CHAPTER 1: GENERAL INTRODUCTION

1. Background and Terms of Reference:

In early March 2003, I was contacted by Mr. John R. Cummings, Q.C., then Deputy Minister of Justice and Deputy Attorney General, inquiring as to whether I would accept being the Commissioner pursuant to the *Public Inquiries Act*, RSNL, 1990, c. P-38, attached as Annex 1 to conduct an inquiry into the administration of justice in Newfoundland and Labrador, explaining to me in general terms the nature and scope of the inquiry, the terms of which are set out hereinafter.

I informed the Deputy Minister that I would be unable to start until September because of another major report I was doing for the Department of National Defence on the State of the System of Criminal Military Justice (the five year review foreseen in the law following major changes to the Military Justice System). He informed me that this was not a problem since the staff would need that time to prepare for hearings. On March 14, 2003, I was advised by him by letter that the Lieutenant-Governor in Council had appointed me Commissioner. Accompanying Mr. Cumming's letter was the Proclamation establishing this Royal Commission, setting out the rationale for its creation and including the specific Terms of Reference.

PROCLAMATION

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her Other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

EDWARD ROBERTS
Lieutenant Governor

KELVIN L. PARSONS
Minister of Justice

TO ALL TO WHOM THESE PRESENTS SHALL COME,
GREETING;

A PROCLAMATION

WHEREAS Section 2 of the *Public Inquiries Act*, provides in part, as follows:

> Where the Lieutenant Governor in Council considers it expedient to make an enquiry into a matter connected with ...the administration of justice, ... 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 an enquiry.

AND WHEREAS the Lieutenant Governor in Council is of the opinion that the arrests and prosecutions of Gregory Parsons and Randy Druken have raised a number of questions relating to the administration of criminal justice in Newfoundland and Labrador, and are of sufficient public importance to justify an inquiry.

AND WHEREAS the Lieutenant Governor in Council is of the opinion that the detention of Ronald Dalton for eight years before the integrity of his conviction was brought on for a hearing in the Supreme Court of Newfoundland and Labrador, Court of Appeal, has raised a number of questions about the administration of justice in the province and is of sufficient public importance to justify an inquiry.

Gregory Parsons

AND WHEREAS Catherine Carroll was murdered on or about 2 January, 1991.

AND WHEREAS following an investigation conducted by the Royal Newfoundland Constabulary on 10 January 1991, Gregory Parsons was arrested and charged with the murder of Catherine Carroll, and,

(a) on 18 January 1991 Gregory Parsons was granted judicial interim release;
(b) on 15 February 1994 Gregory Parsons was convicted of second degree murder in the death of Catherine Carroll and on 17 February 1994 was sentenced to life without parole for 15 years;
(c) on 25 March 1994 Gregory Parsons was granted judicial interim release by the Supreme Court of Newfoundland and Labrador, Court of Appeal, pending his Appeal of the conviction of second degree murder;
(d) on 3 December 1996 the Supreme Court of Newfoundland and Labrador, Court of Appeal, overturned Gregory Parsons' conviction of second degree murder in the death of Catherine Carroll and ordered a new trial;
(e) in August 1997 certain exhibits used in the trial of Gregory Persons were released for DNA testing;
(f) on 26 January 1998 the results of the DNA testing confirmed that the DNA found at the murder scene was not that of Gregory Parsons;
(g) on 2 February 1998 a Stay of Proceedings was entered on the murder charge against Gregory Parsons;
(h) on 5 November 1998 Gregory Parsons was acquitted of the charge that he had murdered Catherine Carroll;
(i) on 5 November 1998, after the Crown called no evidence, the then Minister of Justice and Attorney General, the Honourable Chris Decker, publically apologized to Gregory Parsons and his family and stated that Gregory Parsons had no involvement in the murder of Catherine Carroll. Retired Justice Nathaniel Noel was appointed to investigate the circumstances of Mr. Parsons' arrest and prosecution;
(j) on 8 January 1999 Gregory Parsons commenced a civil action against Government and, as a result, Justice Noel suspended his investigation;
(k) on 28 February 2002 Government announced that it had reached an agreement to compensate Gregory Parsons for his arrest and conviction in the death of Catherine Carroll; and
(l) Brian Doyle was subsequently convicted of second degree murder in the death of Catherine Carroll.

Randy Druken

AND WHEREAS Brenda Young was murdered on or about 12 June 1993.

AND WHEREAS following an investigation by the Royal Newfoundland Constabulary, on 20 August 1993, Randy Druken was charged with the murder of Brenda Young, and

(a) on 18 March 1995, following a trial before a judge and jury, Randy Druken was convicted of second degree murder in the death of Brenda Young and on 14 June 1995 was sentenced to a period of life imprisonment with no eligibility of parole for 14 years;
(b) on 30 June 1995 Randy Druken caused a Notice of Appeal to be filed with the Supreme Court of Newfoundland and Labrador, Court of Appeal;
(c) on 17 July 1999, following an Application to admit fresh evidence, the Supreme Court of Newfoundland and Labrador, Court of Appeal, overturned the conviction for second degree murder and ordered a new trial;
(d) on 30 August 2000 the Crown entered a Stay a Proceedings of the charge against Randy Druken in the death of Brenda Young. This Stay expired on 30 August 2001 and to date no further charges have been laid against anyone in the death of Brenda Young; and
(e) on 29 August 2002 Randy Druken commenced civil proceedings against Government alleging police negligence and malicious prosecution.

Ronald Dalton

AND WHEREAS at approximately 1:15 a.m. on 16 August 1988, the wife of Ronald Dalton, Brenda Dalton, was declared dead.

AND WHEREAS following an investigated [sic] by the Royal Canadian Mounted Police on 17 August 1988 Ronald Dalton was arrested and charged with the murder of Brenda Dalton, and

(a) on 15 December 1989, following a trial before a judge and jury, Ronald Dalton was convicted of second degree murder in the death of Brenda Dalton;
(b) on 27 December 1989 Ronald Dalton caused a Notice of Appeal of his murder conviction to be filed with the Supreme Court of Newfoundland and Labrador, Court of Appeal;
(c) Ronald Dalton's Appeal was heard by the Court of Appeal some eight years later on 8 and 9 January, 1998;
(d) on 29 May 1998 the Court of Appeal allowed Ronald Dalton's Appeal, overturned his murder conviction and ordered a new trial on the murder charge. In ordering the new trial the Court of Appeal expressed concern over the delay between the filing of the Notice of Appeal and its eventual perfection. In its Reasons for Judgment the court stated: Undoubtedly those charged with the administration of justice and the provision of legal services in this Province will feel constrained in due course, when satisfied that collateral inquiry will not imped [sic] the realization of justice on retrial, to receive explanation why a citizen languished in prison for eight years before substantial challenges to the justification of his presence there were brought before this court for hearing.

(e) following a retrial before judge and jury, on 24 June 2000 Ronald Dalton was acquitted of the murder of Brenda Dalton; and

(f) on 30 November 2001 Ronald Dalton commenced civil proceedings against Dr. Charles Hutton, alleging that Dr. Hutton was negligent in his opinion that Brenda Dalton had died of strangulation. Government is joined as Dr. Hutton's employer.

NOW THEREFORE by Commission under the Great Seal and under the authority of the *Public Inquiries Act*, the Lieutenant Governor in Council appoints the Right Honourable Antonio Lamer, P.C., a Commissioner.

AND BE IT ORDERED that the Commissioner:

(a) 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;

(b) inquire into the conduct of the investigation in the death of Brenda Young, and the circumstances surrounding the resulting criminal proceedings commenced against Randy Druken for the murder of Brenda Young;

(c) 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;

(d) inquire into why Ronald Dalton's Appeal of his murder conviction in the death of Brenda Dalton took eight years before it was brought on for a hearing in the Newfoundland and Labrador Court of Appeal; and

(e) 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.

AND IT IS FURTHER ORDERED THAT the Commissioner has 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 and have all the powers of an "investigating body" under the *Public Investigations Evidence Act*.

AND THAT the Commissioner report his findings on these matters, including any findings respecting practices or systemic issues that may have contributed to or influenced the course of the investigation or resulting prosecution in the case of Gregory Parsons and Randy Druken, or in the case of Ronald Dalton, the length of time before the hearing of his Appeal, and make such recommendations as he considers advisable relating to the current administration of criminal justice in the Province of Newfoundland and Labrador.

AND THAT the Commissioner perform his duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization and without permitting the enquiry to become a retrial of Gregory Parsons, Randy Druken or Ronald Dalton.

AND THAT the Commissioner complete this inquiry and deliver his final report containing his findings, conclusions and recommendations to the Attorney General on or before December 31, 2004 and give the Attorney General such interim reports as he considers appropriate to address urgent matters in a timely fashion in a form appropriate for release to the public which release will be subject to the *Freedom of Information Act* and other relevant laws.

AND THAT to the extent the Commissioner considers advisable he rely on any transcript or record of pre-trial, trial or appeal proceedings before any Court in relation to the proceedings and prosecution and on such other related materials as he considers relevant to his duties.

AND THAT reasonable legal fees that may be incurred from time to time to assist Gregory Parsons, Randy Druken and Ronald Dalton during those phases of the inquiry relevant to each, should standing at the inquiry be granted, in an amount and under such terms as may be determined by the Deputy Attorney General in accordance with the existing policies and practices of the Government of Newfoundland and Labrador, the account of which will be subject to taxation by a taxation or judicial officer appointed by the Commissioner.

AND FURTHER THAT 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 in the inquiry.

WITNESS: Our trusty and well-beloved the Honourable
Edward Roberts, one of Her Majesty's Counsel learned in the
law, Lieutenant Governor in and for Our Province of
Newfoundland and Labrador.

AT OUR GOVERNMENT HOUSE in Our City of St. John's
this 20th day of March, in the year of Our Lord two thousand
and three in the fifty-second year of Our Reign.

BY COMMAND,

ROBERT F. SMART
Deputy Registrar General

It soon became apparent to all that the 21 month time limit for the Report was at the outset unrealistic given the scope of the Inquiry, when compared to others dealing with one murder case rather than three. For example, the Guy Paul Morin inquiry took 26 months. As a result, the time limit of the Report was extended to December 31, 2005. The related Order in Council is included as Annex 2.

At the outset of the hearings on September 23, 2003, the Terms of Reference became the subject of considerable controversy. It was suggested that they permitted me to make determinations of factual innocence in the cases of Ronald Dalton and Randy Druken. I was urged to do so or to request that the Government make such declarations. It was also argued that, in the absence of a determination (or a declaration by the Government) of factual innocence, it would be impossible to address Terms 1(c) and 1(e). With respect to possible compensation for Messrs. Dalton and Druken, diverse views were expressed on these and other issues.

