least since 1994 but he cannot be sure when the onset of that disease began. He concluded that

her brain was vulnerable to begin with, and that the dementia could have developed over weeks, months or even years. Dr. Strong viewed her sworn videotaped statement and read the transcript of her preliminary inquiry evidence, which shows elements of confusion. It is possible in his view that the early stages of the frontal lobe dementia could have been present and caused problems for M.D. as early as June of 1993 or before. In relation to her evidence at the preliminary inquiry he said, "her answers are not what I would expect from a normal 63 year old, functioning properly".

In addition to the foregoing, her IQ was numerically in the range of 74, while an average IQ is 100. Psychological testing showed that she had for some years at least, functioned at a low level. In Dr. Strong's opinion, her perception of facts could have been impaired in 1993. Before concluding his evidence, Dr. Strong had further psychological testing done during the voir dire itself and he again examined M.D.

His final conclusion is that in 1993 he had a good

memory - she had a good memory for events but not for their time sequences. That is, she could remember events but not the event - but not their place in time. His comments he says are applicable to the evidence which she gave at the preliminary inquiry. He believes that the closer in time her statements were to the events which she described, the more reliable they would be, nevertheless, it is possible that she could have confused the events which she says occurred in the early morning of the 13th of June, with other events which occurred the night before or in the previous weeks and months.

Dr. Strong's opinion becomes especially significant in the light of the evidence already before the Court, but on the previous night the accused went to Brenda Young's apartment in the early hours of the morning and that they had an argument after she had let him in the front door and they had gone upstairs to the apartment. Furthermore there is evidence that the accused and Ms. Young lived together off and on for more than year prior to June 13th, 1993 and that they had stormy relationship involving loud quarrels.

(Voir Dire)

Dr. Strong said that a CT scan of M.D.'s brain taken in May of 1994 shows that there had been atrophy of the brain to a mild degree, and that this is common with dementia and is ordinarily a sign of prior brain problems. Dr. Strong's evidence raises considerable concern over the possibility or likelihood that M.D. may have been experiencing some degree of mental incapacity or impairment as early as June 1993 and that impairment could have affected her memory and thus her evidence of the preliminary inquiry.

An examination of the transcripts of the preliminary inquiry and the taped interview, tend to confirm Dr. Strong's observations with respect to M.D.'s timing of events. For example:

a) M.D. was not sure when she told the police about what she heard.

b) She was not sure when she talked to the police, i.e. it may have been a week or even two weeks after Brenda Young's death.

(Voir Dire)

c) She did not remember speaking to the police on June 12th or 13th, 1993.

d) She says that she told the police everything in her first interview.

e) She said at one point that she did hear Brenda say "don't do that no more Randy" until 10 or 12 minutes after she had heard more than one person go upstairs.

In addition, M.D. demonstrated some difficulty in hearing questions which were asked to her at the preliminary inquiry and at times may have been confused.

There is another complicating factor. On June 13th at 5:12 p.m. M.D. gave a statement at her home. She related in the statement how she went to bed between 9:30 and 10:00 p.m. and then said,

> "I remember I got up at about 12:55 a.m. or 1:00 a.m. to get a drink of water to take my medication. It could have been

two or three times I got up before this. When I came out into the kitchen Pat was in the front room cleaning up the coffee table. I took my pill and then went to the bathroom and went back to bed. My husband had a friend over earlier and they were drinking a few beer. He was in bed when I got up and Pat was cleaning up after them. A little while after Pat came in and opened my bedroom door and asked if I called out to him and I said no and he just left the room. I took notice of the time because of the medication I am on. I would say it was about 1:15 a.m. or 1:30 a.m. when I heard more than one person going up the stairs to the apartment upstairs. I never heard a sound after this. I asked my husband if he heard anything and he said no. I think the stairs to the upstairs apartment go over my bedroom and I can hear them clearly when they walk up the stairs. I know it was more than one person that went up over the stairs because I could hear them take their shoes off".

On the 13th and 14th of June, immediately after Brenda Young's death, M.D.'s son was under intensive police question at RNC headquarters and was told that he was a suspect in the murder. About mid-afternoon on the 14th of June her son requested an opportunity to call a lawyer. After speaking to a lawyer he told police that he had nothing further to say to them, at which point he was taken home. About 40 minutes later the police again came

(Voir Dire)

to the home and at 4;57 p.m. M.D. gave another statement to the police in which she said in part,

> "Between 1 and 1:30 a.m. I heard Brenda kick off her shoes, because you can hear on the hardwood floor. About 10 to 15 minutes later cause I got in bed quarter after one, after getting a drink of water and taking a pill, I went back to bed. My grandson was up around. I heard Brenda say stop Randy don't do it anymore. She was screaming it out loud. I never heard anything after that. Question: And where were you when you heard all of this going on upstairs? Answer: In my bed. I went back to bed at 1:15, 1:20 a.m. Between that and 1:30 I heard the noise. Question: M.D., who else was in your house when you heard Brenda? Answer: My husband he was asleep, Pat was in bed at the time I heard Brenda, my grandson Paddy was up. Question: M.D. did you tell anyone else about what you heard? Answer: I told my husband, my son-in-law Jim Kearney and my daughter Bernadette Kearney. Question: When did you tell them about what you heard? Answer: Yesterday after Randell left. She continued with matters.

In her videotaped interview if June 22nd, 1993, M.D. again described what she heard and said in answer to a question: "well, she was just at the top of the stairs when I heard her. Constable Randell "yes". This is why when she said "Randy, don't do that no more", I figured

(Voir Dire)

well, there had to be something done to her before she took off her shoes".

Later in the same video interview M.D. said in response to a question, Singleton: "M.D. how much time passed from the time you heard Brenda come in and kick off her pumps to the time that you heard, you say, this silence? How much time passed: M.D.: I'd say from quarter after one to quarter to two, about a half hour, from the time I heard it, it was quarter after one until I went to - until I heard Brenda saying "Randy, don't do that no more".

In the preliminary inquiry in November 1993, M.D. said at pages 168 - 169, Question: You indicate that the evening you heard "don't do it any more" how many times was the word Randy mentioned? Answer: Randy got up over the stairs. She said, "Randy, don't do that". And it was sort of loud that I could hear her. In the still of the night when there is nothing going you're bound to hear it. And then she said again "Randy, don't do that", about three times. And then her voice started to get low, until

there was nothing. I could hear nothing".

M.D. was questioned at the preliminary inquiry as to why she had first omitted to tell the police about hearing Brenda's voice on the early morning of June 13th and was until to give, according to my reading any explanation of that omission. Furthermore, she seemed to maintain that she had told the police. Furthermore it is unclear whether or she understood the significance of what she was being asked, or why she was being asked it.

I now turn to Section 715 of the Criminal Code which says in subsection (1) and (2):

> 715.[643](1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person
>
> (a) is dead,
>
> (b) has since become and is insane,

> (c) is so ill that he is unable to travel or testify, or
>
> (d) is absent from Canada,
>
> and where it is proved that his evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, if the evidence purports to be signed by the judge or justice before whom it purports to have been taken, unless the accused proves that it was not in fact signed by that judge or justice or that he did not have full opportunity to cross-examine the witness.
>
> (2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be read as evidence in the prosecution of the accused for any other offence on the same proof and in the same manner in all respects as it might, according to law, be read in the prosecution of the offence with which the accused was charged when the evidence was taken.

The first issue I can dispose of very quickly, it is whether it has been proved on oath that the witness "has since become and is insane"; and/or "is so ill that she is unable to travel or testify". On both questions I am fully satisfied on the evidence of Dr. Strong that clauses (b) and (c) are both applicable and that the requirements of these clauses have been satisfied, with the result that

(Voir Dire)

M.D. is unable to give evidence at this trial. However, says Novalinga, 19 C.C.C. etcetera, respecting mental as distinct from physical illness.

The next question which I must consider is, whether the Crown is entitled to have the videotaped evidence, together with the evidence taken at the preliminary inquiry, placed before the jury as an exception to the rule against the admission of hearsay evidence and pursuant to Section 715 of the Criminal Code. In the alternative the question becomes, did Parliament in enacting Section 715, intend to provide a full and complete mechanism for resolving questions of the kind which we are considering.

In my view, it is implicit in the wording of Section 715 that the section was designed to resolve questions relating to both the use of a sworn statement made to the police and the sworn evidence from a preliminary inquiry. Subsection (1) uses the words "or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry". I interpret the use of the

word "or" to mandate the use of one or the other, not both the sworn statement and the record from the preliminary inquiry. Had M.D. been able to give evidence at trial, neither her videotaped statement nor her preliminary inquiry evidence would have been placed before the jury. To allow both to be placed before the jury at a trial in which she is unable to give evidence, would permit one statement to reinforce the other, despite the fact that the video statement was not subject to cross-examination.

I find that in the present circumstances, the Crown is entitled only to have the Court determine whether or not the evidence which was subject to cross-examination, namely that from the preliminary inquiry, can be read.

Interpretation of Section 715 was considered by the Supreme Court in **R. v. Potvin**. The Court concluded that the word "may" confers on the trial judge a discretion not to allow the previous testimony to be admitted in circumstances that would operate unfairly to the accused. However, such circumstances will be relatively rare, and the discretion is not a blanket authority to undermine the

object of the subsection.

The commentary in Tremeear's Criminal Code consider such evidence when it says at page 1402 in respect to Section 7 of the Charter and Potvin.

> A Code provision allowing the admission of previously obtained testimony as evidence in a trial where the witness is unavailable does not contravene the accused's right to a fair trial, in the absence of circumstances which negated or minimized the accused's opportunity to cross-examine the witness when the previous testimony was given. The right to confront unavailable witnesses at trial is neither an established nor a basic principle of fundamental justice. However, the accused would have a constitutional right to have the evidence of prior testimony excluded where it was obtained in the absence of a full opportunity to cross-examine the witness.

That reference follows and echoes the words of Martin, J.A. of the Ontario Court of Appeal as referred to at page 301 of Potvin. The Court then went on to say:

> I would respectfully agree with Martin J.A. that the accused would have a constitutional right to have the evidence

> of prior testimony obtained in the absence of a full opportunity to cross-examine the witness excluded. When the evidence is sought to be introduced in order to obtain a criminal conviction which could result in imprisonment, the accused is threatened with a deprivation or his or her liberty and security of the person and this can only be done in accordance with the principles of fundamental justice that the accused have had a full opportunity to cross-examine the adverse witness.

It is important in a consideration of this kind, to remember the words of MacIntyre, J. in Mezzo v. The Queen.

> "The problem which arises here has it roots in the tendency to overlook the division of duties inherent in a trial by judge and jury. No authority need be cited for the proposition that in a jury trial all questions of law are for the judge alone and, of equal importance, all questions of fact are for the jury along. the distinction is of fundamental importance. It should be preserved so long as it is considered right to continue the use of the jury in the criminal law. Much of the difficulty that has arisen on this subject has been caused by a failure to recognize and preserve this distinction."

It is important to be aware of the distinction between "reliability" and "weight". The weight of a

particular piece of evidence is for the trier of fact. The reliability of evidence, as the term is used by the courts and confirmed in **Potvin**, goes not to the issue of weight, but to reliability in the way in which the earlier evidence was obtained and formally tendered at the preliminary inquiry or by sworn statement as the case may be. I should say to you that - that paragraph which I have just read is mine I finished the quote as you - as you are probably aware.

The distinction is clearly shown by the matters which occupied the attention of the Court in **Potvin**, namely, was it under oath, was it given in the presence of the accused, was there full opportunity to cross-examination, were the formalities of authentication observed. These considerations, which are matters of law, are quite different from consideration of the weight, or as it has sometimes been expressed, the quality of the evidence itself. Such matters are always for the trier of fact.

In my view there maybe problems with M.D.'s testimony. Some of these arise from:

a) confusion

b) possible hearing problems;

c) being ill and/or on medication;

d) having taken sleeping pills up to approximately one-half hour before the events which she described;

e) her location which was in the bedroom at the back of the building, not underneath the stairs and landing of Brenda Young;

f) the fact that others who might have been expected to hear screamed words, apparently heard nothing;

g) the fact that her first statement to the police specifically said that she heard nothing after hearing the footsteps, while 24 hours later when she knew that her son was a suspect, she in a statement, placed suspicion directly on the accused;

h) that she was of low measured intelligence with functional mental abilities which were borderline;

I) the fact that medical evidence now

indicates that she had suffered from severe depression and had received electric shock treatment that she may have been suffering from some degree of brain atrophy in June 1993, and that she may have been in the early stages of frontal lobe dementia; and that he continuing difficulties appeared to be especially in respect of the times at which events happened rather than the events themselves.