As a result of the controversy surrounding the Terms of Reference, I scheduled a special hearing during the week of October 28th for the purpose of hearing the views of all parties in relation to the meaning and scope of the Terms of Reference. The hearing was conducted, submissions were received, and they culminated in my *Ruling On The Terms Of Reference* released in November 2003. This Ruling addresses not only the interpretation of the specific terms of my mandate but also the general nature of public inquiries and broader constitutional questions. It is attached as Annex 3.

On April 28, 2005, the Terms of Reference were further amended to the effect that the Government will await my Report on the administration of justice before proceeding with the compensation phases of the Inquiry. Minister Marshall's press release dated May 5, 2005 stated "that there will be a period of not more than six months following receipt of [my] report during which Government will review [my] findings." The related Order in Council together with the Press Release is attached as Annex 4. The time limit for this Report was extended to May 31, 2006.

2. Nature of a Commission:

Understandably, there is much confusion in the general public, indeed, even on the part of some members of the legal community as regards the difference between a Court and a Commission, which compels me to convey my respectful views of these fundamental differences.

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

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 conclusion or recommendation 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. A Commission 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"? A Commission 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 adversarial manner and it must scrupulously avoid making findings which express an opinion as to criminal or civil responsibility in law.

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.

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

There are, of course, 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.

The legislation governing public inquiries in most provinces contains a provision similar to section 13 of the federal *Inquiries Act*, which states:

> No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel.

The *Public Inquiries Act* of Newfoundland and Labrador does not contain such a provision. In my view, such an opportunity to be heard is required by the Administrative Law principle of fairness, even if it is not mandated by legislation. I adopted a specific procedural rule for this Inquiry and incorporated this practice into my proceedings.

However, I believe it would be desirable for Newfoundland and Labrador to amend its *Public Inquiries Act* to incorporate such a provision. Since this matter does not fall within my Terms of Reference, I merely state this as an observation rather than making a specific recommendation.

3. Video:

In order to avoid unnecessary expenditures, a video system was installed and when the Report is completely sent to the Lieutenant-Governor in Council, the equipment, I am told, will be installed in Newfoundland and Labrador. Motions for standing and other motions of an administrative nature were disposed of from my office in Ottawa without the cost of my going to the Commission's office in St. John's. Also, due to restrictions for a short while on my traveling for health reasons, two witnesses were heard. Although there was initial reluctance to the use of the video, it was conveyed to me that, after experiencing its use, most felt it to be a reasonable alternative, including hearing certain witnesses. It is to be noted that many Courts, given our geography in Canada, are making more and more use of this modern technology. A hearing on standing for all three phases was conducted by videoconference on June 26, 2003. Most of the applications for standing were addressed and the results are reproduced *infra*, at pp. 10-13. Subsequent applications were received and disposed of in writing.

4. Chronology of Hearings and Standings:

The Terms of Reference for the Ronald Dalton case have to do with why it took some eight years for his case to get heard by the Court of Appeal. This Inquiry

is totally different from the other two: Gregory Parsons and Randy Druken, where the issue is why they were convicted.

I therefore chose to deal with Dalton before addressing the other two. I then inquired into Parsons before Druken since the murder, police investigation and judicial proceedings in Parsons took place before those in Druken. Thereafter, followed a systemic examination which included what changes to policy and practice were made over some 15 or more years following these events.

Before proceedings began in Dalton, applications for standing were sought on two occasions: in June 2003, in relation to the delay in Dalton, and in relation to the investigation and prosecution in both Parsons and Druken; and in March 2005 in relation to the systemic issues in Dalton, Parsons and Druken. There were, however, no restrictions on when an application for standing could be brought, and applications were received from time to time throughout the Inquiry. As well, a number of persons who did not have standing were either permitted, upon application, or invited to make submissions with respect to various aspects of the Inquiry.

Not everyone who applied was granted standing including the Association in Defence of the Wrongfully convicted (AIDWYC). In light of its national prominence and advocacy for the wrongfully convicted, I thought I would include the reasoning behind my decision in my report. AIDWYC applied for standing on two occasions and, having been given every opportunity to argue its case, the applications were denied. I did so for three reasons: One, AIDWYC did not have a direct and substantial interest in the Commission's investigative role into the Dalton, Parsons and Druken cases. Two, AIDWYC has already made a substantial contribution to our understanding of wrongful convictions, especially with its work in the Morin and Sophonow Inquiries. Fortunately, the fruits of its efforts are available to me through the reports of those two inquiries and the literature on the subject. There was therefore no need for me to repeat what had already been done. Third, AIDWYC did submit a written submission on systemic issues, introduced through Jerome Kennedy's submission on behalf of Gregory Parsons, and James Lockyer of AIDWYC was called as a witness.

Those granted standing in relation to the delay in Dalton:

Ronald Dalton represented by Robert Simmonds, Q.C.

The Attorney General of Newfoundland and Labrador represented by Don Burrage, Q.C.

The Director of Public Prosecutions Office represented by Lois Hoegg, Q.C.

David Eaton, Q.C., counsel for Ronald Dalton at trial and initially on the appeal, represented by John Kelly.

David Day, Q.C., the second of three counsel who acted for Ronald Dalton on the appeal, represented by Gerald O'Brien, Q.C.

Those granted standing in relation to the investigation and prosecution in Parsons:

Gregory Parsons represented by Jerome Kennedy, Q.C.

The Attorney General of Newfoundland and Labrador represented by Donna Ballard.

The Director of Public Prosecutions Office represented by Lois Hoegg, Q.C.

The Royal Newfoundland Constabulary represented by Paul Noble.

The Royal Newfoundland Constabulary Association, Sergeant Paul Hierlihy, investigator, and Constable Karl Piercey, forensic investigator, represented by Brian Casey.

Inspector Alban Singleton, lead investigator, and Sergeant Barry Randell, investigator, represented by James Walsh.

Retired Lieutenant Gerard Kielly, coordinator of the investigation, represented by David Buffett, Q.C.

Catherine Knox, Crown counsel at trial, represented by Silas Halyk, Q.C.

Bernard Coffey, Q.C., Crown counsel with carriage of the case up to trial, represented by David Hurley, Q.C.

Mr. Justice Gerald Lang, trial judge, represented by Brian Crane, Q.C.

Those granted standing in relation to the investigation and prosecution in Druken:

Randy Druken represented by William Collins, Q.C.

The Attorney General of Newfoundland and Labrador, represented by Donna Ballard.

The Director of Public Prosecutions Office represented by Lois Hoegg, Q.C.

The Royal Newfoundland Constabulary represented by Paul Noble.

The Royal Newfoundland Constabulary Association and Sergeant Paul Hierlihy, investigator, represented by Brian Casey.

Retired Inspector Desmond Peddle, senior investigator, represented by Mark Pike.

Inspector Alban Singleton, coordinator of the investigation, and Sergeant Barry Randell, lead investigator, represented by James Walsh.

Judge Wayne Gorman, Crown counsel at trial and on appeal, represented by John Dawson.

Bernard Coffey, Q.C., Crown counsel up to the laying of the charge, represented by David Hurley, Q.C.

Mr. Justice Robert Wells, trial judge, represented by Brian Crane, Q.C.

Cindy Young, daughter of Brenda Marie Young, Teresa Kielbasa, mother of Brenda Marie Young, and Jean Chartrand, sister of Brenda Marie Young represented by Geoff Budden.

Those granted standing at the Systemic Phase of the Hearings:

Ronald Dalton represented by Robert Simmonds, Q.C.

Gregory Parsons represented by Jerome Kennedy, Q.C.

Randy Druken represented by William Collins, Q.C.

The Attorney General of Newfoundland and Labrador represented by Donna Ballard.

The Director of Public Prosecutions Office represented by Lois Hoegg, Q.C.

The Royal Newfoundland Constabulary represented by Paul Noble.

The Royal Newfoundland Constabulary Association represented by Brian Casey.

Inspector Alban Singleton, lead investigator in Parsons and coordinator in Druken, and Sergeant Barry Randell, investigator in Parsons and lead investigator in Druken, represented by James Walsh.

Mr. Justice Gerald Lang, trial judge in Parsons and Mr. Justice Robert Wells, trial judge in Druken, represented by Brian Crane, Q.C.

Cindy Young, daughter of Brenda Marie Young, represented by Geoff Budden.

Those invited to make submissions at the Hearings on the Terms of Reference:

The Federal Department of Justice represented by Jake Harms.

AIDWYC represented by James Lockyer and Melvyn Green.

Those granted leave to make written submissions in relation to the investigation and prosecution in Parsons:

Robert Simmonds, Q.C., counsel for Gregory Parsons at trial, represented by Barry Learmonth, Q.C.

Staff Sergeant Victor Gorman, RCMP crime lab, represented by Jake Harms, counsel for the Department of Justice Canada.

Those permitted to make submissions in Druken:

Teresa Kielbasa, mother of Brenda Marie Young, Jean Chartrand, sister of Brenda Marie Young, and Stacy Neville, niece of Brenda Marie Young.

As one can see, the Counsel chosen by those granted standing are all reputed members of the Bar of Newfoundland and Labrador and to whom, I am most grateful for their help, professionalism and courtesy.

5. Role of Counsel:

There are three Commission lawyers: two to handle the hearings and one to be my legal advisor and to assist me in the preparation of this Report. Since in Canada our Commissions, at times, proceed in a manner analogous to an adversarial process, I decided to keep Professor Ratushny at arm's length from the production and the examination of witnesses. He and not the Counsel (Hearings), gives me advice, when sought, to deal with interlocutory matters, such as the disposition of objections. He also assisted in developing the Commission's Rules of Practice and Procedure, in accordance with the requirements of the *Public Inquiries Act* found at Annex 5. He often acted as a liaison, on my behalf, with my staff in St. John's. Finally, he assisted in the preparation of this Report.

This division of responsibilities allowed Counsel (Hearings) considerable latitude, under my general direction, to gather all relevant documentation, interview potential witnesses and marshall the evidence at the hearings. They were also free to take strong positions in their submissions before me and counsel for the parties were free to challenge such submissions. The parties knew that I would not be receiving any "private" submissions from Commission Counsel (Hearings).

6. The Systemic Phase:

I held a two-hour meeting of counsel for those granted standing for the Systemic Phase on April 29, 2005. It was a round table discussion. A great variety of subjects were canvassed. It was finally agreed that work on the issues of a systemic nature be divided amongst counsel. That having been agreed to, a meeting of counsel was held on May 4, 2005, at the Commission's premises, to allocate responsibilities amongst counsel.

During the investigative phases of all three cases, I permitted counsel to question witnesses and address issues that were of a systemic nature as they arose, thereby avoiding the cost and the inconvenience of calling the witness back at the Systemic Phase. Also, I am of the view that systemic issues are best assessed when in context.

My mandate in relation to Gregory Parsons and Randy Druken relates to their investigation and prosecution. My mandate for Ronald Dalton relates only to the delay in the hearing of his appeal. For this reason, I divided the Systemic Phase into two parts: one related to Ronald Dalton and the other related to both Gregory Parsons and Randy Druken.

The Systemic hearings were held in early June, the last hearings of this Inquiry. Although this separate Systemic Phase was held, there is no separate chapter in this Report, addressing systemic issues. Instead, they are addressed in relation to each of the three cases, in the context in which they arose.

7. This Report:

Conducting a single Commission of Inquiry in relation to three distinct and separate murder cases posed special challenges for the structure of this Report. There are some similar features to the Parsons and Druken cases but it would have been impossible to integrate the discussion of these two cases. Where a recommendation was made in the Parsons chapter, that also was applicable to the Druken chapter, it was not repeated.

The mass of detail required to understand a complex murder case also poses a challenge for the reader. In this Report, the challenge is multiplied three fold. This challenge extends to lawyers who are not familiar with the cases, let alone non-lawyers. Yet I believe that all citizens should have access to information about **their** criminal justice system. This is particularly important where the events were considered by the Government of Newfoundland and Labrador to be so serious as to warrant the establishing of this Commission of Inquiry.

With this goal in mind, the Report has been written in a style quite different from most Royal Commission and other public reports. Each of the three cases

within my mandate is a unique "story". I decided to present them to the reader in a narrative form that is easily understandable and then to return to the same subject matter by way of more detailed analysis and specific recommendations.

In each of the following three chapters the Chronology of Events introduces the salient features and issues in the case. These chronologies are, generally, descriptive in nature and an attempt to provide an "overview", although occasional subjective observations are made. Each of these chronologies is followed by a revisiting of the same subject matter. This time, there is a detailed analysis resulting in my findings and recommendations.

The distinction between description and analysis is not precise or rigid and this form of presentation is necessarily repetitious. I have not hesitated to engage in repetition whenever it might assist the reader in understanding these "stories", which have captivated me for the past two and one-half years.

In my view, the Chronology of Events in relation to each of the three cases also rendered an Executive Summary unnecessary. The reader may simply go to the start of the relevant chapter and read the related summary in narrative form, without the further detail provided in the subsequent Analysis. The Recommendations are summarized in the last chapter.

CHAPTER 2: RONALD DALTON

1. Introduction:

The previous chapter contains a detailed discussion of the Terms of Reference. With respect to Ronald Dalton, the most relevant Term is 1(d), which authorizes me:

> ...to inquire into why Ronald Dalton's Appeal of his murder conviction in the death of Brenda Dalton took eight years before it was brought on for a hearing in the Newfoundland Court of Appeal.

Term 1(e), which deals with possible financial compensation to Ronald Dalton as a result of this delay, was suspended by an Order-in-Council dated April 28, 2005.

In addition, Term 4 authorizes me to make, in relation to Ronald Dalton:

> ...any findings respecting practices or systemic issues that may have contributed to or influenced...the length of time before the hearing of his Appeal...

The Systemic Phase of hearings was also discussed in the previous chapter.

Much of the evidentiary basis for this chapter is contained in correspondence documenting what occurred over the eight years while he was in prison. Most of the correspondence was generated by Mr. Dalton, himself, in his often frustrated efforts to have his appeal heard.

2. Chronology of Events:

(a) Introduction:

This chapter is more "linear" than the Parsons and Druken chapters that follow, since it traces a sequence of events over an eight year period. This has allowed me to "highlight" significant observations, conclusions and recommendations as they are made. This style of presentation was not suitable for the other two chapters and was not followed there.

(b) Initial Representation:

On August 15, 1988, Ronald Dalton was a successful bank manager, residing in the city of Gander with his young family. At approximately mid-night, his wife died and on August 17th, he was charged with her murder. He consulted with two

lawyers, who were then partners, David Eaton and David Day, while incarcerated in Her Majesty's Penitentiary in St. John's. It was agreed that Mr. Eaton would represent Mr. Dalton. On December 15, 1989, Ronald Dalton was convicted of the second-degree murder of his wife and sentenced to the minimum of ten years in prison. On December 27th, a Notice of Appeal was filed on his behalf by David Eaton, who undertook carriage of the appeal.

When they met that same day, Mr. Dalton was advised that an application for bail pending appeal was not likely to succeed and bail was not pursued. He was also told that it would take approximately one year for the transcript of the trial to be prepared and that it likely would be an additional six months before the appeal would be heard.

At that meeting, they did not discuss the financing of the appeal but by that time Mr. Dalton had spent approximately $100,000.00 in legal fees, his house had been sold and he was impecunious. After being transferred to the Federal penitentiary in Renous, New Brunswick, he received a letter from Mr. Eaton dated February 20, 1990, indicating he would explore with Legal Aid the possibility of funding for the appeal and advise further in due course. Mr. Eaton finally wrote to the Newfoundland Legal Aid Commission by letter dated July 30th, inquiring as to what steps should be taken to obtain funding for the appeal. The Commission responded by letter dated August 9th, providing an application form and requesting supporting documentation from Mr. Dalton.

Mr. Eaton's attention was also drawn to a regulation informally described as "the claw-back". It applies to a lawyer who has previously provided services to a client for remuneration in relation to the same matter for which legal aid is being sought. Mr. Eaton described its effect in his letter to Mr. Dalton dated September 27th:

> It seems that they would want me to repay them everything billed to date so that they can pay me on a hourly rate of $33 for my time spent. That is hardly a workable situation.

He added that special consideration might be given since it would be much more expensive to retain a lawyer who had not conducted the trial. He also informed Mr. Dalton that the trial transcript recently had been completed.

Mr. Dalton returned his completed application on October 4, 1990. In spite of the logistical constraints of being imprisoned in another province and his preoccupation with a custody application in relation to his children, he was able to provide all of the documentation subsequently required by March 19, 1991. By letter dated April 8th, the Commission informed Mr. Eaton that it would grant a legal aid certificate for the appeal but it would only become operative after he had

contributed 215 hours of work without remuneration. In effect, the objective was to average the fees already paid by Mr. Dalton at legal aid rates and add them to the new retainer.

Mr. Eaton successfully appealed this decision on behalf of Mr. Dalton. By its decision of April 25th, the Legal Aid Appeals Board reduced the "claw-back" from 215 to ten hours and authorized approximately 150 hours for work on the appeal. Mr. Eaton was informed of this decision by letter dated May 1st, and a copy was sent to Mr. Dalton. Mr. Dalton then wrote to Mr. Eaton on May 14th, to obtain confirmation that he was prepared to conduct the appeal under that arrangement. He wrote again on July 4th, on November 14th, and on February 5, 1992, but did not receive a reply. Finally, by letter dated August 5, 1992, Mr. Eaton advised Mr. Dalton that he did not have time to pursue the appeal but would be pleased to assist him in finding another competent lawyer.

(c) Unrepresented Period:

Mr. Dalton understood that he was then unrepresented but did not realize that a legal aid certificate essentially "belongs" to the client, not the lawyer. In other words, he had approval for legal representation on his appeal. Moreover, the ten hours "claw-back" would not apply to another lawyer and the 150 hours likely would be increased significantly for a lawyer who had not acted at the trial. He wrote to Legal Aid on September 14, 1992, asking "where matters stand" in relation to his application. The response dated September 25th, advised him to seek clarification from Mr. Eaton (The Commission did not know he had withdrawn).

Mr. Dalton, understandably, felt he had been let down by Mr. Eaton. He also had no confidence in the Legal Aid Commission. He decided to focus his efforts on the Court of Appeal itself. He had written to the Court previously, on April 2, 1991, when his prospects for obtaining legal aid appeared doubtful. He had received a prompt and helpful response from Madonna Morris, then the Assistant Deputy Registrar. Her letter of April 8th, enclosed a copy of the Criminal Appeal Rules and a precedent for an application under section 684 of the *Criminal Code*. This provision authorizes an appellate court or judge to assign counsel to act on behalf of an accused.

On January 25, 1993, he again wrote to the Court of Appeal, referring to his circumstances and requesting that an appeal book be prepared pursuant to Rule 14. This Rule refers to a person appealing a conviction who is not represented by counsel. Ms. Morris responded on February 17th, explaining that the appeal book, essentially, was already before the Court. All that was required was a factum and she explained that a factum was a brief of legal argument. Mr. Dalton replied on March 3rd that he wished to proceed without a factum (which is permitted by Rule 15(5) for a person not represented by counsel).

Ms. Morris took the initiative of checking with Mr. Eaton who confirmed that he had withdrawn from the case. She also confirmed with the Legal Aid Commission that legal aid had been approved and by letter dated March 24th informed Mr. Dalton that he could be represented by another lawyer. She added that it "is the Court's position..." that he should obtain legal representation because of the complex legal issues involved. Ms. Morris testified that she would show Mr. Dalton's correspondence to the Chief Justice and if she received no instructions, would show him her proposed reply before it was sent. It is obvious that the Chief Justice felt strongly that Mr. Dalton should be represented by counsel on the appeal.

Mr. Dalton replied again on April 2nd, in effect, stating that counsel would be desirable but the delay was worse than proceeding unrepresented and he wished to proceed. However, he also referred to the legal aid approval as being conditional upon him retaining Mr. Eaton. She again checked with Legal Aid and confirmed to Mr. Dalton by letter dated April 15th that unconditional legal aid would be approved for the counsel of his choice and that the Commission would also be prepared to assign counsel. She provided the name and telephone number of the Director of Legal Aid who had suggested Mr. Dalton should call him.

Mr. Dalton then wrote to the Legal Aid Commission on April 26th asking: (1) whether the approval of Mr. Eaton would extend to other solicitors and, if so, what conditions applied; (2) whether the Commission would provide a list of solicitors both qualified and willing to act for him; and (3) whether there was a qualified Commission staff lawyer available to deal with his appeal. The Provincial Director of Legal Aid responded by letter dated May 13th, by answering the third inquiry. He named a staff lawyer who was prepared to act and invited Mr. Dalton to call him.

At the same time, Mr. Dalton's scepticism caused him to write to Ms. Morris requesting that she proceed to arrange for his appeal as an unrepresented "Prisoner". This time he received a reply directly from the Chief Justice of the Court of Appeal. In this letter, dated May 6th, the Chief Justice stated that he had instructed the Registrar to proceed in accordance with Rule 14. He then cautioned Mr. Dalton that the appeal would be restricted to the evidence presented at trial, subject to the special rules governing the introduction of fresh evidence. Finally, he strongly recommended that further effort be made to retain a lawyer.

(d) Secondary Representation:

Mr. Dalton had little confidence in the Legal Aid Commission at the time the staff lawyer was offered to him. He was also aware of the general view among prisoners that such staff lawyers often were over-extended and unable to prepare properly. It was not possible for him to meet personally with his lawyers from St. John's while imprisoned in New Brunswick. However, he recalled that David Day

had attended his initial meeting with David Eaton in late August of 1989, shortly after he was charged.