All of the foregoing except for (i) were known to the defence at the time of the preliminary inquiry in November 1993 and were or could have been pursued on cross-examination. All of the foregoing are clearly matters which the jury are fully capable of assessing and taking into account in their deliberation, in much the same way as they as they would have had M.D. been able to give evidence, save of course for the observation of her demeanour.

(Voir Dire)

The problem now before this Court is, did the accused have a full opportunity to cross-examine the adverse witness by reason of the fact that neither the Crown nor the defence knew at the time, that M.D. may possibly have had some degree of mental illness or impairment, at the time when she was giving her evidence at the preliminary inquiry.

The medical evidence was neither known nor available at the time and cross-examination could hardly have elicited from the witness an accurate, or indeed any, diagnosis of her own mental state. The "new" evidence is nevertheless available to the defence at trial. M.D.'s probable mental state at the time of the preliminary inquiry and in June 1993, is available and may be presented to the jury to assist it in the determination and evaluation of matters of fact, which role is exclusively granted to the jury by law. As the Supreme Court said in **Potvin** at page 304 in referring to Section 715:

> "It is my view that the word "may" is

> directed not to the parties but to the trial judge. I believe it confers on him or her a discretion not to allow the previous testimony to be admitted in circumstances where its admission would operate unfairly to the accused."

In the context of the present case, the words "circumstances where its admission would operate unfairly to the accused", are the operative words. The discretion is a statutory discretion to be used to prevent any unfairness that could otherwise result, in the words of the Court, from a purely mechanical application of the section. As the Court said at page 307:

> "In my view there are two main types of mischief at which the discretion might be aimed. First, the discretion could be aimed at situations in which there has been unfairness in the manner in which the evidence was obtained. Although parliament has set out in the sections specific conditions as to how the previous testimony has to have been obtained if it is to be admitted under Section 715. The most important of course being that the accused was afforded full opportunity to cross-examine the witness. Parliament could have intended the judge to have a discretion in these cases in which compliance with the requirements of Section 715 gave no guarantee that the evidence was obtained in a manner of fair to the accused."

And again at page 308:

> "In my view, once it is accepted that Section 643(1), referring to the old section, gives the trial judge a statutory discretion to depart from a purely mechanical application of the section, the discretion should be construed as sufficiently broad to deal with both kinds of situations, namely where the testimony was obtained in a manner which was unfair to the accused or where, even although the manner of obtaining the evidence was fair to the accused, its admission at his or her trial would not be fair to the accused."

Thought this case presents some difficulty, I have nevertheless concluded that safeguards can be imposed which will satisfy the criteria of fairness to the accused. I am satisfied that the law permits the evidence given by M.D. at the preliminary inquiry, to be read to the jury. However, in allowing it to be read, I have an obligation to ensure that that procedure is not unfair to the accused. I have concluded that fairness can be ensured by making available to the jury all relevant facts both medical and otherwise, touching on M.D.'s evidence, so that they will form a part of the entire evidence and enable the defence to argue the issue of the weight or

quality of M.D.'s evidence, in the light of all of the circumstances surrounding it. To do otherwise would be manifestly unfair to the accused and could allow the jury to receive a distorted view of M.D.'s evidence and a distorted view of her capabilities and/or her possible motives to misrepresent.

It shall be a condition precedent to the reading of M.D.'s evidence taken at the preliminary inquiry, that the Crown will call Dr. Strong to give evidence as to her present and past medical condition insofar as he knows it, and the Crown shall introduce through the appropriate police officers the statements made by M.D. to the police on June 13th and 14th, and will also call Constable Randell to give evidence as to the taking of the statements and the sequence of events involving the suspicions of M.D.'s son, between the times of M.D.'s first and second statements. The accused shall have full right of cross-examination of such medical and other witnesses, after which M.D.'s evidence taken at the preliminary inquiry, may be read to the jury.

I am satisfied that with these safeguards, the jury will be able to make proper factual determinations, and that M.D.'s evidence will have been presented to the jury in a manner which will address the concerns expressed in **Potvin** at page 308 in respect of:

> "The two competing and frequently conflicting concerns of fair treatment for the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue."

So copies will be available for you very shortly.

MR. COLLINS: Thank you, my lord.

THE COURT: Okay. Now we asked the jury to come back at 10:00 tomorrow morning. Mr. Cormier is obviously at the funeral this afternoon in Corner Brook, weather being as it is I'm not sure when he will get back but all we can do is be here 10:00 tomorrow morning and if necessary delay matters until all the jurors turn up. I think that's about all we can do and see what happens tomorrow.

VOIR DIRE ENDS

STATEMENT SYNOPSIS

Phyllis Duke
Address:

DOB: 43-06-29
190 Empire Avenue, St. John's

June 1993, Mrs. Duke Hears Argument at Brenda's Apartment

Insp. Kenny,
telephone conversation
Oct. 4/99

- Said that less than a week before Brenda's death she was in the back hall and heard an argument in Brenda's apartment, she said it wasn't Randy. She never seen Randy that night. She went up to Brenda's door, Brenda opened it a little, she asked if she needed her to call someone and Brenda said no. When asked if she knew who it was with Brenda, Mrs. Duke said that she don't want to get involved, that the Policejust twists things around.

Insp. C. Kenny
Oct. 20/99

- A few days to a week prior to Brenda's death Mrs. Duke hears an argument coming from Brenda's apartment. Went up and asked Brenda if she needed the Police called, Brenda says no and closed the door.

- Don't remember what the argument was about

- Know who the other person was but refused to tell.

- Mrs. Duke refused to divulge certain information on tape, the followinginformation was given in confidence, and according to Mrs. Duke, she will not testify to it.

- Mrs. Duke further states (off the record), that the argument that she heard coming from Brenda's apartment a few days before Brenda's death was between Brenda and Pat Dooley Sr., and they were arguing about stolen goods. This is when Mrs. Duke went to Brenda's apartment, Brenda opened the door ajar, and Mrs. Duke asked if she wanted the Police called. Brenda says no.

(Please note: This incident is Similar to that of Mrs. Duke going to Brenda's apartment on Friday night and asking Brenda the same thing, but was then referring to Randy's behaviour and not Pat Dooley Sr. Mrs. Duke now denies going to Brenda's Friday night)

Thursday, June 10/93
Mrs. Duke hears a person yelling and swearing out back

S/Sgt. Singleton and Cst. Randell (KGB statement) August 19/93

- Mrs. Duke heard Randy Thursday night, shouting and yelling and swearing. She said "I don't know if he swore on me or wore on Brenda cause I was taking my grandson in on the back."

- She heard them arguing, "like you couldn't hear every word, like all you could hear was most generally swearing and yelling." Only heard "bits and pieces, like nothin that could really make sense - like you son of a bitch, you won't go no where."

- When asked who was saying this, she said, "As I thought, it was Randy. I couldn't swear cause I closed the door and came in out of it..."

- Referring to hearing the Thursday night argument, Mrs. Duke said: "...I never paid no attention to time. It was early, cause Michael wasn't in bed, it had to be, Michael generally comes in between 9:30, quarter to ten..."

- Questioned -Did you see him Thursday night? Mrs. Duke replied "Yeah, well I - I didn't actually see him, like he was on the side of the house, but you could hear him swearing and yelling."

Lt. D. Peddle, verbal statement, noted on 1624 form Nov. 7/93

- Thursday, June 10/93, sometime *after* supper, but before dark, she heard Randy Druken shouting up to someone in Brenda's apartment. Randy was at rear of apartment, just outside and went up the entrance to the back steps. He was looking up at the area of Brenda's kitchen window. She heard Randy shout: "You fucking whore, you'll never get to the mainland, I'll make away with you."

Cst. P. Davis, 2:23 p.m. Nov. 13/93

- See Randy on Thursday, June 10/93 around supper time.

- Pat Dooley was there too.

- In kitchen, heard yelling, Randy was calling her a slut and a whore. Mrs. Duke said "I can't remember exactly what he said but he said you'll never make it to the mainland or you'll never get to the mainland or away or something."

- She seen Pat Dooley in window (kitchen).

- Stood up by the back window when she saw Randy

- In the kitchen with the door closed after she got Mike, a dish could still hear Randy.

Preliminary Hearing, examined by Mr. Gorman Nov./93

- On Thursday heard Randy say "You'll never get to the fucking mainland."

- Swearing, yelling bitch, whore, hitting the side of the house.

Trial Voir Dire, by Mr. Gorman Oct./94

- Thursday, Mrs. Duke heard "you slut", "you bastard", "you fucker you'll never get to the mainland", 'whore", 'you cocksucker".

XX, by Bill Collins Oct./94

- Kitchen door was open when she heard Randy outside on Thursday, June 10/93.

- Closed the kitchen door when she got Mike in and locked it.

- Never saw anybody else around when Randy was suppose to be shouting and hitting the house Thursday June 10,93.

Pre-trial preparation, Wayne Gorman and Cst. Randell (Cst. Randell's notes) Nov. 20/94 - Randy was in a rage like he was hitting the side of the house.

- He said, "You cocksucker, you'll never make it to the mainland."

Trial, Wayne Gorman Nov. 29/94 - Said "you will never get to the fucking mainland."

Trial, Mr. Collins Nov. 30/94 - Referring to Des Peddle's interview in November 1993 and her comment that she heard "I will make away with you", referring to Randy outside the house on Thursday, Mrs. Duke say that "I can't remember saying it like that."

Insp. Kenny, audio taped interview July 2/99 - Thursday night, Mrs. Duke was in her kitchen, had back door open and window open, heard commotion, shouting and swearing. Went out back door, down the steps and had her grandchild Michael to come in.

Insp. Kenny Oct. 20/99 - Thursday, heard and saw Randy Druken out back shouting and swearing. Saw another person out back standing by a car, don't know who he was or if he was with Randy.

Friday, June 11/93, Mrs. Duke speaks to Brenda about a new dress

Cst. G. C. Walsh
June 13/93 - Second last time I saw Brenda was about 4:30 p.m., new dress and shoes.

Lt. D. Peddle and
S/Sgt. A. Singleton
August 11/93 - Friday afternoon, June 11/93 up at Brenda's, showed me new dress and shoes.

- Randy was not there at the time.

- This was around 4 " 4:30 p.m. before supper.

* Check Lisa Legrows statement and evidence regarding time spent with Brenda on June 11/93.

S.Sgt. Singleton
and Cst. Randell
(KGE statement)
August 19/93 -Friday afternoon 4:30 p.m. or 5:00 p.m. maybe 5:30 p m. talking to Brenda at top of stairs between the living room and by the bathroom. Brenda showed her the shoes and dress she had bought. Conversation occurred between the bathroom and livingroom.

Cross Examination,
Bill Collins
Nov. 29/94 - Seen Brenda Friday afternoon coming out of Dooley's, spoke to her about her new dress and shoes, they spoke at top of Brenda's front staircase. Mrs. Duke had her hand on the knob of the door but still on the stairs.

Insp. C. Kenny
Oct. 20/99 - Friday afternoon up on top of stairs at Brenda's, seen new dress and shoes. Mrs. Duke goes on to say that she is not sure if it was Friday or a couple of days before that. Then states that it couldn't be Friday, it had to be Wednesday or Thursday.

Friday, June 11/93, Mrs. Duke visits Brenda's apartment after Bingo

Lt. D. Peddle, verbal statement, noted on 1624 form
Nov. 7/93

- Mrs Duke went to Brenda's Friday night, after she got home from Bingo. She wanted to know if Brenda had any trouble tonight, like last night, should she call the Police. Brenda said no. Brenda also told Mrs Duke she had to give Randy a ride home. Brenda also said she had to go because she was on the phone to her mother.

Cst. P. Davis, 4:00 p.m.
Nov. 13/93

- Went to Brenda's apartment on Friday, June 11/93 at 5 or ten after ten, maybe a bit earlier maybe a bit later.

- She went up the back hall, Brenda opened the door ajar, not fully. Said to Brenda "If you have any problem tonight do you want me to call somebody."

- Brenda said "No, I'm talking to Mom and then I'm taking him home."

Trial, Mr Collins
Nov. 30/94

- Referring to Cst. Davis' statement in November/93. Mrs. Duke went to Brenda's and asked if she had problem tonight if she should call someone. Brenda said no, I'm talking to Mom and then I'm taking him home. Mrs. Duke now says that she don't know if that was Friday night, Thursday night or Wednesday night.

- Mrs. Duke states, "No, not Friday night, it either had to be Wednesday night or Thursday night or one night during the night when it was a ruckus upstairs."

Insp. C. Kenny
Oct. 20/99

- Did not go to Brenda's apartment after Bingo as previously noted by Det Peddle. Mrs. Duke was emphatic about this point.

Friday, June 11/93, Mrs. Duke, home from Bingo, leaves residence

Lt. D. Peddle and

August 11/93

- Went to Bingo, got home around 10:30 p.m.

- Went out by door to cool off, walked around building.

- Around 11:00 p.m., on back of building to cool off.

S/Sgt. Singleton and Cst. Randell (KGB statement)

August 19/93

- Returned to her own apartment, got supper and went to Bingo at Country Bingo, Rickett's Road.

- Returned from Bingo, Judy Janes went home, Mrs. Duke went home.

- Heat up on 90° and went for a walk, walked down the road, came up back lane, back door was jammed; "Went up around Dooley's, young fellow came out this way and for the minute. I can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on... I heard the door close and I heard the car leave."

Preliminary Hearing, examined by Mr. Gorman

Nov./93

- Went to store and bought beer for Peter

- Returned home and left again to go down and see what is keeping Judy (Janes). Went to Judy's, she was in the washroom so Mrs. Duke left and returned home.

Pre-trial preparation, Wayne Gorman and C/d Randell (Cst. Randell's notes)

Nov. 20/94

- Got home from Bingo Friday night at 10:00 p.m

- Got ½ dozen beer at store (2 blocks away).

- Walked down by Judy Janes' house and turned around and walked behind apartment building.

Trial, Wayne Gorman

Nov. 29/94

- Got home, went to the store, bought a half dozen beer and went back home.

- Went for a walk down toward Judy Janes' house, cut down between Judy's house and Marion Carroll's and came up the back. Saw Randy Druken, anywhere from 10:30 p.m. - 11:00 p.m.

- Q. Did you go to Judy Janes' apartment at any time?
A. No.

Insp. Kenny, audio taped interview

July 2/99

- Went down to the store, on the way back met her two boys, they were looking for money, advised than she would come back and meet than. This was Friday night.

- Referring to Friday night, Mrs. Duke said she came home from Bingo, went to the store and bought her husband a dozen beer, banged into ha boys and they wanted money. She brought the beer home and walked back towards the dote and met her son and gave him a few dollars. Walked around the house and came up the back way. Mrs Duke states, "I banged into a person, I was about three or four feet away from 'emwhen he told me mind my 'fing business." She went into Dooley's, they had company and she went home. Mrs.

Duke said, "I just made an excuse, I had to go up finish playin cards, and I went in the house, played cards until I'm not sure, it was five to one or five after one."

Insp. Kenny, telephone conversation July 3/99 - Mrs. Duke said that after speaking with her husband subsequent to our interview yesterday, she realized that it was only Kenny that came home that night (Friday, June 11/12, 1993) and Paul stayed with his girlfriend on Prince of Wales Street or Campbell Avenue.

Insp. Kenny, telephone conversation Oct. 4/99 - Mrs. Duke called and said that she never gave beer or beer money to her sons that night (June 11/93). She said that Paul wasn't there that night at all. Kenny was down on the corner with 8 or 9 young fellows. She may have given him money and he told her he was going downtown. She said that neither Paul or Kenny were living at home at the time, Kenny lived on Cook Street and Paul lived on either Campbell Avenue or Prince of Wales Street. She said Kenny never came back home that night, she was up until 3:00 a.m. and never heard a sound.

Insp. C. Kenny Oct. 20/99 - Kenny and Paul did not live at home in June 1993

- Met Kenny Friday night after Bingo and gave him money, he was going downtown.

- Paul was not there Friday night.

- Neither Kenny nor Paul came back home Friday night.

Friday, June 11/93, Mrs. Duke meets a person on side of apartment building

Lt. D. Peddle and S/Sgt. A. Singleton
August 11/93

- Saw Randy Druken coming around Southwest corner going North to a car parked at back of building.

- He walked toward car. Heard door close and car drove off.

- Car went too fast for Randy to be driving, think he got into the back.

- Thinks there was someone else in car.

- Had not looked back.

- Not Sure of time but definitely after 10:30 p.m.

Verbal by Lt. D. Peddle and Singleton (Peddle's notes)
August 11/93

- Saw Randy Druken at around 10:30 - 11:00 p.m. Friday night 93-06-11 at rear of 194 Empire Avenue. He got into a car with someone else driving and left area. Never told Police before because she was afraid of Druken.

S/Sgt. Singleton and Cst. Randell (KGB statement)
August 19/93

- Heat up on 90° and went for a walk, walked down the road. came up back lane, back door was jammed; "Went up around Dooley's, young fellow came out this way and for the minute, I Can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on. . I heard the door close and I heard the car leave."

-Went into her own house.

- Under questioning:
"Yeah, to me I thought it was Randy Druken. I couldn't -that's what I thought - that's what I thought it was."

"Cause I met him before and like I wasn't paying no mind to him because he really passed me really fast and he put his head down and but - the night before there was kind of an argument out in the back and-"

"Cause... I don't know why I felt that way because every time I ran into Randy, it's like I use to get a cold feeling, like an afraid feeling and this is what I got when he passed by me I got a really cold, afraid feeling when he passed by me, even though the young fellow never did say nothin' to me on the way. But that's just the way I used to feel every time I use to talk to him or be handy to him."

- Referring to Friday night, Mrs. Duke said, "But I can't swear to it, you know like - to my opinion, it was Randy -", "That's only my opinion."

- Talking about Friday night seeing Randy at 10:30 to 11 o'clock, Mrs. Duke replied, "Yeah, or maybe a bit later or maybe a bit earlier, I don't know." "It wouldn't have bun no earlier *than* 10:30 but it could have been a bit later than 11, I couldn't swear to it."

Preliminary Hearing, examined by Mr. Gorman
Nov./93

-Back door locked, went up around the front.

- Saw person, he put his head down, thought it was Randy Druken.

- Thought she heard a car door close.

Preliminary Hearing, crossed by Mr. Collins
Nov./93

- Friday night, just had a view of the person for a couple of seconds.

- Mrs. Duke never looked behind, and don't know where he went.

Pre-trial preparation, Wayne Gorman and Cst. Randell (Cst. Randell's notes)
Nov. 20/94

- Saw Randy on corner of Brenda's house between 10:30 p.m. - 11:00 p.m.

- Hesitant to tell Police, feared for son's safety.

Pre-trial interview by Wayne Gorman and Cst. Randell (Cst. Randell's notes)
Nov. 27/94

- Mrs. Duke stated that when she met Randy Druken on the corner of Brenda Young's house, he said words to the effect of: "You fucking slut, keep you're fucking mouth shut and go in out of it." He also called her a bitch as he walked away muttering. Mrs. Duke said Randy was like he was "bombed" or something. He was unsteady on his feet and his balance was off.

Verbal by D. Peddle and Singleton (Peddle's notes)
Nov. 28/94

- Interviewed Mrs. Duke about her meeting with Wayne Gorman and Cst. Randell the previous evening. Mrs. Duke wouldn't say what she told them.

- Mrs. Duke said she saw Randy around 10:45 - 11:00 p.m. Friday night.

- Mrs. Duke advised that Wayne Gorman had promised her he wouldn't tell anyone what she had to say to him last evening. She felt he was now going to ask her this on the stand and she was not going to answer it. She would leave the court room.

- Peddle: "I asked her why she was so afraid of saying what, if anything, Randy Druken said to her that Friday night and if he had threatened her - she became very upset - crying uncontrollably." Interview concluded.

Trial, Wayne Gorman
Nov. 29/94

- Went for a walk down toward Judy Janes' house, cut down between Judy's house and Marion Carroll's and came up the back. Saw Randy Druken, anywhere from 10:30 p.m. - 11:00 p.m.

- "He kind of shout and yelled at me when I was there. He was either drunk—he looked like—like he wasn't Randy that I knew—"

- "He shouted and yelled at me and told me to mind my own fucking business and go in and keep your mouth shut and stuff, like he was just raving on."

Cross Examination, Bill Collins
Nov. 29/94

- Told Mr. Gorman in confidence what Randy had said to her on Friday night going around the building.

- Heard a car door close but didn't hear the car driving away (referring to Randy at back of apartment on Friday night.

- Never talked to anybody about what she seen or heard. Didn't watch the news or read the newspaper.

Insp. Kenny, verbal interview (Insp. Kenny's notes) July 2/99

- Mrs. Duke said that the night she saw the man walking around the building was on Thursday night and not Friday night. She said it was late, after 2:00 a.m. Friday morning, so that's how she got confused, she considered that to be Friday.

Insp. Kenny, audio taped interview July 2/99

- Referring to Friday night, Mrs. Duke said she came home from Bingo, went to the store and bought her husband a dozen beer, banged into her boys and they wanted money. She brought the beer home and walked back towards the store and met her son and gave him a few dollars. Walked around the house and came up the back way. Mrs. Duke *states*, "I banged into a person. I was about three or four feet away from 'em when he told me mind my 'f'ing business." She went into Dooley's they had company and she went home. Mrs. Duke said, "I just made an excuse, I had to go up finish playing cards, and I went in the house, played cards until. I'm not sure, it was five to one or five after one."

- Mrs. Duke said that it was only when the person said mind your 'f'ing business that she recognized Randy's voice. She stated "If he didn't have to speak to me I would never know who it was."

- When asked if the person she met going around the building and telling her to mind her own 'f'ing business could it have been one of Randy's brothers, she replied "It could've been."

- Said that this had to be Friday night because she had no money on Thursday night, but she was at Bingo on Friday night.

- Referring back to meeting Randy: Mrs. Duke said that the person telling her to mind her own 'f'ing business sounded like Randy. He was three or four feet gone past her when he spoke, she didn't look back and didn't see where he went.

- When asked if she seen his face, Mrs. Duke said: "Yes I seen his face. But it still never, no, wait now, yes cause he, like I couldn't, really it was *dark*, it was just, I really thought it was Randy *cause* it was really dark, you couldn't tell right off but. But when he spoke, that's what kinda scared me. And when he said that to me, that really scared me. But I, no."

Insp. C. Kenny Oct. 20.99

- Sure it was Friday night that she seen the person going around the apartment building.

- Nearly banged into the person going around the building, but did not see his face. The person never said anything to her either. This was around 10:30 p.m. - 11:00 p.m.

- Mrs. Duke says she is now confused because she met a person going around the building again around 1:30 a.m., maybe 2:30 a.m. when she went out looking for he boys. (*The beys didn't Live at her residence according to Mrs. Duke) The person then says to Mrs. Duke: "Keep your nose outta me business" or "mind your own business."

Q. "Did you recognize *the* persons' faces either time?"
A. "The first I, I just had a feeling who it was. I knew who it was. Like I didn't have to look at em it's just, I knew it was Randy."

- Around 2:30 a.m. see other person on side of building. he had his head down and said mind your own God damn business or keep your God damn nose outta my business.

- See nobody else around but there could have been a dozen there.

- Referring to seeing the person at around 10:30 - 11:00 p.m., Mrs. Duke said that the person never said anything and that she never saw a car or heard a car.

Q. "The person you seen that you nearly banged into, did you see that person again later around two o'clock?"
A. "I'm not sure it was him, seriously."
"I seen somebody but I'm not sure it was him and the person had their heads down and they told me either, I'm not sure if they said keep your nose outta my God damn business or you always got your nose in somebody's business, something sarcastic, and I turnt around and walked right back into me house and that's where I stayed at."

When Mrs. Duke was referring to "Him" she was referring to "Randy Duke."

On this occasion (2.00 a.m.), Mrs. Duke walked around the front of the apartment building.

- Mrs. Duke said she was not sure of who this person was, nor did she recognize his voice. (Please note: that this aspect of Mrs. Duke's statement relating to seeing a person at around 2:00 a.m. Saturday morning is a completely new scenario that has not been divulged in any prior statement or testimony, and she is now changing her account of seeing the person around the building at 10:30 p.m. - 11:00 p.m.)

Saturday, June 12/93, Mrs. Duke speaks to Brenda out in front

Cst. G. C. Walsh
June 13/93

- Last time saw her, 1:15 a.m., 93-06-12.

- Definitely did not see Brenda with anybody on Friday morning

S/Sgt. Singleton and Cst. Randell (KGE statement)
August 19/93

- Judy Janes arrived and played cards.

- Judy Janes left about five after one.

- Gut washed and dressed. Heat back up on 90°, went out on front doorstep.

- Spoke to Brenda about the weather, went back in house, did puzzle book and went to bed.

- See Brenda on the stairs leading down to the apartment building. Don't know which way Brenda went.

Preliminary Hearing, examined by Mr. Gorman
Nov./93

- Saw Brenda at around :00 a.m.