On July 8, 1993, almost one year after Mr. Eaton had withdrawn, Mr. Dalton wrote to David Day and asked him to prepare and present the appeal. By this time, Mr. Eaton and Mr. Day were members of separate law firms and Mr. Day had completed his work as counsel to the Hughes Royal Commission of Inquiry in relation to the Mount Cashel Orphanage. Mr. Day responded promptly to say that he would make some inquiries but could give no indication whether he would ultimately undertake carriage of the appeal.

On July 20th, Mr. Day wrote to the Legal Aid Commission and received a reply the next day indicating that funding had been authorized for Mr. Eaton for 150 hours plus two days attendance before the Court of Appeal. Mr. Day was invited to apply for an increase in the number of hours since he did not conduct the trial. On July 22nd, he wrote to Mr. Dalton indicating they were discussing whether or not they would be able to afford to take on his appeal at legal aid rates.

On November 1st, Mr. Dalton wrote to Mr. Day to ask where matters stood. He also wrote to the Chief Justice, relating that he still was unable to secure counsel and requesting that his appeal be scheduled for hearing. On November 4th, Madonna Morris spoke to Mr. Day's secretary who informed her that the Court of Appeal would be informed "within the next couple of days" whether Mr. Day would represent Mr. Dalton. On November 18th, Ms. Morris received a further message from Mr. Day's office indicating that he was communicating with Mr. Dalton. Ms. Morris testified she was then satisfied that Mr. Day was handling the appeal.

However, the next day, Mr. Day wrote to Mr. Dalton to ask him to direct Mr. Eaton to deliver all of his files to Sandra Burke. She was a junior lawyer in Mr. Day's firm, who had worked with him on the Hughes Royal Commission. In his letter, Mr. Day made it clear that they were jointly reviewing his case and wanted to examine these files "before we decide whether or not to undertake carriage of your appeal". Mr. Dalton promptly wrote to Mr. Eaton, as requested, by letter dated November 22, 1993, with a copy to Ms. Burke.

On December 15th, Mr. Day again wrote to Mr. Dalton to advise that the files were not received and asking him to write again. Mr. Dalton wrote to Mr. Eaton again on December 23rd . Mr. Eaton responded by writing to Ms. Burke on January 11, 1994, and stating that two "banker's boxes" were available to be picked up.

However, by letter also dated January 11th, Mr. Dalton wrote to the Law Society of Newfoundland. He stated that although his appeal had been filed in 1989 and the transcripts were available in October of 1990, "nothing has been done

towards my appeal." He had been in prison for over four years and Mr. Eaton advised him one and one-half years previously that he no longer had time available to act for him. He stated that another lawyer agreed to consider acting for him but first required an opportunity to review his files. He requested assistance in having his files transferred to Ms. Burke.

The Legal Director of the Law Society sent a copy of Mr. Dalton's letter to Mr. Eaton, indicating that it appeared to be a request for "assistance in transferring his files." The Director added that she would "leave the matter to be resolved directly between you and Mr. Dalton" and wrote to Mr. Dalton to the same effect. While the bulk of the documents already had been transferred, there was some ongoing dispute about the general correspondence file and some other documents. Mr. Dalton wrote again but the Director maintained her general approach.

On January 21st, Mr. Day spoke to Mr. Dalton by telephone and told him he would be making a proposal to the Legal Aid Commission. He added that if they agreed to act for him, Ms. Burke would get started shortly and they would involve him in the preparation of the factum. The file memorandum of this conversation, prepared by Mr. Day, concluded:

> I made it clear to Mr. Dalton and he stated he understood, that this factum must be prepared, if our firm agrees to act, bearing in mind that previous retentions must be honoured from day to day and that while preparation of his factum will not get top priority, it will be dealt with as expeditiously as other client commitments permit.

On January 31st, Mr. Day submitted an application to the Legal Aid Commission indicating that Ms. Burke had been working on Mr. Dalton's file as a potential [emphasis in original] client. He requested 237.5 hours for himself (at $60.00 per hour) and 237.5 hours for Ms. Burke (at $45.00 per hour) plus disbursements. Negotiations between Mr. Day and the Commission continued over the following months.

Finally, on April 28, 1994, Mr. Day wrote to Mr. Dalton indicating that he and Ms. Burke would represent him on the basis of the 200 hours, plus attendance before the Court, which was authorized by the Commission. The letter specified that representation would be "from the date the Commission issues a funding certificate". The letter also reported that the Commission denied funding for a "bail application", in spite of the granting of bail after a murder conviction to Mr. Parsons a few weeks earlier. A retainer agreement with the firm was also sent to Mr. Dalton, who returned it with his letter of May 6th.

However, the Legal Aid Commission did not receive a response from Mr. Day with respect to the hours it had authorized for him. The Commission wrote to

him on June 2nd to determine if he would be accepting a certificate. Mr. Day's response dated June 9th did not confirm that he would accept the certificate but, instead, requested further details as to what the certificate would cover. The Commission provided a detailed response by letter dated June 16th but heard nothing further from Mr. Day and wrote once more on October 28th. On November 22nd, Mr. Day responded that the firm agreed to accept the certificate "effective today". On November 25th, he wrote to Mr. Dalton to advise him of this. The certificate, also dated November 25th, was signed by Mr. Day on January 11th, 1995, and returned to the Commission.

Mr. Day took the position that his responsibility as counsel to Mr. Dalton only commenced with his signing of the certificate on January 11th. In a subsequent letter to the Minister of Justice, Mr. Day stated that, as to what transpired prior to that date, he was not "required to account". Even the retainer agreement, executed by Mr. Dalton in early May 1994 was said by him to be subject to the formal issuance of the certificate. In his testimony, he accepted responsibility for Mr. Dalton's representation from December of 1994, when he received the certificate from the Legal Aid Commission. He also testified that he deliberately delayed finalizing the certificate because he was incapable of doing the work. He had been hospitalized in the summer of 1994 and was not "sufficiently rehabilitated" to carry on until November.

Mr. Day testified that his role as counsel in the Hughes Royal Commission of Inquiry had taken a toll on his health. He had a chronic condition of migraine headaches but these became much more severe after the Hughes Commission. He had interviewed some 455 persons in relation to allegations of sexual abuse occurring over a period from 1942 to 1990. After the Commission, he would experience periods of 4-5 days at a time when he was incapacitated and unable to work. There was also a period of 4-5 months when he was totally disabled and confined to a dark room with no sound. But even when he was able to work, at times he would be less effective because of his health.

The Dalton file was a burden for him. He did put in considerable time in visiting Gander, interviewing witnesses and in ongoing discussions with a forensic expert. He testified that he did not simply withdraw for health reasons because, in part, he was in denial of the seriousness of his illness. He also felt that he was making significant progress with the forensic expert, who could be critical to the success of the appeal. His pride also may have been a factor. He acknowledged that he had been "tardy" but he also was "determined".

Mr. Day's colleague, Sandra Burke, had no illusion as to when she was acting on behalf of Mr. Dalton. She felt they were representing him from the summer and fall of 1993 when they began to review the transcript and gather documents. She began recording her time in 1994 and from January 17th to March 18th, she docketed

111.35 hours in this respect. On June 30th, she wrote to Mr. Dalton expressing the hope that a draft factum would be completed by late July. She had been working on this almost every day, completed it in August and gave it to Mr. Day for review and comment. As indicated above, the legal aid certificate was signed by Mr. Day on January 11, 1995.

On February 21st, Mr. Dalton wrote to inquire where matters stood and Mr. Day responded on April 5th that the first draft of the factum had been completed by Ms. Burke and that he was working "full-time" on the second draft. On the same day, Ms. Burke sent Mr. Dalton a copy of the draft factum. She is positive that she would not have sent it without Mr. Day's approval, either directly or through his secretary. On July 4th, Mr. Dalton wrote for a further update and Mr. Day responded on July 19th that the factum "being prepared by me, is nearing completion". He added that he looked forward to meeting Mr. Dalton in New Brunswick in August. Mr. Day also referred to the impending completion of the factum and the proposed visit to Mr. Dalton at the prison, in letters dated August 9th and September 8th.

Mr. Dalton heard nothing further from Mr. Day and in his now "annual inventory" of his situation, he decided to write to the Minister of Justice of Newfoundland and Labrador, whom he described as having a good reputation as a lawyer. In his letter dated January 12, 1996, he also referred to the Minister's "private and public reputations for fairness". This letter outlined Mr. Dalton's plight in summary form and asked the Minister to intervene. Copies were sent to the Chief Justice, the Director of Legal Aid and Mr. Day, as well as to the Minister of Justice of Canada (who was not further involved).

Mr. Day promptly wrote directly to the Minister of Justice explaining: that he was only retained on January 11, 1995 (a year earlier); that he had done considerable work on the file but was prevented by illness from meeting with Mr. Dalton "to review the factum"; and that he intended to see him in late February or early March to review the draft factum and then finalize it. On January 23, 1996, Mr. Day also wrote to Mr. Dalton stating that he had completed a draft of the factum and would arrange "within the next four or five weeks to meet with him." The Director of Public Prosecutions (DPP) replied on behalf of the Minister of Justice to say that Mr. Day appears to have everything in hand, and any concern about Mr. Day should be referred to the Law Society. The Legal Aid Commission responded to say that Mr. Day appears to have everything in hand and "there is nothing further you can wish of the Commission at this time".

Mr. Dalton heard nothing further from Mr. Day and on April 1st, again asked for an update. He added that it would assist their eventual meeting if Mr. Dalton could receive a copy of the draft factum, which Mr. Day had prepared. On April 8th, Mr. Day forwarded to Mr. Dalton what he emphasized was a "first draft" factum,

indicating that a "second draft" would be forwarded "within three weeks". Mr. Dalton was "disappointed", to say the least, that the draft factum sent by Mr. Day was identical to that prepared by Ms. Burke almost two years previously with only the date changed.

On April 16th, Mr. Dalton wrote to Mr. Day to express his concern that "there has virtually been nothing done on my file during the past two years". He suggested that a realistic review was in order. When he received no response, he wrote once more on June 17th, again requesting an update. On July 25th, Mr. Day responded that a draft factum "prepared exclusively by me" would be sent in early August. After receiving Mr. Dalton's input, a meeting would be arranged at the prison.

When he heard nothing further, Mr. Dalton again wrote to the Court of Appeal on October 10th asking whether it would be necessary for him to file a factum or whether he could simply appear and present oral argument. A few days later, he forwarded to the Court, the draft factum prepared by Ms. Burke, with some modest additions he had made. Madonna Morris responded on October 30th that she had contacted the Legal Aid Commission who advised that Mr. Day had been appointed to represent him. She then spoke to Mr. Day's secretary who advised that he would be filing a supplement to his factum within three weeks. She suggested that Mr. Dalton await the filing of the supplement in view of the complex legal issues involved and the desirability of him being represented by counsel.