Cross Examination, Bill Collins
Nov. 29/94

- Referring to after seeing Brenda outside, she said "went back to my kitchen, and I sat down with a puzzle book and then I went to bed."

Insp. Kenny, audio taped interview
July 2/99

- Last seen Brenda 1:10 a.m. or 1:20 am. Saturday morning, June 12, 1993.

- Brief discussion with Brenda about the weather.

- Brenda was alone.

- After cards, Mrs. Duke went outside to cool off and spoke to Brenda.

Insp. Kenny, telephone conversation
Sept. 1/99

- Mrs. Duke expressed fear of going back to court and said that the Police back then were pressuring her to say that Randy was with Brenda when she saw Brenda on the steps that night, but she wouldn't say it because she only saw Brenda by herself. Mrs. Duke said that Barry Randell was good but the others were pressuring her.

Saturday, June 12/93.

Mrs. Duke leaves residence, sees two men and one woman out front

Insp. Kenny,
audio taped interview
July 2/99

- Mrs. Duke, around 2:00 a.m. (Saturday morning) outside looking for her sons.

- Mrs. Duke returned home, and was waiting for her boys to come home. It was after two o'clock, Mrs. Duke went down Empire Avenue looking for her sons, went back up at the rear of the building and met three people near Brenda's front entrance, 2 males and a female, nothing spoken, returned home and her sons arrived home at around 2:45 a.m.

- Said when her sons came, they were drunk, Kenny and Paul

- During the break in the taped interview and at the conclusion of the interview after the tape was shut off, Mrs. Duke advised that she is pretty sure that she recognized the man who was on the Dooley/Young doorstep as being Pat Dooley Sr. He was with the other male and female after 2:00 a.m. when she walked around the apartment building on June 12/93. She also feels that it was pat Dooley Sr. who called and threatened to harm her son Kenny. This information was documented on a separate sheet of paper and sealed in an envelope in my briefcase and not documented in my notebook as per the norm.

Insp. Kenny,
telephone conversation
July 3/99

- Mrs. Duke said that after speaking with her husband subsequent to our interview yesterday, she realized that it was only Kenny that came home that night (Friday, June 11/12, 1993) and Paul stayed with his girlfriend on PMce of Wales Street or Campbell Avenue.

Insp. Kenny,
telephone conversation
Oct. 4/99

- Mrs. Duke called and said that she never gave beer or beer money to her sons that night (June 11/93). She said that Paul wasn't there that night at all. Kenny was down on the corner with 8 or 9 young fellows. She may have given him money and he told her he was going downtown. She said that neither Paul or Kenny were living at home at the time, Kenny lived on Cook Street and Paul lived on either Campbell Avenue or PMce of Wales Street. She said Kenny never came back home that night, she was up until 3:00 a.m. and never heard a sound.

Insp. C. Kenny
Oct. 20/99

- Mrs. Duke stated that she has probably seen Paul Druken visit Brenda's once or twice.

- Mrs. Duke refused to divulge certain information on tape, the following information was given in confidence, and according to Mrs. Duke, she will not testify to it.

When referring to seeing two men and a woman out in front of Brenda's apartment during the early hours of Saturday morning, she states that one person was Pat Dooley Sr., and now says that she is pretty Sure that the other male was "Paul Druken". She also initially stated that Paul Druken was out on the back stairs, stating that she heard him and made mention of Mrs. Evoy seeing him, Mrs. Duke goes on to say that she didn't know who the person on the back steps was. (There is little doubt that Mrs. Duke has heard something about Paul Druken's involvement and is now incorporating this in her account of events) Mrs. Duke did say that she definitely did see Paul Druken in front of Brenda's Saturday morning.

Sunday, June 13/93, Mrs. Duke receives telephone call from Randy

Verbal, notes made by Cst. Robert Rose (Scene Security) June 13/93

- Received a call from Randy Druken.

- Randy was asking her what she was saying to Police.

- Acted casual on the phone because she didn't want her husband Pete to hear her call, and for fear her neighbours would hear.

Cst. T. K. Walsh June 23/93

- Phone call received from Randy.

- Questions asked by Randy:
  What time did you see Brenda?
  Was she by herself?
  Did she seem mad?
  What time was it that I seen her?

- Randy said "Cause I left her at 10:30."
  Questions " Was she alone?

- He said "Good, tell that the Police."

- Asked more questions but can't remember what.

- The last thing he said was "If I remember anything else to tell it to the Police."

Lt. D. Freddie and S/Sgt. A. Singleton August 11/93

- On Sunday received call. Questions asked:
  What time did you say you saw Brenda?
  What was she wearing?
  Was anyone with her?

- Randy said "You make sure that you tell the cops that I left Brenda at 10:30 p.m.; if you know anything else; to tell the cops." He said this in such a way as to make sure I didn't tell the cops anything... My impression was that I shouldn't tell the cops anything.

- Mrs. Duke didn't tell Police this before because she was afraid for the safety of her son Kenny. Told today because her husband made her.

S/Sgt. Singleton and Cst. Randell (KGB statement) August 19/93

- Received phone call from Randy Druken on Sunday lunch time. Randy said "by the way and anything else you knows he said tell it to the God damn Police" and that's the way he put it.

- Randy said "I left her quarter after ten."

- Referring to the telephone call, Mrs. Duke stated; "And the reason I didn't mention it before cause I was afraid of him and I still am afraid of him."

Preliminary Hearing, examined by Mr. Gorman
Nov./93

- Randy phoned Sunday asking questions. Randy never said nothing to me in his whole life out of the way but this day he really scared me. Randy said "Make sure you tell the Police time I left between quarter after 10 and half past 10 that night.

Preliminary Hearing, crossed by Mr. Collins
Nov./93

- Phone call from Randy, Mrs. Duke said that Randy told her to "tell everything that you know to the Police."

Verbal by D. Peddle and Singleton (Peddle's notes)
Nov. 28/94

- Mrs. Duke was afraid for herself and her children. The phone call from Randy had frightened her to death.

Trial, Wayne Gorman
Nov. 29/94

- Referring to phone call from Randy:
"What time was it Brenda came home"
"Who was she with"
"Was she by herself"

- Told Randy that she didn't want him calling anymore.

Trial, Mr Collins
Nov. 30/94

- Referring to Mrs. Duke's statement of June 23/93 about Randy's phone call: "If I remember anything else to tell it to the Police."

- And in the August 11/93 KGB statement she said "Tell it to the God damn Police."

June 1993, Mrs. Duke Receives Threatening Telephone Calls

Insp. Kenny, audio taped interview
July 2/95

- Received threatening phone calls from a male but it wasn't Randy. The caller threatened to do hurm to her son Kenny. Person disguised his voice. Mrs. Duke said that the caller said "keep your nose out of other people's business or you're gonna be sorry, and its gonna hurt you where you last expect it."

Insp. C. Kenny
Oct. 28/95

- Mrs. Duke talks about receiving threatening phone calls, but changes her account by first saying that the caller did make utterance, to the caller never saying anything but just hanging up.

November 1993, Mrs. Duke Receives Money from Police

Insp. Kenny,
telephone conversation.
July 4/99 - Mrs. Duke said that she never received any money from the Police and neither did her sons Kenny or Paul. When asked about her husband she passed the phone to him. Peter Duke explained that he received $200.00 from Des Peddle for an unrelated incident involving stolen property and that he gave the money to Mrs. Duke because she had missed seven days work (due to testifying in court)

Insp. Kenny,
telephone conversation
Sept. 1/99 - Mrs. Duke asked what was going on with the $200.00. I explained that there was some mention that she had been paid. Mrs. Duke said that she did get 3200.00. she said that Sgt. Peddle gave her four 50 dollar bills, when she asked him what it was for, he said it was for all the time she missed off work when she was in court. Mrs. Duke went on to say that after Peddle left, her husband wanted money for a dozen beer, and when he got drunk he told her that the money was his for something that he did and he told Peddle to give it (money) to her for the time that she missed from work. She never learned of this stolen property that Mr. Duke passed over to Peddle until lately.

Insp C. Kenny
Oct. 20/99 - Speaks about receiving $200.00 from Des Peddle, and it was her initial belief that it was for missing hours of work but later learned that the money was given as a result of something unrelated between her husband and Peddle.

November 1993, Mrs. Duke Threatened by Derek Druken

Insp. Kenny,
telephone conversation
Sept. 1/99 - Called Mrs. Duke concerning being threatened by Derek Druken. She stated that she was at her daughter Deanne's house on Hunts Lane and Derek walked down the street past her, she was out by the car and Derek called her a "slut" or a 'whore". she's not sure which She didn't know who he was until Deanne told ha he was Derek Druken, and then she got scared (this is contrary to Deanne's recollection, as Deanne says *that* Derek never threatened or spoke to her mother).

Insp. C Kenny,
Oct. 20/99 - When asked about the incident on Hunt's Lane when Derek Druken allegedly threatened Mrs. Duke, she now says that he didn't say nothing to her but looked at her in such a way that scared her. Mrs Duke gives a similar account of her feelings as she gave about allegedly meeting Randy Druken. Again, Mrs Duke's daughter, Deanne, tells a completely different *story*.

Other Relevant Comments of Mrs. Duke

Cst. G. C. Walsh
June 13/93 - Randy wanted to control her.

Trial Voir Dire,
by Mr. Collins
Oct./94 - Mrs. Duke can't remember speaking at Dooley's residence as described in the transcripts.

Pre-trial preparation,
Wayne Gorman and
Cst. Randell
(Cst. Randell's notes)
Nov. 20/94 - Brenda told Mrs. Duke that she was afraid of Randy and wanted to get away from him.

- Saw bruise on Brenda's face a couple of days to a week before she died.

Cross Examination,
Bill Collins
Nov. 29194 - Told Mr. Gorman in confidence what Randy had said to her on Friday night going around the building.

- Referring to about what she said in confidence to Mr. Gorman, "When he gave me his—when he said—whatever is said here is said here I didn't think that he could say it in court." He said, "Whatever bes (sic) said here, it'll be left here."

- Never talked to anybody about what she seen or heard. Didn't watch the news or read the newspaper.

Des Peddle, verbal
March 2/95 - Mrs. Duke telephoned Peddle, very upset that she was subpoenaed by Bill Collins. Discussion with Peddle but evidence not discussed as Peddle was also subpoenaed by Bill Collins.

Insp. Kenny, initial
contact by telephone
to set a meeting
July 1/99 - Mrs. Duke said that she had too many CID coming to her house at all hours and they would write down things and when they read it back they had it all twisted.

Insp. Kenny,
verbal interview
(Insp Kenny's notes)
July 2/99 - Mrs. Duke said that CID really confused her the last time, different officers kept coming back every day at all hours and were pressuring her to tell more, but she said she didn't know more. Said it made her really confused.

- Said CID had all her statements twisted.

Insp. Kenny,
telephone conversation
Sept. 1/99 - Mrs. Duke expressed fear of going back to court and said that the Police back then were pressuring her to say that Randy was with Brenda when she saw Brenda on the steps that night, but she wouldn't say it because she only saw Brenda by herself. Mrs. Duke said that Barry Randell was good but the others were pressuring her.

Insp. Kenny,
telephone conversation
Oct. 4/99 - Mrs. Duke said something happened yesterday regarding this case but she don't want to get involved, but she do want to meet me.

- Mrs. Duke agreed to be interviewed, when apparently her husband came in the room and she said that she would call back in half hour

Insp. C. Kenny
Oct. 20/99

- Mrs. Duke refused to call a doctor and get pills for Brenda upon her request. Brenda [illegible] then moved away from her. This, of course, is contrary to her earlier accounts of visiting [illegible] frequently.

STATEMENT SYNOPSIS

Phyllis Duke DOB: 43-04-25
Address: 190 Empire Avenue, St. John's

June 13/93 by Cst. G. C. Walsh

- Randy wanted to control her.
- Second last time I saw Brenda was about 4:30 p.m., new dress and shoes.
- Last time saw her, 1:15 a.m., 93-06-12.
- Definitely did not see Brenda with anybody on Friday morning.

June 13/93, verbal, notes made by Cst. Robert Rose (Scene Security)

- Received a call from Randy Druken.
- Randy was asking her what she was saying to Police.
- Acted casual on the phone because she didn't want her husband Pete to hear her call, and for fear her neighbours would hear.

June 23/93 by Cst. T. K. Walsh

- Phone call received from Randy.
- Questions asked by Randy:
  - What time did you see Brenda?
  - Was she by herself?
  - Did she seem mad?
  - What time was it that I Seen her?
- Randy said "Cause I left her at 10.30."
  - Questions - Was she alone?
- He said "Good, tell that the Police."
- Asked more questions but can't remember what.
- The last thing he said was "If I remember anything else to tell it to the Police."

August 1/93 by Lt. D. Peddle and S/Sgt. A. Singleton

- Friday afternoon, June 11/93 up at Brenda's, showed me new dress and shoes.
- Randy was not there at the time.
- This was around 4 - 4:30 p.m. before supper.
- Check Lisa Legrows statement and evidence regarding time spent with Brenda on June 11/93.

- Went to Bingo, got home around 10:30 p.m.
- Went out by door to cool off, walked around building.
- Around 11:00 p.m., on back of building to cool off.
- Saw Randy Druken coming around Southwest corner going North to a car parked at back of building.
- He walked toward car. Heard door close and car drove off.
- Car went too fast for Randy to be driving, think he got into the back.
- Thinks there was someone else in car.
- He not looked back.
- Not sure of time but definitely after 10:30 p.m.

- On Sunday received call. Questions asked:
  What time did you say you saw Brenda?
  What was she wearing?
  Was anyone with her?

  Randy said: "You make Sure that you tell the cops that I left Brenda at 10:30 p.m.; if you know anything else; to tell the cops." He said this in such a way as to make sure I didn't tell the cops anything... My impression was that I shouldn't tell the cops anything.
- Mrs. Duke didn't tell Police this before because she was afraid for the safety of ha son Kenny. Told today because her husband made her.

August 11/93, verbal by Lt. D. Peddle and Singleton (Peddle's notes)

- Saw Randy Druken at around 10:30 - 11:00 p.m. Friday night 93-06-11 at rear of 194 Empire Avenue. He got into a car with someone else driving and left area. Never told Police before because she was afraid of Druken.

August 19/93by S/Sgt. Singleton and Cst. Randell (KGB statement)

- Friday afternoon 4:30 p.m. or 5:00 p.m. maybe 5:30 p.m. talking to Brenda at top of stairs between the livingroom and by the bathroom. Brenda showed her the shoes and dress she had bought. Conversation occurred between the bathroom and livingroom

- Returned to her own apartment, got supper and went to Bingo at Country Bingo. Rickett's Road.

- Returned from Bingo, Judy Janes went home. Mrs. Duke went home

- Heat up on 90° and went for a walk, walked down the road, came up back lane, back door was jammed; "Went up around Dooley's, young fellow came out this way and for the minute. I can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on... I heard the door close and I heard the car leave."

- Went into her own house.

- Judy Janes arrived and played cards.

- Judy Janes left about five after one.

- Got washed and dressed. Heat back up on 90°, went out on front doorstep.

- Spoke to Brenda about the weather, went back in house, did puzzle book and went to bed.

- Under questioning:

  "Yeah, to me I thought it was Randy Druken. I couldn't - that's what I thought - that's what I thought it was."

  "Cause I met him before and like I wasn't paying no mind to him because he really passed me really fast and he put his head down and but - the night before there was kind of an argument out in the back and -"

  "Cause... I don't know why I felt that way because *every* time I ran into Randy, its like I use to get a cold feeling, like an afraid feeling and this is what I got when he passed by me I got a really cold, afraid feeling when he passed by me, even though the young fellow never did say nothin' to me on the way. But that's just the way I used to feel every time I use to talk to him or be handy to him"

- See Brenda on the stairs leading down to the apartment building. Don't know which way Brenda went.

- Received phone call from Randy Druken on Sunday lunch time. Randy said "by the way and anything else you knows he said tell it to the God damn Police" and that's the way he put it.

- Randy said "I left her quarter after ten."

- Referring to the telephone call, Mrs. Duke stated; *'And* the reason I didn't mention it before cause I was afraid of him and I *still* am afraid of him."

- Mrs. Duke heard Randy Thursday night, shouting and yelling and swearing. She said "I don't know if he swore on me or swore on Brenda *cause* I was taking my grandson in on the back."

- She heard them arguing, "like you couldn't hear every word, like all you could hear was most generally swearing and yelling." Only heard "bits and pieces, like nothin that could really make sense - like you son of a bitch, you won't go no where."

- When asked who was saying this, she said, "As I thought, it was Randy. I couldn't swear cause I closed the door and came in out of it..."

- Referring to Friday night, Mrs. Duke said, "But I can't swear to it, you know like - to my opinion, it was Randy -", "That's only my opinion."

- Referring to hearing the Thursday night argument, Mrs. Duke said ". I never paid no attention to time. It was early, cause Michael wasn't in bed, it had to be, Michael generally comes in between 9:30, quarter to ten..."

- Talking about Friday night seeing Randy at 10:30 to 11 o'clock, Mrs. Duke replied, "Yeah, or maybe a bit later or maybe a bit earlier, I don't know." "It wouldn't have been no earlier than 10:30 but it could have been a bit later than 11, I couldn't swear to it."

- Questioned " Did you see him Thursday night? Mrs. Duke replied "Yeah, well I - I didn't actually see him, like he was on the side of the house, but you could hear him swearing and yelling."

November 7/93 by Lt. D. Peddle, verbal statement, noted on 1624 form

- Thursday, June 10/93, sometime after supper, but before dark, she heard Randy Druken shouting up to someone in Brenda's apartment. Randy was at rear of apartment, just outside and went up the entrance to the back steps. He was looking up at the area of Brenda's kitchen window. She heard Randy shout: "You fucking whore, you'll never get to the mainland, I'll make away with you."

- Mrs. Duke went to Brenda's Friday night, after she got home from Bingo. She wanted to know if Brenda had any trouble tonight, like last night, should she call the police. Brenda said no. Brenda also told Mrs. Duke she had to give Randy a ride home. Brenda also said she had to go because she was on the phone to her mother.

November 13/93 at 2:23 p.m. by Cst. P. Davis

- See Randy on Thursday, June 10/93 around supper time.

- Pat Dooley was there too.

- In kitchen, heard yelling, Randy was calling her a slut and a whore. Mrs. Duke said "I can't remember exactly what he said but he said you'll never make it to the mainland or you'll never get to the mainland or away or something."

- She seen Pat Dooley in the window (kitchen).

- Stood up by the back window when she saw Randy.

- In the kitchen with the door closed after she got Mike, and she could still hear Randy.

November 13/93 at 4:00 p.m. by Cst. P. Davis

- Went to Brenda's apartment on Friday, June 11/93 at 5 or ten after ten, maybe a bit earlier maybe a bit later.

- She went up the back hall, Brenda opened the door ajar, not fully. Said to Brads "If you have any problem tonight do you want me to call somebody."

- Brenda said "No, I'm talking to Mom and then I'm taking him home."

November 20/94, Pre-trial preparation. Wayne Gorman and Cst. Randell (Cst. Randell's notes)

Referring to Thursday night:

- Randy was in a rage like he was hitting the side of the house
- He said, "You cocksucker, you'll never make it to the mainland."
- Brenda told Mrs. Duke that she was afraid of Randy and wanted to get away from him.
- Saw bruise on Brenda's face a couple of days to a week before she died.
- Got home from Bingo Friday night at 10:00 p.m.
- Got ½ dozen beer at store (2 blocks away).
- Walked down by Judy Janes' house and turned around and walked behind apartment building.
- Saw Randy on corner of Brenda's house between 10:30 p.m. - 11:00 p.m.
- Hesitant to tell Police, feared for son's safety.

November 27/94, Pretrial interview by Wayne Gorman and Cst. Randell (Cst. Randell notes)

- Mrs. Duke stated that when she met Randy Druken on the corner of Brenda Young's house, he said words to the effect of: "You fucking slut, keep you're fucking mouth shut and go in out of it." He also called her a bitch as he walked away muttering. Mrs. Duke said Randy was like he was "bombed" or something. He was unsteady on his feet and his balance was off.

November 28/94, verbal by D. Peddle and Singleton (Peddles notes)

- Interviewed Mrs. Duke about her meeting with Wayne Gorman and Cst. Randell the previous evening. Mrs. Duke wouldn't say what she told them.
- Mrs. Duke said she saw Randy around 10:45 - 11:00 p.m. Friday night.
- Mrs. Duke was afraid for herself and her children. The phone call from Randy had frightened her to death.
- Mrs. Duke advised that Wayne Gorman had promised her he wouldn't tell anyone what she had to say to him last evening. She felt he was now going to ask her this on the stand and she was not going to answer it. She would leave the court room.
- Peddle: "I asked her why she was so afraid of saying what, if anything, Randy Druken said to her that Friday night and if he had threatened her - she became very upset - crying uncontrollably." Interview concluded.

March 2/95 by D a Peddle, verbal

- Mrs. Duke telephoned Peddle, very upset that she was subpoenaed by Bill Collins. Discussion with Peddle but evidence not discussed as Peddle was also subpoenaed by Bill Collins.

Preliminary Hearing, examined by Mr. Gorman

- Went to store and bought beer for Peter.
- Returned home and left again to go down and see what is keeping Judy (Janes). Went to Judy's. She was in the washroom so Mrs. Duke left and returned home
- Back door locked. went up around the front
- Saw person, he put his head down. thought it was Randy Druken.
- Thought she heard a car door close.
- Saw Brenda at around 1:00 a.m.
- On Thursday heard Randy say "You'll never get to the f'ing mainland."
- Swearing, yelling bitch, whore, hitting the side of the house.
- Randy phoned Sunday asking questions. Randy never said nothing to me in his whole life out of the way but this day he really scared me. Randy said "Make sure you tell the Police that I left between quarter after 10 and half past 10 that night.

Preliminary Hearing, crossed by Mr. Collins

- Phone call from Randy, Mrs Duke said that Randy told her to "tell everything that you know to the Police."
- Friday night, just had a view of the person for a couple of seconds.
- Mrs. Duke never looked behind, and don't know where he went.

Trial Voir Dire, by Mr. Collier

- Mrs. Duke can't remember speaking at Dooley's residence as described in the transcripts.

Trial Voir Dire, by Mr. Gorman

- Thursday, Mrs. Duke heard "you slut", "you bastard", "you fucker you'll never get to the mainland", "whore", "you cocksucker".

XX, by Bill Collins

- Kitchen door was open when she heard Randy outside on Thursday, June 10/93.
- Closed the kitchen door when she got Mike in and locked it.
- Never saw anybody else around when Randy was suppose to be shouting and hitting the house Thursday June 10, 93.

Trial, November 29/1994, Wayne Gorman

- Said "you will never get to the fucking mainland."
- Got home, went to the store, bought a half dozen beer and went back home.
- Went for a walk down toward Judy Janes' house, cut down between Judy's house and Marion Carroll's and came up the back. Saw Randy Druken, anywhere from 10:30 p.m. - 11:00 p.m.
- Q. Did you go to Judy Janes' apartment at any time?
  A No.

  This was referring to when Mrs. Duke left the house and walked around the apartments and seen Randy.
- Referring to phone call from Randy:
  "What time was it Brenda came home"
  "Who was she with"
  "Was she by herself"
- Told Randy that she didn't want him calling anymore.
- "He kind of shout and yelled at me when I was there. He was either drunk – he looked like--like he wasn't Randy that I knew--"
- We shouted and yelled at me and told me to mind my own fucking business and go in and keep your mouth shut and stuff, like he was just raving on."

Bill Collins Cross Examination

- Seen Brenda Friday afternoon coming out of Dooley's, spoke to her about her new dress and shoes, they spoke at top of Brenda's 60nt staircase. Mrs. Duke had her hand on the knob of the door but still on the Stairs.
- Told Mr. Gorman in confidence what Randy had said to her on Friday night going around the building.
- Referring to about what she said in confidence to Mr. Gorman, "When he gave me his-- when he said--whatever is said here is said here. I didn't think that he could say it in court." He said, "Whatever bes (sic) said here, it'll be left here."
- Heard a car door close but didn't hear the car driving away (referring to Randy at back of apartment on Friday night).
- Never talked to anybody about what she Seen or heard. Didn't watch the news or read the newspaper.
- Referring to after seeing Brenda outside, she said "went back to my kitchen, and I sat down with a puzzle book and then I went on to bed."

November 30/1994, Mrs. Duke Cross Examined by Mr. Collins

- Referring to Mrs. Duke's statement of *June* 23/93 about Randy's phone call: "If I remember anything else to tell it to the Police."
- And in the August 11/93 RGB statement she said "Tell it to the God damn Police."
- Referring to Cst. Davis' statement in November/93. Mrs Duke went to Brenda's and asked if she had problem tonight if she should call someone. Brenda said no, I'm talking to Mom and *then* I'm taking him home. Mrs. Duke now says that she don't know if that was Friday night, Thursday night or Wednesday night.
- Mrs. Duke states, "No, not Friday night, it either had to be Wednesday night or Thursday night or one night during the night when it was a ruckus upstairs."
- Referring to Des Peddle's interview in November 1993 and her comment *that* she heard "I will make away with yw", referring to Randy outside the house on Thursday, Mrs. Duke say that "I can't remember saying it like that."