On November 12th, Mr. Dalton wrote to Ms. Morris stating that he had not heard from Mr. Day and was obliged to proceed unassisted. On November 22nd, Ms. Morris responded to the inquiries raised in Mr. Dalton's previous letter about the process and "strongly" advised him to contact Mr. Day. On January 6, 1997, Mr. Dalton again wrote to her, requesting that he be given an early hearing. He asked why he had not received the Crown's factum in response to his.

On January 14th, Ms. Morris responded that she had contacted the Crown but they were informed by Mr. Day's office that he would be filing a factum on behalf of Mr. Dalton. The Crown was awaiting that factum before filing a response. She also contacted Mr. Day's office but was told he was out of the province until the end of the month.

Sandra Burke did not have access to Mr. Dalton's file from the time she completed the draft factum in August 1994. In late October of 1996, she had received a call from the Court of Appeal advising her that Mr. Dalton had filed a factum. She attended at the Court to review the file and was "horrified" to see that the factum was, essentially, the draft she had prepared over two year earlier. Although apprehensive, as a junior lawyer in the firm, she raised her concerns with another partner, Jean Dawe. However, the Court of Appeal file had also indicated

that Mr. Day would be filing a supplementary factum in November. There was ongoing discussion between Ms. Burke and Ms. Dawe. When Ms. Burke heard from the Court of Appeal in January of 1997, she again went to review the file and saw that nothing had been done. She again spoke to Ms. Dawe, who spoke to Mr. Day and received an assurance that the matter would be completed.

On January 15th, Mr. Day sent a memo asking his firm to advise the Court of Appeal that he would be meeting with Mr. Dalton the following week. He then wrote to Mr. Dalton stating that the factum "is now completed" and he would be arriving at the prison on January 24th to meet with him. On that date, the firm advised Mr. Dalton that Mr. Day's "present trial is delaying his departure" and that their meeting would be postponed. From February 18th to 28th, Mr. Day sent six letters to Mr. Dalton raising various legal issues and referring to their alleged forthcoming meeting.

On March 24th, Mr. Dalton again wrote to Ms. Morris stating that nothing had been done and that they both had been misled by Mr. Day and Ms. Burke. He added that he had no alternative but to proceed unrepresented. On April 2nd, Ms. Morris sent a copy of this letter to Ms. Burke, who decided she had to take action on her own.

Ms. Burke immediately advised Mr. Dalton that her firm was not able to act for him and that he should retain another lawyer. She recommended Jerome Kennedy. She also contacted Mr. Kennedy and explained the circumstances to him. Mr. Kennedy spoke with Mr. Dalton by telephone on April 3rd. On the same day, Mr. Dalton sent a letter to Mr. Kennedy, retaining him take carriage of the appeal. Sandra Burke testified that when she spoke to Jerome Kennedy, he was very specific about what had to be done and there was no doubt in her mind he would do it.

(e) Tertiary Representation:

On April 3, 1997, the same day he was retained by Mr. Dalton, Mr. Kennedy wrote to the Legal Aid Commission requesting that the certificate issued to Mr. Day be transferred to him or that a new certificate be issued. The Commission responded that a new policy had come into effect the previous July requiring that all new applications and re-assignments were to be handled by lawyers employed full time by the Commission. Over the next few days, Mr. Day agreed to work with Mr. Kennedy on the appeal and share the certificate with him. This arrangement was ultimately approved by the Commission.

On April 3rd, Mr. Kennedy also spoke with the Superintendent of Prisons and requested Mr. Dalton be transferred to Her Majesty's Penitentiary in St. John's until his appeal was heard. This was approved on April 8th, and arrangements were made for him to be brought to St. John's by the end of the month.

On April 4th, Mr. Kennedy met with the Chief Justice and Crown Counsel and the date of June 24th was discussed for hearing the appeal. He commenced reading the transcript on the week-end of April 5th and on April 7th, wrote to the Chief Justice and the Crown Counsel to advise that he hoped to file his factum by mid-May so the June 24th hearing date could be observed.

Mr. Kennedy continued his preparation over the following week, including lengthy telephone conversations with Mr. Dalton and commencing the drafting of the factum. On April 13th, he wrote to Mr. Day to update him on his progress. He was satisfied that Mr. Dalton had "very good grounds of appeal, especially in relation to the charge to the jury". However, he wished to obtain further information from trial counsel, David Eaton as to: why Mr. Dalton didn't testify on the *voir dire*; and, why a prior consistent statement of Mr. Dalton was not introduced in view of the implicit allegation of recent fabrication by the Crown. He also wanted to explore an application to introduce as fresh evidence, the opinion of another pathologist to challenge the evidence of the Crown expert at the trial. He added that if he received instructions from Mr. Dalton to explore all of these avenues, the appeal would have to be set over from June 24th, to September.

Mr. Kennedy was scheduled to commence a 2-3 month drug trial on April 14th (the next day) and proposed a division of labour as follows:

- Mr. Day would review the draft factum as each section was completed and discuss strategy;
- Mr. Kennedy would argue the charge to the jury, the admissibility of the written statement and Crown conduct; and
- Mr. Day would prepare and present argument on the conflicting expert forensic evidence.

Other issues were also explored in this letter. Mr. Day replied on April 21st and expressed general agreement and support for Mr. Kennedy's approach.

On April 28th, Mr. Kennedy again wrote to Mr. Day with respect to the draft factum he had sent three days earlier. The only section remaining to be drafted was in relation to the forensic evidence. He asked Mr. Day to complete this section within the next 7-10 days. He also indicated that Mr. Dalton wished to obtain the opinion of a third pathologist and asked Mr. Day to try to retain Dr. Peter Markesteyn, formerly of St. John's and residing in Manitoba at the time. Mr. Kennedy repeated the request on April 30th. On May 6th, Mr. Day wrote to Dr. Markesteyn to ask whether he could provide such an opinion within the next two weeks.

On May 8th, 1997 Mr. Kennedy advised Mr. Day he would be filing the factum on May 14th and required the forensic evidence section by May 12th. On May

9th, Mr. Day confirmed it would be done. On May 12th, Mr. Day's partner wrote to Mr. Kennedy advising that Mr. Day had been "ill and confined" since May 9th and requested that the filing of the factum be postponed. Mr. Kennedy replied the same day saying that Mr. Dalton had instructed him to take over drafting the forensic evidence section so the May 14th filing date could be met.

In the same letter, Mr. Kennedy also asked for an update with respect to Dr. Markesteyn. Mr. Day replied that he had agreed orally to provide the requested opinion and sent the relevant documentation to him in Winnipeg on the same day. On May 30th, Mr. Kennedy wrote again to advise that the appeal had been postponed because of the inability of the Crown to file a responding factum in time. The application to adduce fresh evidence (the prior consistent statement) was scheduled for September 16th and the appeal for October 8th and 9th. He again inquired about Dr. Markesteyn's opinion since it could be the basis of a second application for fresh evidence and could also be important for a bail application that now was being contemplated.

On June 5th, Mr. Day reported that Dr. Markesteyn would be providing a favourable opinion but did not wish to testify in contradiction of the Crown forensic pathologist, in view of their long personal association.

On June 23rd, Mr. Kennedy again wrote to advise Mr. Day of some developing issues and to inquire further with respect to Dr. Markesteyn's opinion. Mr. Kennedy also pointed out that he had already allocated over 120 hours to this file and anticipated an additional 40-50 hours being required. He added that when he agreed to accept one-half of Mr. Day's certificate (100 hours each), he did not envision:

> ... the writing of a 130 page factum by myself from scratch in six weeks. While I appreciate the amount of time you have put into this file it was of no assistance to me in writing the factum.

He asked Mr. Day to approach the Legal Aid Commission since the certificate was in his name. Mr. Kennedy added that Mr. Dalton was "exasperated" and "extremely displeased" that he could not speak or meet with Mr. Day. Mr. Kennedy asked him to speak to Mr. Dalton on an urgent basis since there were issues that had to be resolved between them.

Mr. Day responded the next day and addressed the various issued raised by Mr. Kennedy. With respect to Dr. Markesteyn, he stated that the opinion would be "forthcoming" by July 4th or 7th. With respect to fees, he volunteered to increase Mr. Kennedy's share of the certificate from 50% to 75% (150 hours). He acknowledged "the quite extraordinary industry" Mr. Kennedy had displayed. He expressed reluctance but agreed to meet with Mr. Dalton in early July.

On July 15th, Sandra Burke received a telephone call from Mr. Dalton, who was upset with Mr. Day. Ms. Burke sent a memorandum to Mr. Day saying that she had looked for his file previously but could not find it and understood it was not kept in the office. She asked for an opportunity to review the file. On the same day, Mr. Dalton sent a letter to Mr. Day saying that his "continual refusal to contact me" left him no choice but to terminate his services immediately. Mr. Day met personally with Mr. Dalton for approximately three hours the next day when Mr. Dalton asked him to disregard his letter.

On August 19th, Mr. Kennedy wrote to Mr. Day asking when Dr. Markesteyn's opinion would be available and what its content might be. If it were to be of assistance, notice would have to be given to include it in the fresh evidence hearing scheduled for September 16th. Mr, Kennedy also asked whether Mr. Day wished to be present for argument on that day. On August 25th, Mr. Day replied that he was meeting with Dr. Markesteyn that day and would be present for the "fresh evidence" application. On September 1st, Mr. Day wrote to Mr. Kennedy to say that he had spent ten hours with Dr. Markesteyn the previous week and two and one-half hours with Mr. Dalton the previous day to brief him.

The Crown required further time to locate material sought by Mr. Kennedy in relation to electronic surveillance that had come to light. By consent, the fresh evidence application was postponed to October 28th. The appeal was re-scheduled for November 17th and 18th. On September 15th, Mr. Day applied to the Legal Aid Commission for an additional 147 hours of preparation and 55 hours of court time. On October 9th, the Commission authorized an additional 75 hours of preparation as well as actual court time. On September 22nd, Mr. Day forwarded the opinion of Dr. Markesteyn to both Mr. Dalton and Mr. Kennedy.

On October 22nd, Mr. Kennedy reminded Mr. Day that the fresh evidence application was scheduled for October 28th. He suggested that if Mr. Day would not be filing an application in relation to the forensic evidence, he should at least attend and advise the Court of the nature of the application and when he intended to proceed. When no response was received, Mr. Dalton instructed Mr. Kennedy to contact Dr. Markesteyn directly. By the time of the hearing, Mr. Kennedy had not heard back from Dr. Markesteyn but did receive his affidavit from Mr. Day on the day of the hearing. Mr. Kennedy called his office that morning but was advised he was ill.

Following the hearing, Mr. Kennedy sent a letter to Mr. Day reporting that:

- The Panel of the Court hearing the application were displeased to learn that there was another possible application for fresh evidence. If that were to occur, the appeal would not proceed on the scheduled date of November 17th.