December 1/94, Trial Testimony of Mrs. Duke, Cross Examination by Bill Collins

- (rehash of previous testimony)

July 1/99 by Insp. Kenny, initial contact by telephone to set a meeting

- Mrs. Duke said that she had too many CID coming to her house at all hours and they would write down things and when they read it back they had it all twisted.

July 2/99by Insp. Kenny, verbal interview (Insp. Kenny's notes)

- Set interview for later today. Mrs. Duke had to go to work.

- Mrs. Duke said that CID really confused her the last time, different officers kept coming back every day at all hours and were pressuring her to tell more, but she said she didn't know more. Said it made her really confused.

- Mrs. Duke said that the night she saw the man walking around the building was on Thursday night and not Friday night. She said it was late, after 2:00 a.m. Friday morning, so *that's* how she got confused, she considered that to be Friday.

- Said CID had all her statements twisted.

- Set meeting/interview for 3:00 p.m. - 4:00 p.m.

July 2/99 by Insp. Kenny, audio taped interview

- Last seen Brenda 1:10 a.m. or 1:20 a.m. Saturday morning, June 12, 1993.

- Brief discussion with Brenda about the weather.

- Brenda was alone.

- Went down to the store, on the way back met her two boys, they were looking for money, advised them she would come back and meet them. This was Friday night.

- Thursday night, Mrs. Duke was in her kitchen, had back door open and window open, heard commotion, shouting and swearing. Went out back door, down the steps and had her grandchild Michael to come in.

- Mrs. Duke asked to have the tape recorder turned off.

- Tape returned after 30 seconds.

- Mrs. Duke, around 2:00 a.m. (Saturday morning) outside looking for her sons.

- Mrs. Duke requested tape be shut off again at 4.38 p.m., turned on again at 5.37 p.m.

- Referring to Friday night, Mrs Duke said she came home from Bingo, went to the store and bought her husband a dozen beer, banged into her boys and they wanted money. She brought the beer home and walked back towards the store and met her son and gave him a few dollars. Walked around the house and came up the back way. Mrs. Duke states, "I banged into a person, I was about three or four feet away from 'em when he told me mind my 'f'ing business." She went into Dooley's, they had company and she went home. Mrs. Duke said, "I just made an excuse, I had to go up finish playin cards, and I wait in the house, played cards until, I'm not sure, it was five to one or five after one."

- After cards, Mrs. Duke went outside to cool off and spoke to Brenda

- Mrs. Duke returned home, and was waiting for her boys to come home. It was after two o'clock, Mrs. Duke went down Empire Avenue looking for ha sons, went back up at the rear of the building and met three people *near* Brenda's front entrance, 2 males and a female, nothing spoken, returned home and her sons arrived home at around 2:45 a.m.

- Said when her sons came, they were drunk, Kenny and Paul.

- Mrs. Duke said that it was only when the person said mind your 'f'ing business that she recognized Randy's voice. She stated "If he didn't have to speak to me I would never know who it was."

- When asked if the person she met going around the building and telling her to mind her own 'f'ing business could it have been one of Randy's brothers, she replied "It could've been."

- Said that this had to be Friday night because she had no money on Thursday night, but she was at Bingo on Friday night.

- Received threatening phone calls from a male but it wasn't Randy. The caller threatened to do harm to her son Kenny. Person disguised his voice. Mrs. Duke said that the caller said "keep your nose out of other people's business or you're gonna be sorry, and it's gonna hurt you where you least expect it."

- Referring back to meeting Randy: Mrs. Duke said that the person telling her to mind her own 'f'ing business sounded like Randy. He was three or four feet gone past her when he spoke, she didn't look back and didn't see where he went.

- When asked if she seen his face, Mrs. Duke said: "Yes I seen his face. But it still never, no, wait now, yes cause he, like I couldn't, really it was dark, it was just, I really thought it was Randy cause it was really dark, you couldn't tell right off but. But when he spoke, that's what kinda scared me. And when he said that to me, that really scared me. But I, no."

- During the break in the taped interview and at the conclusion of the interview after the tape was shut off, Mrs. Duke advised that she is pretty sure that she recognized the man who was on the Dooley/Young doorstep as being Pat Dooley Sr. He was with the other male and female after 2:00 a.m. when she walked around the apartment building on June 12/93. She also feels that it was Pat Dooley Sr. who called and threatened to harm her son Kenny. This information was documented on a separate sheet of paper and sealed in an envelope in my briefcase and not documented in my notebook as per the norm.

July 3/99 by Insp. Kenny, telephone conversation

- Mrs. Duke said that after speaking with her husband subsequent to our interview yesterday, she realized that it was only Kenny that came home that night (Friday, June 11/12, 1993) and Paul stayed with his girlfriend on Prince of Wales Street or Campbell Avenue.

July 4/99 by Insp. Kenny, telephone conversation

- Mrs. Duke said that she never received any money from the Police and neither did her sons Kenny or Paul. When asked about her husband, she passed the phone to him. Peter Duke explained that he received $200.00 from Des Peddle for an unrelated incident involving stolen property and that he gave the money to Mrs. Duke because she had missed seven days work (due to testifying in court).

September 1/99 by Insp. Kenny, telephone conversation

- Called Mrs. Duke concerning being threatened by Derek Druken. She stated that she was at her daughter Deanne's house on Hicks Lane and Derek walked down the street past her, she was out by the car and Derek called her a "slut" or a "whore", she's *not* sure which. She didn't know who he was until Deanne told her he was Derek Druken, and then she got scared (this is contrary to Deanne's recollection as Deanne says that Derek never threatened or spoke to her mother).

- Mrs. Duke asked what was going on with the $200.00. I explained that there was some mention that she had been paid. Mrs. Duke said that she did get $200.00, she said that Sgt. Peddle gave her four 50 dollar bills. when she asked him what it was for, he said it was for all the time she missed of work when she was in court. Mrs. Duke went on to say that after Peddle left, her husband wanted money for a dozen beer, and when he got drunk he told her that the money was his for something that he did and he told Peddle to give it (money) to her for the time that she missed from work. She never learned of this stolen property that Mr. Duke passed over to Peddle until lately.

- Mrs. Duke expressed fear of going back to court and said that the Police back then were pressuring her to say that Randy was with Brenda when she saw Brenda on the steps that night, but she wouldn't say it because she only saw Brenda by herself. Mrs. Duke said that Barry Randell was good but the others were pressuring her.

October 4/99 by Insp. Kenoy, telephone conversation

- Mrs. Duke called and said that she never gave beer or beer money to her sons that night (June 11/93). She said that Paul wasn't there that *night* at all. Kenny was down on the corner with 8 or 9 young fellows. 'Shemay have given him money and he told her he was going downtown. She said that neither Paul or Kenny were living at home at the time, Kenny Lived on Cook Street and Paul lived on either Campbell Avenue or Prince of Wales Street. She said Kenny never came back home that night, she was up until 3:00 am. and never heard a sound.

- Mrs. Duke said something happened yesterday regarding this case but she don't want to get involved, but she do want to meet me.

- Said that less than a week before Brenda's death she was in the back hall and heard an argument in Brenda's apartment, she said it wasn't Randy. She never seen Randy that night. She went up to Brenda's door, Brenda opened it a little, she asked if she needed her to call someone and Brenda said no. When asked if she knew who it was with Brenda, Mrs. Duke said that she don't want to get involved, that the Police just twists things *around*.

- Mrs. Duke agreed to be interviewed, when apparently her husband came in the room and she said that she would call back in a halfhour.

October 20/99 by Insp. C. Kenny

- Sure it was Friday night that she seen the person going around the apartment building.
- Kenny and Paul did not live at home in June 1993.
- Met Kenny Friday night after Bingo and gave him money. he was going downtown.
- Paul was not there Friday night.
- Neither Kenny nor Paul Came back home Friday night.
- A few days to a week prior to Brenda's death Mrs. Duke hears an argument coming from Brenda's apartment. Went up and asked Brenda if she needed the Police called, Brenda says no and closed the door.
- Don't remember what the argument was about.
- Know who the other person was but refused to tell.
- Thursday, heard and saw Randy Druken out back shouting and swearing. Saw another person out back standing by a car, don't know who he was or if he was with Randy.
- Did not go to Brenda's apartment after Bingo as previously noted by Des Peddle. Mrs. Duke was emphatic about this point.
- Friday afternoon up on top of stairs at Brenda's. seen new dress and shoes. Mrs. Duke goes on to say that she is not sure if it was Friday or a couple of days before that. Then states that it couldn't be Friday, it had to be Wednesday or Thursday.
- Nearly banged into the person going around the building, but did not see his face. The person never said anything to her either. This was around 10:30 p.m. - 11:00 p.m.
- Mrs. Duke says she is now *confused* because she met a person going around the building again *around* 1:30 a.m. maybe 2:30 a.m. when she went out looking for he boys. (*The boys didn't live at her residence according to Mrs. Duke) The person then says to Mrs. Duke: "Keep your nose outta me business" or "mind your own business."
- Q. "Did you recognize the persons' faces either time?"
  A. "The first I, I just had a feeling who it was. I knew who it was. Like I didn't have to look at em it's just, I knew it was Randy."
- Around 2:30 a.m. see other person on side of building, he had his head down and said mind your own God damn business or keep your God damn nose outta my business.
- See nobody else around but there could have been a dozen there.
- Referring to seeing the person at around 10:30 - 11:00 p.m., Mrs. Duke said that the person never said anything and that she never saw a car or heard a car.
- Q. "The person you seen that you nearly banged into, did you see that person again later around two o'clock?"

  A. "I'm not sure it was him, seriously."
  "I seen somebody but Im not sure it was him and the person had their heads down and they told me either, I'm not sure if they said keep your nose outta my God damn business or you always got your nose in somebody's business, something sarcastic, and I turnt around and walked right back into me house and that's where I stayed at."

  When Mrs. Duke was referring to "Him" she was referring to "Randy Druken."

On this occasion (2:00 a.m.), Mrs. Duke walked around the front of the apartment building.

- Mrs. Duke said she was not sure of who this person was, nor did she recognize his voice. (Please note: that this aspect of Mrs. Duke's statement relating to seeing a person at around 2:00 a.m. Saturday morning is a completely new scenario that has not been divulged in any prior statement or testimony, and she is now changing her account of seeing the person around the building at 10:30 p.m. - 11:00 p.m.)

- Mrs. Duke talks about receiving threatening phone calls, but changes her account by first saying that the caller did make utterances, to the caller never saying anything but just hanging up.

- Speaks about receiving $200.00 from Des Peddle, and it was her initial belief that it was for missing hours of work but later learned that the money was given as a result of something unrelated between her husband and Peddle.

- When asked about the incident on Hunt's Lane when Derek Druken allegedly threatened Mrs. Duke, she now says that he didn't say nothing to her but looked at her in such a way that scared her. Mrs. Duke gives a similar account of her feelings as she gave about allegedly meeting Randy Druken. Again, Mrs. Duke's daughter, Deanne, tells a completely different story.

- Mrs. Duke stated that she has probably seen Pad Druken visit Brenda's once or twice.

- Mrs. Duke refused to call a doctor and get pills for Brenda upon her request. Brenda then stayed away from her. This, of course, is contrary to her earlier accounts of visiting and speaking with Brenda frequently.

- Mrs. Duke refused to divulge certain information on tape, the following information was given in confidence, and according to Mrs. Duke, she will not testify to it.

When referring to seeing two men and a woman out in front of Brenda's apartment during the early hours of Saturday morning, she states that one person was Pat Dooley Sr., and now says that she is pretty sure that the other male was "Paul Druken". She also initially stated that Paul Druken was out on the back Stairs, stating that she heard him and made mention of Mrs. Evoy seeing him. Mrs. Duke goes on to say that she didn't know who the person on the back steps was. (There is little doubt that Mrs. Duke has heard something about Paul Druken's involvement and is now incorporating this in her account of events) Mrs. Duke did say that she definitely did see Paul Druken in front of Brenda's Saturday morning.

- Mrs. Duke further states (off the record), that the argument that she heard coming from Brenda's apartment a few days before Brenda's death was between Brenda and Pat Dooley Sr., and they were arguing about stolen goods. This is when Mrs. Duke went to Brenda's apartment, Brenda opened the door ajar, and Mrs. Duke asked if she wanted the Police called. Brenda says no.

(Please note: This incident is similar to that of Mrs. Duke going to Brenda's apartment on Friday night and asking Brenda the same thing, but was then referring to Randy's behaviour and not Pat Dooley Sr. Mrs. Duke now denies going to Brenda's Friday night)

THE INQUIRY

REGARDING

THOMAS SOPHONOW

THE INVESTIGATION, PROSECUTION AND CONSIDERATION OF ENTITLEMENT TO COMPENSATION

COMMISSIONER
The Honourable Peter deC. Cory

SEPTEMBER 2001

CONTENTS

JAILHOUSE INFORMANTS, THEIR UNRELIABILITY AND THE IMPORTANCE OF COMPLETE CROWN DISCLOSURE PERTAINING TO THEM

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.

They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption of the administration of justice. Perhaps, the greatest danger flows from their ability to testify falsely in a remarkably convincing manner. In this case, it will be seen that an experienced detective thought that Mr. Martin, a very frequent jailhouse informant with a conviction for perjury, was a credible witness. He lied in this case and he has testified in at least nine other cases, undoubtedly with the same degree of mendacity. Jailhouse informants are a festering sore. They constitute a malignant infection that renders a fair trial impossible. They should, as far as it is possible, be excised and removed from our trial process.

Jailhouse informants are a uniquely evil group. Justice Kaufman in the Morin Inquiry dealt extensively with jailhouse informants and the harm that they occasion. His thoughtful and helpful recommendations are carefully set out in his report. I will adopt them but go still further in my recommendations on this subject.

This case provides a classic example of the use and the pernicious effect of their testimony. Mr. Peter Neufeld in his book, "Actual Innocence", (Inquiry, Exhibit 139) at page 361 studied 74 cases in which DNA had established that an innocent person had been wrongfully convicted. In 19% of those cases, jailhouse informants were used.

Let us consider the informants put forward in this case.

Thomas Cheng

Mr. Cheng testified in the first and second trials and, despite the objection of Defence Counsel, his evidence was read in at the third trial. Mr. Cheng testified that Thomas Sophonow told him that he had tried to rob a donut shop. Mr. Cheng stated that Thomas Sophonow said that the girl who was in the shop was to tell him where the rest of the

money was located. She was to do this because they were friends. When she did not do this, it made him mad and he took her to the washroom and used a rope to kill her. (Inquiry, Exhibit 158 - Document Brief 7 re Police Investigation Review, page 2).

Mr. Brodsky, Counsel for Thomas Sophonow in the second and third trials, suggested to Mr. Cheng that he had made a bargain with the police in exchange for his testimony. (Inquiry, Exhibit 4 – 1983 Trial Transcripts, pages 1108, 1109).

Mr. Dangerfield was then permitted to re-examine to determine Mr. Cheng's motive for testifying. Mr. Cheng stated that he had not asked for any consideration in return for his story. Aside from the hope that he would be treated in a more kindly manner, the only other reason that motivated him to come forward was that it bothered him to see a murderer on the street. (Inquiry, Exhibit 4 – 1983 Trial Transcripts, pages 1113, 1114).

When Mr. Cheng was asked whether he understood that the police would drop some charges or do various things that would of assistance to him he replied: "sometimes I think so but that's not the main reason I approached the police" (Inquiry, Exhibit 4 – 1983 Trial Transcripts, page 1120). He was then asked if he had told the police officer that he wanted some favourable consideration for telling the story and he replied "no".

This was not true. Mr. Cheng told Sergeant Huff, the polygraph operator, that he considered himself to be a Christian and he believed that a Christian belief does not allow for the taking of a life. This was put forward as one reason that he advised the police of the conversation with Thomas Sophonow. However, he stated that the single most important reason for testifying was that he wished to get out of jail and have the charges against him dropped. He said that he was afraid of having a record as it would prevent him from re-entering the United States and that he would be deported back to Hong Kong. He also stated that he felt that he had brought shame to his family. (Inquiry, Exhibit 158 - Document Brief 7 re Police Investigation Review, Tab 3). Although this was all set out in the police material which was provided to Crown Counsel, it was not disclosed to Defence Counsel at any of the trials. Without that report, Defence Counsel were unable to effectively cross-examine Mr. Cheng. In the absence of that report, Mr. Cheng would appear to have come forward for nothing but the highest and best motives. The jury would assess his credibility based upon the praiseworthy motives that he gave for testifying.

Yet Mr. Cheng was facing 26 counts of fraud which were withdrawn by the Crown. Further, he was released from custody on the understanding that he would be expected to testify at the third trial. Although he did not appear for the third trial, his evidence was read in.

The report of Sergeant Huff was of fundamental importance to arriving at the truth. If it had been disclosed to Defence Counsel, Mr. Cheng could have been shown as the liar that he was. Crown Counsel agreed that this was the type of material that ought to have been disclosed to Defence Counsel in 1982 and 1985. It was not and it should have been. This failure to disclose, along with others referred to later, constituted a very serious error. They demonstrate that there was not a fair disclosure made based on the standards

of 1982. Those failures further indicate that there could not have been a fair trial based on the standards of that time.

On behalf of the police, it was submitted that they did all that was appropriate for the times in checking the reliability of Mr. Cheng. They required him to take a polygraph test and confirmed that he had been seen talking to Thomas Sophonow. For the police, it was contended by their counsel that all relevant documents were given to the Crown. It was argued, with justification in my view, that it was for the Crown to make the decision whether to call Mr. Cheng and for the Crown to disclose such documents as they deemed appropriate to the Defence. Even if it is assumed that the police did all that was required of them, perhaps what is most significant is that an extremely unreliable witness was called who must have had a devastating effect upon the result of Thomas Sophonow's trial. Further, as a result of the failure to disclose Mr. Cheng's statement to Sergeant Huff, the Defence was denied the opportunity to properly and adequately cross-examine Mr. Cheng.

Mr. Dangerfield, Senior Crown Counsel in the first and second trials, agreed at this Inquiry that he would have read the polygraph report before Mr. Cheng testified. (Inquiry, Vol. 47, page 8158). He also agreed that, in his taped conversation with Mr. Brodsky concerning Mr. Cheng, it did appear that he was referring to some of the contents of Sergeant Huff's report. (Inquiry, Vol. 47, page 8164). He went on to say that he had no independent memory of reading that report. Yet he did concede that some underlining, which can be seen in the report, would undoubtedly have been made by someone, other than the police, reading the report. He conceded that, if he had been given the report, he would certainly have seen it before Mr. Cheng testified. He also agreed that the Defence should have had the report but he suggested that he certainly did not keep it from Mr. Brodsky deliberately. I certainly accept that he did not deliberately keep the report from Mr. Brodsky. However, the fact remains that it should have been produced to him and it was not. The consequences of this failure to disclose must have been serious. Mr. Cheng would appear to the judge and jury to have come forward and testified for the highest and most praiseworthy motives. This was false and should have been known to the Crown to be false. The disclosure of the report would have afforded the Defence the opportunity to demonstrate the falsity of Mr. Cheng's evidence.

At the third trial, two additional jailhouse informants were called, Adrian McQuade and Douglas Martin. Let us consider first Adrian McQuade.

Adrian McQuade

Adrian McQuade was well known to the Winnipeg Police as an informant. On behalf of the police, it was submitted that informants must give reliable information to the police or they could not be recognized as informants. Therefore, it was submitted that it was appropriate to put an informant such as Mr. McQuade forward as a witness. When the circumstances surrounding the so-called confession of Thomas Sophonow to Mr. McQuade are reviewed in their proper context, it can be seen how very unreliable his testimony was. Sergeant Biener testified that "he wanted the Crown to know what they were dealing with in Mr. Adrian McQuade". (Inquiry, Vol. 50, page 7709). As a result,

the police made the Crown aware of the following circumstances pertaining to Mr. McQuade:

1) Upon being jailed on a material witness warrant, Mr. McQuade had threatened to sabotage the Crown case and intentionally perjure himself if necessary;

2) A taped conversation between Mr. McQuade and Officers Daher and Smith demonstrated clearly that Mr. McQuade was an informant for the Winnipeg Police and was dealing with them on at least five matters;

3) Mr. McQuade had been told that everything that he said to Officers Daher and Smith had been recorded and that if he did not testify voluntarily against Thomas Sophonow he would be treated as a hostile witness and the tape recording would be played in Court. This, of course, would expose him as an informant with all the dangers which that entails.

Sergeant Biener testified that all this information was disclosed to Crown Counsel. Obviously, this information was important to those who were assessing Mr. McQuade's credibility. Unfortunately, it was not disclosed to the Defence and, as a result, the jury was not made aware of the great frailties and apparent falsehoods in his testimony.

There is an extremely worrisome aspect of Mr. McQuade's evidence. Mr. Whitley, toward the beginning of his examination of Mr. McQuade in the third trial, referred to the March 19, 1982, date when Thomas Sophonow allegedly made his confession. The following appears from the transcript of the third trial.

"Q: Mr. McQuade I want you to think back to 1982, March 27. I understand on that date you were arrested on the charge break entering and theft and possession of stolen goods; is that correct?

A: Yes.

Q: And the police took you where as a result of the arrest?

A: At the Public Safety Building.

Q: How long did you stay in detention at the Public Safety Building?

A: About one weekend."

Mr. McQuade then testified as to the confession that he stated had been made that very weekend by Thomas Sophonow.

However, the evidence is very clear that Mr. McQuade was arrested by Constable Luczenczyn on the 27th of March, 1982. He attempted to exchange information about drugs for a deal pertaining to his charges. This was refused. He then offered to go into a cell in "B" Block with Thomas Sophonow whom he knew. The police accepted this offer and arrangements were made to place him in the cell with Thomas Sophonow. He was asked to talk to Thomas Sophonow and to get any information he could including, if possible, an admission. The following Monday, March 29, Mr. McQuade attended Court

and Constable Luczenczyn met with him. At that time, Mr. McQuade advised the Constable that, although he had spoken to Thomas Sophonow about four times, "the two did not talk of the murder". All of this information was put into a special report which is the Inquiry Exhibit No. 111. The report is, of course, of great significance. It demonstrates that Mr. McQuade, at that time, was denying that he had ever received the confession which he recited at the third trial.

Let us consider what Mr. Whitley knew of Mr. McQuade before he called him as a witness and what information should have been disclosed to Defence Counsel in this regard in 1985.

It is clear that Mr. Whitley knew of the tape recording made by Officers Daher and Smith of their talk with Mr. McQuade. Sergeant Biener's notes reveal that he delivered a transcript of this recording to Mr. Whitley and Mr. Gosman at 2:00 p.m. on January 16th, 1985. Mr. Whitley admitted that he knew Mr. McQuade feared for his life (as a result of being labeled "a rat") and knew Mr. McQuade had threatened to turn on the police and go to the other side. He further conceded that Mr. McQuade had been forced to testify. He stated: "we compelled him to testify, yes". This was accomplished, of course, by threatening Mr. McQuade with labeling him has a hostile witness and playing the tape in Court. (Inquiry, Vol. 50, page 8766).

When Mr. Whitley was asked about the Luczenczyn report, which indicated that there had been no confession, he stated that he was not aware of it. (Inquiry, Vol. 50, page 8768). However, when he was told that Sergeant Biener had submitted it to him, he agreed that this was a fair assumption and that the Luczenczyn report was part of the material he would have looked at in assessing Mr. McQuade's credibility. (Inquiry, Vol. 50, page 8770). With the passage of years, it can be appreciated that Mr. Whitley would not recall the Luczenczyn report. Nonetheless, it is also clear that he was in possession of it and that he would have read it and used it in assessing Mr. McQuade's credibility. When questioned as to whether it should have been disclosed to Defence Counsel on the basis of the practice in 1985, he stated that there was no doubt that Defence Counsel should have had the Luczenczyn report in order to cross-examine Mr. McQuade. He stated: "I can't say at the time if that happened". However, it does appear from the transcript that Mr. McQuade was not cross-examined on the Luczenczyn report. Yet, obviously, it would have been of fundamental importance to the Defence. I cannot imagine that Mr. Brodsky would not have cross-examined Mr. McQuade extensively with regard to it if it had been disclosed to him.

Mr. Whitley went further and agreed that the report should have been disclosed even in 1985 because it is: "such a ..... departure from what he had testified to it would be unfair for this person to testify as if this didn't exist". (Inquiry, Vol. 50, page 8772). Mr. Whitley stated that he didn't know why the report was not disclosed to Mr. Brodsky. His response was: "well I don't know, I don't have an answer for that". (Inquiry, Vol. 50, page 8773).