- One of the judges stated that Mr. Day should have been present. They asked about his involvement and were told that he had obtained an affidavit from Dr. Markesteyn.
- The Panel then recessed.
- When they returned, all three judges addressed questions directly to Mr. Dalton who expressed his frustration with Mr. Day. He stated that Mr. Day was only involved because of the legal aid certificate and his personal relationship and follow-up with Dr. Markesteyn on the forensic issues.
- They also asked whether it would be satisfactory for Mr. Kennedy to replace Mr. Day as the holder of the certificate and he said it would.

Mr. Kennedy added that, while drafting this letter to Mr. Day, Dr. Markesteyn phoned and was advised that Mr. Day had been discharged. Dr. Markesteyn responded that he would no longer be involved in the case but would recommend another forensic pathologist.

The next day, Mr. Dalton sent a letter to Mr. Day formally terminating his services. The Legal Aid Commission also held a meeting on October 29th. The Provincial Director advised the Commission that he was called to meet with the Chief Justice the previous day, following the hearing and was advised of Mr. Dalton's position. The Director was authorized, in effect, to "fix it". On October 30th, Mr. Day wrote to the Commission requesting that any entitlement he may have had under the certificate, as amended, be transferred to Mr. Kennedy. On November 5th, the Director wrote to the Chief Justice to advise that Jerome Kennedy had been authorized by the Commission to represent Mr. Dalton.

Ultimately, Mr. Kennedy obtained the opinion of another forensic pathologist recommended by Dr. Markesteyn. The fresh evidence application was heard on December 5th and the actual appeal was finally heard on January 8-9, 1998. The 86 page judgment of the Court of Appeal was filed on May 29, 1998. Mr. Dalton's appeal was successful and a new trial was ordered. The new trial was held and, on June 24, 2000, he was acquitted.

3. Analysis:

(a) Defence Counsel:

(i) David Eaton:

As indicated in the previous Chronology of Events, Mr. Eaton filed the Notice of Appeal on December 27, 1989, and met with Mr. Dalton on the same day. There is no dispute that Mr. Eaton undertook to conduct the appeal and it was obvious that legal aid would be required to finance it. On February 20,

1990, Mr. Eaton responded to a letter from Mr. Dalton and advised that he would explore funding for the appeal with legal aid. Unfortunately, he did not write to the Legal Aid Commission until July 30, 1990, some five months later.

The issue of legal aid was not resolved until May 1, 1991. This is a period of nine months from Mr. Eaton's initial letter. Assuming the same sequence of events, if he had first written in early January, legal aid funding would have been established by early October, the time when the transcript became available. Mr. Eaton could give no explanation for not promptly inquiring into legal aid funding. However, he had not previously acted on an appeal funded by legal aid and he certainly did not anticipate encountering "the claw-back". Still, greater diligence in pursuing legal aid on behalf of his client might have put him in the position of commencing comprehensive preparation, with funding secured, upon the availability of the transcripts in early October rather than the following May.

On March 23, 1990, Mr. Eaton wrote to Mr. Dalton enclosing transcripts of the *voir dire* rulings and the charge to the jury. He indicated that he would be reviewing these "shortly" and invited comment from Mr. Dalton, who responded by letter dated April 16, 1990. However, it does not appear that any further work on the file was attempted by Mr. Eaton until after funding was in place on May 1, 1991.

Mr. Dalton's legal aid application, with supporting documentation from him and Mr. Eaton, was in place by March 19, 1991. On April 8th, the Commission's "claw-back" decision was sent to Mr. Eaton, who appealed it on behalf of Mr. Dalton. The Appeal Board granted the appeal on April 25th, reduced the "claw-back" hours from 215 to ten and authorized approximately 150 hours for work on the appeal. Mr. Eaton and Mr. Dalton were informed by letter dated May 1, 1991. Mr. Dalton wrote to Mr. Eaton on May 14th, to confirm that he was prepared to proceed on the basis of the Appeal Board's decision. He received no response and wrote again on July 4th, November 14th, and February 5, 1992, all without response. Finally, some 15 months later, by letter dated August 5th, Mr. Eaton wrote to tell Mr. Dalton he did not have time to pursue the appeal but would be pleased to assist him in finding another competent lawyer. Mr. Dalton was extremely disappointed by this turn of events, felt let down by Mr. Eaton and had no confidence in the Legal Aid Commission. Instead of attempting to secure another lawyer he began corresponding directly with the Court of Appeal. This ultimately led to him writing to another lawyer, David Day, on July 8, 1993.

Mr. Dalton's reaction to Mr. Eaton's withdrawal and to his experience with the Legal Aid Commission is understandable. If Mr. Eaton had told

him, after his early attempts to read the transcripts that he was incapable of acting for him and explained why, Mr. Dalton might well still have maintained confidence in him. He might have relied on Mr. Eaton to explain that the legal aid certificate would be transferable to another lawyer and that increased hours might be allocated to a lawyer who was not familiar with the trial. He might well have relied on Mr. Eaton to assist in finding another lawyer. But he felt, justifiably, betrayed.

In his testimony, Mr. Eaton could provide no explanation for his failure to respond to Mr. Dalton's letter dated May 14, 1991, until August 5, 1992. He had worked long and hard hours in preparation and during the trial to the complete exclusion of other files and family at times. He became emotionally involved and testified that he was shocked and devastated by the outcome. During the period following the resolution of legal aid, in early May 1991, he would try to read the transcript but would become frustrated, upset and unable to concentrate. He would set it aside and then try again on a future occasion. He testified:

> I know that what Mr. Dalton wanted to hear from me was that I was making progress. I wasn't making progress, so I had no good news to pass on to him and there was always the hope that in another few weeks I will have some news.

Mr. Eaton was forthright in accepting complete responsibility for not fulfilling his undertaking to conduct Mr. Dalton's appeal. In describing his emotions he did not purport to suggest a justification for his inaction but merely tried to describe his feelings at the time.

It should be noted that when he wrote to Mr. Dalton on August 5, 1992, to withdraw, he stated as his reason that he could not find "the necessary block of time to prepare the factum..."

Mr. Eaton told Mr. Dalton at the outset that bail pending appeal was highly unlikely. In my view, that was reasonable advice at the time. The Crown had strongly contested bail pending trial. It was highly exceptional for bail to be granted pending appeal, particularly following a murder conviction. A cash deposit had been required for the bail established pending trial and if such a condition were imposed pending appeal, Mr. Dalton would not be able to fulfill it. In any event, Mr. Dalton was concerned about the negative consequences for his children, if he were to re-establish their relationships only to have his appeal denied and to be returned to prison. Mr. Dalton did not instruct Mr. Eaton to apply for judicial interim release on his behalf.

Nor do I think a great deal turns on the issue of the transfer of files from Mr. Eaton to Mr. Day. At Mr. Day's request, Mr. Dalton wrote to Mr. Eaton on November 22, 1993, to request that all of his files be delivered to Sandra Burke. Mr. Eaton testified that within the next few days after receiving this request, he sorted through the files and organized two boxes of what he thought might be of assistance in preparing the appeal. He did not include, for example, his notes of the evidence at trial since the transcript was by then available. Nor did he include the chronological correspondence file, including notes of communications.

Based on his past experience in transferring files, Mr. Eaton expected that the next step would be for Ms. Burke to call him to arrange the transfer. Instead, Mr. Day wrote to Mr. Dalton, once more, on December 15th, to request that Mr. Dalton write a second letter to Mr. Eaton requesting the files. It is difficult to appreciate why Mr. Day would not have simply called Mr. Eaton directly by telephone. In any event, Mr. Dalton wrote a second letter on December 23rd and Mr. Eaton responded by writing to Ms. Burke on January 11, 1994, describing the documents and to say that the documents were available to be picked up. After Ms. Burke reviewed the documents, Mr. Day called Mr. Dalton and asked him to send yet another letter to Mr. Eaton requesting additional documents. Mr. Eaton then responded to Ms. Burke providing most of the remaining documents but inviting her to review the voluminous general correspondence file and take copies of anything she thought might be relevant. Further correspondence followed in relation to this file but it was not significant.

While this whole issue may verge on the picayune, Mr. Dalton appeared to be concerned that Mr. Eaton may have been further delaying matters by not fully co-operating. Mr. Day's approach was not helpful. Mr. Dalton would have been justified in sensing there was some "sniping" going on between the two law firms. However, this whole issue had little if any significance in relation to the delay experienced in this case.

In my view:

- **Mr. Eaton was the direct cause of the delay during the period from May 1, 1991 (authorization of legal aid) to August 5, 1992 (his withdrawal from the case), a period of 15 months.**
- **If he had been diligent in writing to the Legal Aid Commission in January instead of July of 1990, that could well have advanced the authorization of legal aid from early May, 1991, to early October, 1990, a period of seven months.**
- **If Mr. Eaton had withdrawn in a timely manner, and not kept his client "dangling" for 15 months, he might well have**

assisted in arranging alternative representation and avoiding Mr. Dalton's "unrepresented" period from August 5, 1992, to mid-July 1993, a period of 11 months.

I accept that Mr. Eaton's procrastination was not motivated by the unattractive legal aid rates or any other oblique motive. His competence at the trial was never questioned. However, when a citizen puts his trust in a lawyer, the lawyer must perform or step aside, particularly where that citizen is languishing in prison.

(ii) David Day:

David Day had an excellent reputation as a lawyer. When Mr. Dalton was charged with the murder of his wife, it was Mr. Day whom he contacted. Mr. Day attended the initial meeting with Mr. Dalton, together with his partner, David Eaton. It was agreed that Mr. Eaton would act for Mr. Dalton because of Mr. Day's other commitments at that time.

Following Mr. Eaton's letter of withdrawal dated August 5, 1992, Mr. Dalton wrote to the Legal Aid Commission to ask "where matters stand". He received a response by letter dated September 25th, indicating that his appeal was being handled by Mr. Eaton in accordance with the certificate authorized by the Commission, that he should contact Mr. Eaton and that the Commission could be of no further assistance.

The Commission did not know that Mr. Eaton had withdrawn and Mr. Dalton did not tell them but by then he had no confidence in the Commission, let alone Mr. Eaton. He decided to deal directly with the Court of Appeal and pursue his appeal unrepresented. On January 25, 1993, he wrote to the Court of Appeal which resulted in ongoing correspondence between himself and the deputy Registrar, Madonna Morris. Ms. Morris took the initiative to contact Mr. Eaton and the Legal Aid Commission and, ultimately, Mr. Dalton decided once more to attempt to engage counsel.

Mr. Dalton wrote to Mr. Day on July 8, 1993. He recounted the background of his plight and referred to Mr. Eaton's role and the availability of legal aid funding. He mentioned that the Chief Justice was encouraging him to continue to try to retain counsel. He told Mr. Day that his "personal, professional reputation" was the reason he contacted him initially and implored him to take on his case.