Unfortunately, the matter raises still more problems. Mr. Brodsky was told by Mr. Whitley that Mr. McQuade's statement was being taken "as we speak". Mr. Brodsky testified, referring to the Luczenczyn report:

> **"Brodsky:** I never heard about it. I didn't know about it. I was told it did not exist, because as I've already said I was told the statement was the only one that was being taken.
>
> **Com. Cory:** I'm sorry Mr. Brodsky who told you that?
>
> **Brodsky:** The Crown.
>
> **Com. Cory:** The Crown? Mr. Whitley?
>
> **Brodsky:** Yes.
>
> **Com. Cory:** Mr. Whitley?
>
> **Brodsky:** He told me that the statement was being taken as we spoke and that was the only statement I knew about. I did not know about an earlier statement."

Mr. Brodsky prepared a memorandum and placed it in his file. It indicated that he was told by the Crown that Mr. McQuade's statement was taken for the first time on January 30th, 1985. (Inquiry, Vol. 57, page 10049). Thus, Mr. Brodsky was not aware either of the Luczenczyn report or the transcript of the conversation between Mr. McQuade and Officers Daher and Smith.

Mr. Brodsky, of course, confirmed that he would have liked to have seen the transcript from Officers Daher and Smith of the McQuade conversation. He further testified that he would have expected to be given something as important as the Luczenczyn report. (Inquiry, Vol. 57, page 10160).

I should have mentioned that the very fact that the Luczenczyn report was found in the Crown's files speaks volume for the candour and courage of Sergeant Biener. The report was probably only known to three people, Inspector DePourcq, Sergeant Biener and Mr. Luczenczyn. It was a document that the Crown would not normally have received. Yet Sergeant Biener realized that the Luczenczyn report was relevant and exceedingly important to any assessment to be made of Mr. McQuade. That the Luczenczyn report was made available to the Crown is a credit to Sergeant Biener's sense of fairness and integrity. He realized its relevance and importance and made certain that it was disclosed to Crown Counsel. It is unfortunate that a document as important as that was not, as it was conceded it should have been, disclosed to Counsel for the Defence. This meant that there could not be a fair trial for there could not be an appropriate assessment made by the jury of Mr. McQuade's credibility, tested by cross-examination with reference to the Luczenczyn report and the Daher and Smith transcript.

Douglas Martin

Another jailhouse informant called at the third trial was Douglas Martin. He is a prime example of the convincing mendacity of jailhouse informants. He seems to have heard

more confessions than many dedicated priests. He has testified as a jailhouse informant in at least nine cases in Canada. When he came forward, the police learned that he certainly did have a significant record including a conviction for perjury. Inquiries were made regarding this conviction but it was thought that there was a reasonable explanation for it, namely, that threats had been made to his wife and that he perjured himself in order to protect her. The danger of jailhouse informants is emphasized by the assessment of Sergeant Paulishyn, at that time an experienced police officer. He thought that Mr. Martin was a credible witness and that he came across as a truthful type. (Inquiry, Vol. 41, pages 6570, 6571). To his credit, Sergeant Paulishyn carefully advised the Crown of Mr. Martin's record.

Findings Regarding the Use of Jailhouse Informants in the Thomas Sophonow Trial

It is apparent there was nothing untoward about the use of jailhouse informants in 1982 and 1985. The Winnipeg Police did attempt to investigate to assure themselves of the reliability of these witnesses and, on this issue, no fault can be attached to the work of the police. What the case does demonstrate is the ease with which experienced officers and Crown Counsel can be fooled by jailhouse informants as to their credibility and apparent truthfulness.

The very real problem arose in this case from the failure to disclose to Defence Counsel important aspects of the material regarding the jailhouse informants, which Crown Counsel readily agreed should have been disclosed. If that had been done, cross-examination would have helped to demonstrate the unreliability of these witnesses. The material was in the possession of the Crown. Crown Counsel agreed that it should have been disclosed to the Defence. It was not. This was a serious error on the part of the Crown and the Crown must accept responsibility for it. The error contributed significantly to the wrongful conviction of Thomas Sophonow.

Some General Comments on Jailhouse Informants

The manner in which jailhouse informants rush to give testimony in a prominent case is demonstrated by the Thomas Sophonow trial. Before the third trial, no less than 11 jailhouse informants had volunteered their services. The police and the Crown took pride in narrowing it down to the three who were called on the basis of their "credibility and reliability". Yet how deceptive and untruthful they were and how very unreliable they were. As a group, they have an unsurpassed record for deception and lying. As a group, they do merit very special attention and caution must be exercised in the use of their evidence.

It is true that Justice Dickson, in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, cautioned against placing witnesses in pigeon holes so that only some classes of witnesses would require warnings regarding their testimony. Nonetheless, jailhouse informants are in a special class with the demonstrated ability to mislead and deceive the most discerning

and experienced observers. They have, as a class, established a unique record of consistently giving false testimony. They must be given special attention and their evidence should generally be excluded and only be admitted in very rare cases. On those rare occasions that it is admitted, it must be approached with the greatest caution.

It is not unduly difficult for jailhouse informants to obtain information, particularly in high profile cases, which would appear to come only from the perpetrator of the crime. As a result, they appear to be reliable and credible witnesses. This case demonstrates that experienced police officers considered very unreliable informants to be credible and trustworthy. Crown Counsel obviously thought that they were credible witnesses who should be put forward. If experienced police officers and Crown Counsel can be so easily taken in by jailhouse informants, how much more difficult it must be for jurors to resist their blandishments. How difficult, if not impossible, it is for jurors to appreciate the polished and practiced facility with which they deliver false testimony. Jailhouse informants are, indeed, a dangerous group. Their testimony can all too easily destroy any hope of holding a fair trial and severely tarnish the reputation of Canadian justice.

There is always a very natural and healthy tendency to sympathize with the victims of the crime and with their families. There is as well a very real concern for the safety of society. Citizens of Canada have every right to be protected from perpetrators of crimes, particularly of violent crimes. The incarceration of those who commit violent crimes is the only feasible manner of protecting society. However, in the desire to protect society, we cannot compromise the principle of a fair trial. Our criminal justice system is based upon the principle that those accused of crimes are entitled to and will always receive a fair trial.

In the United States, the miscarriages of justice occasioned in whole or in part by jailhouse informants have been set out in the book, "Actual Innocence", co-authored by Peter Neufeld. In Canada, Justice Kaufman considered the same issue and made strong recommendations in the Morin Inquiry that would limit the use of these informants and require strong cautionary instructions to the jury with regard to their testimony. By now it should be clear that jailhouse informants are so unreliable that they tend to undermine criminal trials.

Their testimony has all too often resulted in a wrongful conviction. When such a miscarriage of justice occurs, the entire system of justice suffers. Indeed, the entire community suffers as a result of the demonstrated inability to provide the accused with a fair trial. How many wrongful convictions must there be before the use of these informants is forbidden or, at least, confined to very rare cases. In the rare case that they are called, their testimony should automatically be subject to the strongest possible warning to jurors to approach it with great caution. Lawyers, particularly Crown Counsel and Judges, must be made aware of the irreparable damage that these informants can cause to the administration of justice in Canada.

U.S. Studies on Jailhouse Informants

This conclusion is supported by studies done of jurors in the United Stated regarding the effects of a confession made to a jailhouse informant. Mr. Peter Neufeld gave impressive testimony with regard to this subject. His studies reveal that, in roughly 20% of the cases that were established to be wrongful convictions of innocent persons, jailhouse informants were used by the prosecution.

Further, it is unfortunately apparent that jurors give great weight to these alleged confessions. American studies indicate that, to the average juror, there is not much difference between the manner in which they receive and weigh a confession given to a police officer and a confession given to a jailhouse informant. (Inquiry, Vol. 56, page 9891). It is very easy to build a sufficiently compelling argument to convince the jury that the informant is a credible witness. (Inquiry, Vol. 56, page 9983). This occurs despite the fact that the experience in the United States has been that the same jailhouse informant may testify in numerous cases. Mr. Martin demonstrates the Canadian tendency to follow this pattern. It was Mr. Neufeld's recommendation that, because jailhouse informants are so unreliable and their testimony has such a devastating effect, they should not be used in any circumstances. Further, he noted that the testimony of multiple jailhouse informants in a case has a cumulative effect on the jury listening to the evidence. (Inquiry, Vol. 56, page 9909). He demonstrated, by means of a well documented example, how easy it was for jailhouse informants to obtain information which would appear to a juror could only have come from the perpetrator of the crime.

There have been recommendations made in the United States to exclude all evidence from jailhouse informants. The Morin Inquiry and the Sophonow Inquiry have demonstrated that their testimony gives rise to the same dangers in Canada as it does in the United States.

What Have the Studies of Jailhouse Informants Revealed?

The findings can be summarized in the following manner:

1) Jailhouse informants are polished and convincing liars.
2) All confessions of an accused will be given great weight by jurors.
3) Jurors will give the same weight to "confessions" made to jailhouse informants as they will to a confession made to a police officer.
4) "Confessions" made to jailhouse informants have a cumulative effect and, thus, the evidence of three jailhouse informants will have a greater impact on a jury than the evidence of one.
5) Jailhouse informants rush to testify particularly in high profile cases;
6) They always appear to have evidence that could only come from one who committed the offence.
7) Their mendacity and ability to convince those who hear them of their veracity make them a threat to the principle of a fair trial and, thus, to the administration of justice.

As a result of the foregoing, I have some hopes, suggestions and recommendations to put forward. I would suggest that Trial Judges and Appellate Court Judges should recognize the dangers that arise in hearing the testimony of these informants. I therefore most earnestly and respectfully express the hope that the occasion will arise for the Supreme Court of Canada to consider again the issue raised in *R. v Brooks*, [2000] 1 S.C.R. 237. It may be that the studies done in the United States, together with the Morin and Sophonow Inquiries, have now sufficiently demonstrated the tragic dangers occasioned to the administration of justice by the testimony of jailhouse informants in light of the reliance jurors place upon alleged confessions made to these most unreliable of witnesses. Later, I will recommend that, as a general rule, the evidence of jailhouse informants should be inadmissible. However, in very rare cases and subject to stringent conditions, the evidence of a jailhouse informant may be admitted.

As an example of the rare case in which a jailhouse informant might be permitted to testify would be a situation where a kidnapping has taken place and only the kidnapper could possibly know the location of the victim. Should a jailhouse informant learn, as a result of a statement made by the accused person, of the whereabouts of the kidnapped victim and that location is confirmed by the police investigation, that evidence might be admissible. Generally, the evidence proposed to be given by the jailhouse informant should in itself relate to a very major aspect of the crime and be of such a unique and detailed nature that only the culprit would know it. That evidence would have to be independently confirmed by the police before the Crown should consider putting the informant forward as a witness.

Mr. Finlayson, Assistant Deputy Attorney General, gave very helpful evidence with regard to this issue. It is very clear that Manitoba has commendably taken giant steps forward with regard to significantly restricting the use of jailhouse informants. Indeed, the Manitoba Guidelines may lead the country in this regard. Mr. Finlayson forcefully observed that it was clear that, at the very least, there must always be a strong cautionary warning by the Trial Judge to the jury as to the dangers of the testimony of jailhouse informants. These excellent guidelines are attached as Appendix "F" to this Report.

To them, I would add the further restrictions outlined as follows.

RECOMMENDATIONS

1. **As a general rule, jailhouse informants should be prohibited from testifying.**

   They might be permitted to testify in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim. In such a situation, the police procedure adopted should be along the following lines.

   Upon learning of the alleged confession made to a jailhouse informant, the police should interview him. The interview should be

videotaped or audiotaped from beginning to end. At the outset, the jailhouse informant should be advised of the consequences of untruthful statements and false testimony. The statement would then be taken with as much detail as can be ascertained.

Before it can even be considered, the statement must be reviewed to determine whether this information could have been garnered from media reports of the crime, or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place.

If the police are satisfied that the information could not have been obtained in this way, consideration should then be given to these factors:

Has the purported statement by the accused to the informant:

a) revealed material that could only be known by one who committed the crime;
b) disclosed evidence that is, in itself, detailed, significant and revealing as to the crime and the manner in which it was committed; and
c) been confirmed by police investigation as correct and accurate.

Even then, in those rare circumstances, such as a kidnapping case, the testimony of the jailhouse informant should only be admitted, provided that the other conditions suggested by Justice Kaufman in his Inquiry have been met. In particular, the Trial Judge will have to determine on a voir dire whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Justice Kaufman.

2. Further, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used.

3. In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence. It may be advisable as well to point specifically to both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence was of jailhouse informants.

It is well to remember that in this case Terry Arnold, who was for a time suspected of the killing, volunteered to give evidence implicating Thomas Sophonow. Let us then consider a case where the real killer volunteers to give evidence implicating another. In those circumstances, the informant would have information that only the killer could possess. Thus, it would be easy to ascribe this knowledge to another with devastating