By this time, Mr. Eaton and Mr. Day were practising in different law firms. Mr. Day had completed his work as counsel to the Hughes Royal

Commission. He continued to have an excellent reputation in the legal community. Mr. Day testified as to his professional commitment:

> I've had the privilege of being a lawyer for slightly more than 35 years. My life is the law. I have nothing else. I have devoted myself virtually every day and evening, and I say this without any question of exaggeration, for 35 years to the practice of law.

Mr. Day has a reputation for being meticulous in preparing his cases. His own counsel commented that:

> You know, he's the kind of person if you ask him the time of day, you'll get the history of Switzerland.

Mr. Day testified that two years would be an appropriate period of time for a competent and prudent counsel to bring this matter to a hearing from the time that legal aid was in place. He emphasized the care and time that had to be devoted to "courting" a forensic expert.

Mr. Day testified that through the entire period he represented Mr. Dalton, and for at least three years afterwards, he experienced severe ill health. His medical condition was described in the previous Chronology, *supra,* at p. 22. Mr. Day was unable to indicate the number of days of delay in representing Mr. Dalton that were attributable to his illness:

> ...There are periods when I worked on the file, there were periods when I was unable to work on the file...where there were delays, the delays were related to my health... .

However, he did not keep track of his days lost due to illness.

In his initial response to Mr. Dalton, Mr. Day emphasized that he would make further inquiries but that he was not undertaking carriage of the appeal. In subsequent communications he emphasized that he would not be acting on his behalf until the actual issuing of the legal aid certificate. Nevertheless, Ms. Burke and he began to review the transcript and to obtain the files from Mr. Eaton. Ms. Burke considered that they were acting on behalf of Mr. Dalton from the time she began work on his case. However, Mr. Day insisted that although they were both working on the matter they were not retained. He frankly admitted that he delayed having the certificate issued because:

> ...if I asked for the certificate, once that certificate was issued, then I was responsible.

A solicitor-client agreement was sent to Mr. Dalton on April 28, 1994, was executed by him and was returned on May 6th. However, even that agreement was said by Mr. Day to take effect only upon the issuing of the certificate.

Mr. Day first took the position that he bore no responsibility until the certificate was signed by him on January 11, 1995. He later advanced that date to November 22, 1994, when he wrote to the Legal Aid Commission agreeing to accept the certificate. He accepted no responsibility from the time he received Mr. Dalton's first letter on July 14, 1993. Nor did he accept responsibility from the time legal aid was effectively resolved and he sent Mr. Dalton a retainer agreement, on April 28, 1994.

This is a troubling abdication of responsibility, for such a senior and well-respected lawyer, in particular. Mr. Dalton was extremely vulnerable and already had been mistreated by his previous lawyer. Mr. Dalton put his trust in Mr. Day to move his appeal forward. Instead, he deliberately engaged in further delay. **Mr. Day cannot stand behind an artificial disclaimer fashioned from the technicality of issuing the legal aid certificate. He had an obligation to Mr. Dalton from the time of receiving his first letter on July 14, 1993. Any lawyer should have perceived the reality and desperation of Mr. Dalton's situation.**

Mr. Day elaborated on his reason for engaging in delay to avoid responsibility. He was hospitalized in the summer and early fall of 1994 and was unable to do the necessary work. He wanted to postpone the issuing of the certificate in the hope his health would improve. The difficulty, of course, is that this strategy did nothing for Mr. Dalton other than leave him in limbo and in prison. **At the very least, Mr. Day had an obligation to inform Mr. Dalton of his health problems and the delays they were likely to cause.** He stated that:

> ...I was tardy in the representation of Mr. Dalton, but I was determined no matter what the condition of my health.

This is a heroic position but it did not serve Mr. Dalton's desperate need at the time.

Mr. Day had devoted some time towards the preparation of Mr. Dalton's appeal from the time he was first contacted in July of 1993. However, some of his efforts appeared to be unfocused or of marginal relevance, such as his four trips to Gander to observe the Emergency Room, the route to the hospital, etc. Although he compiled some 550 pages of notes,

they contributed little to the preparation of the factum. He pointed out that a part of careful preparation was to encounter "dead ends". However, it is also important not to miss the forest for the trees.

Mr. Day fell into a pattern of assuring his client that the factum would soon be completed and that he would visit Mr. Dalton to discuss the factum. He talked about working "full time" on the next draft of the factum and it being very close to completion. In response to a letter sent by Mr. Dalton to the Minister of Justice on January 12, 1996, Mr. Day advised the Minister that he had completed a draft factum. He indicated he had planned to visit Mr. Dalton, in prison, in December to discuss the factum but was prevented by illness from doing so. On January 23rd, he wrote to Mr. Dalton to the same effect, also indicating he would be arranging to visit Mr. Dalton "within the next four or five weeks".

On April 1st, Mr. Dalton wrote to Mr. Day to ask where matters stood and to request a copy of the draft factum in anticipation of their still unscheduled meeting. On April 8th, Mr. Day sent him a copy of the draft prepared by Ms. Burke, with only the date changed. Mr. Day had not realized that she had sent a copy to Mr. Dalton a year earlier! He was justifiably upset. Mr. Day acknowledged this was bad judgment on his part.

As these assurances by Mr. Day multiplied, they only multiplied the broken promises. His representations to Mr. Dalton were exaggerated and misleading. He must have been tormented by his desire to assist Mr. Dalton but his inability to do so. He expressed as part of the problem, his inability to accept the severity of his illness. He testified:

> ...you go into denial, you go into denial, you refuse to believe that your health has interfered with what is the focus of your life to the point where you can't help people, you can't do your files, and, I think, to some extent, it was a question of my feeling in denial about the illness, and that within two weeks, three weeks, fours weeks, I might be available to be on the bridge again...

He acknowledged he had broken his promise to Mr. Dalton in relation to the factum preparation and that he should have discussed his illness and advised Mr. Dalton to "look elsewhere".

Mr. Day kept the true state of affairs away from even his junior, Ms. Burke. Even though she had worked on the file and prepared a draft factum, he did not share further work on the file with her. Her intervention ultimately led to the resolution of Mr. Dalton's problem but she did not even have access to the file. She learned about the difficulties through the Deputy

Registrar, Madonna Morris, and had to examine the public file at the courthouse to discover what had been transpiring. Had she been kept directly involved, Mr. Day might have come to an early realization of the serious consequences flowing from his medical condition.

Mr. Day took the position that his work in "courting" Dr. Markesteyn, ultimately led to the production of an affidavit, and the identification of another expert, that were crucial to the successful appeal. Mr. Day stated in his testimony:

> ...I believe, with great respect, that I identified the solution to this matter, obtained the appropriate affidavit that was instrumental in him obtaining a new trial.

While Mr. Day may have exaggerated the significance of his contribution to the ultimate result, the avenue of communication with Dr. Markesteyn was a valuable resource for Mr. Kennedy to pursue. There was nothing unique in Mr. Day's engagement of the expert.

It is doubtful, given his medical condition at the time, that Mr. Day would have been able to channel this resource into a successful appeal. However, Mr. Kennedy's energy in pursuing this avenue that Mr. Day had opened, proved to be extremely important to the ultimate outcome. It should be added that it was Mr. Dalton, himself, who really convinced his counsel of the significance of the forensic evidence. Both lawyers were sceptical of the possibility of fresh forensic evidence being permitted. Mr. Day's role following the retention of Mr. Kennedy is discussed further, *infra,* at pp. 40 *et seq.*

I wish to note that Mr. Day fully recognized the energy and efficiency that Mr. Kennedy brought to this case. He agreed to share part, and then all of his legal aid certificate with Mr. Kennedy. He also, personally, absorbed some $8,000.00 of disbursements on Mr. Dalton's behalf. He was invited to apply for compensation from the Legal Aid Commission for his contribution to the Dalton file but declined to do so.

Mr. Day was something of a tragic figure in all of this. He was a lawyer with an outstanding reputation, who had the best of intentions and great determination, but who became a hindrance rather than a help to his client. **Mr. Day adopted a pathetic pattern of deception to disguise his procrastination and his medical condition.** Unfortunately for Mr. Dalton, the legal community was aware of Mr. Day's reputation but not his procrastination, medical condition and deception.

In my view, Mr. Day was the direct cause of the delay running from July 14, 1993 until the time Mr. Kennedy was retained on April 3, 1997. Even thereafter, he contributed to further delay matters indirectly for another two months, for a total of almost four years.

(iii) Sandra Burke:

Sandra Burke had worked with David Day on the Hughes Commission and was aware of the profound effect that the "horrific child abuse" exposure had upon Mr. Day. She had to take time off after the inquiry and subsequently avoided doing criminal law because of that experience. She knew that Mr. Day suffered from migraine headaches and would be away from the office for periods of from seven to ten days at a time. When Mr. Dalton's letter to Mr. Day was received on July 14, 1993, she was an associate in his firm with approximately four years at the Bar.

Mr. Day was ill for most of the rest of that summer and fall. Towards the end of the year, she assisted in obtaining Mr. Dalton's file from Mr. Eaton and began recording her hours in January of 1994. She read the transcript and worked on a draft factum which was completed by August of 1994. In response to an inquiry by Mr. Dalton on February 21, 1995, to Mr. Day and a telephone conversation with Mr. Dalton on April 5th, she sent her draft factum to him on the same day. She is confident she would not have sent it without Mr. Day's approval. This was her only involvement in the file since completing the draft factum the previous summer. Nor did she have access to the file.

Ms. Burke's next involvement occurred in October of 1996, when Mr. Dalton renewed his efforts directly with the Court of Appeal to proceed unrepresented. The Deputy Registrar, Madonna Morris, again contacted Mr. Day's office to inquire whether Mr. Day was still representing Mr. Dalton. Ms. Burke was advised that Mr. Dalton had filed a factum. She attended at the courthouse to inspect the file and was "horrified" to see that the factum filed by Mr. Dalton was the draft she had prepared over two years earlier, with some minor changes. She was distressed at the difficulties Mr. Dalton was encountering. However, the file also indicated that Ms. Morris had spoken with Mr. Day's secretary, who indicated that he would be filing a supplement to Mr. Dalton's factum within the next three weeks.

As a junior lawyer, Ms. Burke was reluctant to confront Mr. Day directly and, no doubt, his senior status and excellent reputation were also factors. However, she did talk to another senior partner, Jean Dawe, and they had a number of conversations about this problem. In January of 1997, Ms. Morris called again and Ms. Burke again attended at the courthouse to review

the file. Ms. Dawe again spoke to Mr. Day, who conveyed "the usual assurances" to the Court of Appeal, to Mr. Dalton and to his colleagues.

On March 24th, Mr. Dalton again wrote to the Court of Appeal and said:

> While we have both been mislead [sic] by the advices [sic] of Mr. Day and Ms. Burke the fact of the matter is I have not spoken to either of them in several years and it is obvious they do not intend to attend to this matter.

On April 2nd, Ms. Morris sent a copy of this letter to Ms. Burke, who decided she had to take action on her own. She immediately called Mr. Dalton to express her concerns and put him in touch with Jerome Kennedy, who spoke with him by telephone and was retained the next day.

When Ms. Burke had attended to review the file on January 13, 1997, she advised Ms. Morris that she would be in contact with Mr. Dalton over the next few days. Ms. Morris passed this information on to Mr. Dalton in her letter to him dated January 14th. Ms. Burke did not contact Mr. Dalton as indicated. This probably was the basis for his assertion that he had been misled by her. Her decision not to do so probably turned on the written direction sent by Mr. Day to Jean Dawe on January 15th and transmitted to Ms. Morris on the same day, which stated:

> Please inform Madonna at Court of Appeal registry that I have arranged to meet next week with Ronald Dalton in New Brunswick to approve the final form of his factum which will be filed the following week.

There certainly was no deliberate attempt to mislead and, in the circumstances, her failure to call Mr. Dalton was reasonable. It was also reasonable for her to infer from this memorandum that a meeting had been arranged for the following week and that Mr. Day had completed the factum. She was not aware of the full extent of Mr. Day's medical condition or his past unfulfilled assurances. It was his file, not hers, and she was quite junior and aware of his excellent reputation.

Mr. Dalton subsequently acknowledged the significance of Sandra Burke taking the initiative to review his file at the courthouse. She had bypassed her own office and gone directly to the Court of Appeal, which was what Mr. Dalton would do when he ran into brick walls with his lawyers. **It was the combination of the conscientious follow-up by Madonna Morris and the intervention of Sandra Burke that led to the lifeline from Mr. Kennedy to Mr. Dalton.**

(iv) Jerome Kennedy:

The circumstances surrounding Jerome Kennedy's involvement in this case were detailed in the previous Chronology of Events. Suffice it to say that he acted in an exemplary manner.

He recognized that a serious injustice was occurring and he immersed himself in the file immediately upon his retainer on April 3, 1997. The next day he arranged for Mr. Dalton's transfer to St. John's. Since his conviction and notice of appeal, Mr. Dalton had been incarcerated in federal penitentiaries in New Brunswick. In some provinces, prisoners awaiting appeal are kept in local provincial jails, which might facilitate contact with counsel pending the appeal. However, such institutions are lacking in facilities and often are overcrowded. In Mr. Dalton's case, being in New Brunswick also kept him closer to his family. In spite of all of the delay he had experienced for other reasons, Mr. Dalton was transferred back to Her Majesty's Penitentiary in St. John's in a timely manner, when requested by defence counsel. In my view, that is the best approach to the issue of incarceration pending appeal. He also met with the Chief Justice and Crown Counsel on the same day and established a "target" appeal date of June 24th. By April 13th, he had reviewed most of the transcript and had discussed it at length with Mr. Dalton.

Although he was about to commence a 2-3 month drug trial the next day, he wrote to Mr. Day on April 13th indicating his view that there were "very good grounds of appeal". In particular, he identified 8-10 legal errors in the judge's charge to the jury, several of which, in themselves, could result in a new trial. He also identified other potentially fruitful areas for exploration, but which would require additional preparation time. These included:

- The conduct of the defence and, in particular, the decisions not to call Mr. Dalton on the *voir dire* and not to introduce a statement in response to an allegation of recent fabrication;
- Possibly seeking to introduce an opinion from a forensic pathologist as fresh evidence; and
- Possible deficiencies in Crown disclosure;

In this letter he also set out a coherent plan for proceeding, as follows:

- He agreed to Mr. Day's proposal that he would share 50% of the legal aid certificate;
- He would seek Mr. Dalton's instructions as to whether the additional potential grounds should be explored. If so, the

appeal would have to be postponed until September but, meanwhile, he would prepare on the basis it would be heard on June 24th.

- If the grounds of appeal were to be limited to those found in the transcript he would be able to file a complete factum within 4-6 weeks.
- The labour would be divided, essentially with Mr. Day taking responsibility for the forensic evidence and Mr. Kennedy handling the rest.

Mr. Day responded on April 21st expressing general agreement and support.

Mr. Kennedy completed the draft factum, sent it to Mr. Day and discussed it with Mr. Dalton. It was approximately 100 pages long. On April 28th, he wrote Mr. Day to say that the only section outstanding was the discussion of the forensic evidence. He specifically asked Mr. Day to prepare:

> ...a 5-6 page summary of the evidence to add to the statement of facts which summarizes in a concise manner the evidence of Doctors Hofman and Hutton and the emergency room personnel...

In addition, he requested a "brief legal argument" on the judge's charge to jury on the issue. He was still "striving hard" to have this matter heard in June and asked that this section be completed within 7-10 days so it could be inserted into the factum. In spite of assurances from Mr. Day, until the last minute, Mr. Kennedy had to take over the drafting of this section to avoid further delay.

Mr. Kennedy also requested that he arrange for an opinion to be obtained from Dr. Markesteyn prior to the appeal. He knew that Mr. Day had been in contact with this pathologist and also thought he would be particularly helpful because of his approach taken in an earlier case in which both he and Mr. Kennedy were involved.

On May 6th, Mr. Day wrote to Dr. Markesteyn to request an opinion within two weeks. On May 12th, Mr. Day advised Mr. Kennedy that he spoke to Dr. Markesteyn by telephone and he agreed to provide the opinion. On the same date, Mr. Day forwarded the necessary documentation to enable this expert to formulate his opinion.

Ultimately, the date for the appeal was re-scheduled for November 17th and 18th and the application by Mr. Kennedy to submit fresh evidence was re-scheduled for October 28th. Mr. Kennedy's application related to the prior consistent statement that was available but not introduced at trial. As a

result of discussions between Mr. Kennedy and Mr. Dalton, they both placed increasing weight on the potential value of fresh forensic evidence.

In May, Mr. Dalton made numerous attempts to contact Mr. Day but his calls were not returned. In a letter to Mr. Day dated June 23rd, Mr. Kennedy stated that Mr. Dalton "is exasperated at his inability to contact you" and his failure to meet with Mr. Dalton in spite of written assurances he would. Mr. Dalton was particularly anxious to learn about the development of the forensic evidence. Mr. Kennedy felt there were issues that had to be resolved between Mr. Day and Mr. Dalton and urged him to contact Mr. Dalton. Mr. Day responded that he would make an appointment to meet with him by July 9th but he did not.

Mr. Dalton wrote to Mr. Day on July 15th "to terminate your services effective immediately". Mr. Dalton had been reluctant to do this since he knew Mr. Kennedy was being paid on Mr. Day's legal aid certificate, and felt this could be jeopardized. On the same day Mr. Dalton called Sandra Burke and vented his frustration over Mr. Day's lack of performance. He alluded to a complaint he had made some years earlier to the Law Society against David Eaton. On the same day, Ms. Burke incorporated this information into a memorandum to Mr. Day and expressed her own concern about the matter. Mr. Day met with Mr. Dalton for over three hours the next day and discussed the impending Markesteyn opinion with him. Mr. Dalton asked him to disregard his letter terminating his services.

On September 22nd, Mr. Day forwarded Dr. Markesteyn's opinion to Mr. Dalton and Mr. Kennedy and said he was considering the options based on it. He said he would advise "shortly". Mr. Kennedy wrote Mr. Day on October 1st indicating that an application to introduce fresh forensic evidence would have to be filed "as soon as possible" for the October 28th hearing. On October 22nd, he wrote again suggesting that if an application is not filed, Mr. Day should at least attend at the October 28th hearing and provide as much information as possible about the nature of the application and when it would be brought.

When nothing was heard, Mr. Dalton instructed Mr. Kennedy to contact Dr. Markesteyn directly. By the time of the hearing, Mr. Kennedy had not heard back from him but did receive his affidavit from Mr. Day on the day of the hearing. Mr Day did not attend the hearing. The next day he was discharged by Mr. Dalton. Following the intervention of the Court of Appeal, the legal aid certificate was transferred to Mr. Kennedy.

Mr. Dalton and Mr. Kennedy were placed in a very awkward position by Mr. Day's continued presence following Mr. Kennedy's retention on April 3rd. The Legal Aid Commission's policy at that time was that:

> ...all new application and reassignments are to be handled by lawyers employed full time with the Legal Aid Commission.

The only way that Mr. Kennedy could continue to remain involved was to share Mr. Day's certificate.

They also grew increasingly aware of the potential significance of fresh forensic evidence. They knew that Mr. Day had a relationship with Dr. Markesteyn and could at least cover off that discrete aspect of the case. However, he was unable to deliver. Mr. Kennedy was required to draft the entire factum and it was a frustrating struggle for Mr. Dalton to attempt to obtain Dr. Markesteyn's opinion in a timely fashion.

Mr. Kennedy was placed in the awkward position of having to manage his working relationship with Mr. Day and his solicitor-client relationship with Mr. Dalton. At the same time, he was constrained by the solicitor-client relationship that also existed between Mr. Day and Mr. Dalton. On April 28th, Mr. Kennedy asked Mr. Day to obtain the opinion from Dr. Markesteyn. In my view, an effective forensic opinion would have been obtained much sooner had Mr. Kennedy pursued this personally rather than having to rely on Mr. Day.

However, he was constrained by the circumstances of the legal aid certificate and the fact that Mr. Day had already contacted Dr. Markesteyn. Mr. Kennedy was gracious and generous in describing the effort and contribution of Mr. Day and, no doubt, was conscious of his stature and reputation. Mr. Dalton was also gracious in thanking Mr. Day at one point. However, the bottom line is that Mr. Dalton would have been in a far better position had Mr. Kennedy been able to take over completely on April 3rd.

Mr. Day testified that two years would have been a reasonable period for a competent and prudent counsel to bring this case to the Court of Appeal. Mr. Kennedy did so in nine months. That might well have been reduced by approximately two months if he had been given free rein from the time of his retainer on April 3rd.

(b) **The Legal Aid Commission:**

(i) **General:**

I am mindful that the allocation of legal aid is governed by legislation, regulations and policies that establish an organizational structure for its administration. In Mr. Dalton's case, the primary decision-making was conducted by the Provincial Director, Newman Petten, often in consultation with staff lawyers and the Legal Aid Commission itself.

Different patterns of decision-making occurred in approving the initial applications of Mr. Eaton and Mr. Day, respectively. In the case of Mr. Eaton, the Provincial Director took the decision to apply the "claw-back" provisions in his letter dated April 8, 1991. The matter was resolved by the Legal Aid Appeals Board by its decision dated April 25th. In the case of Mr. Day, the Provincial Director, felt it necessary to involve the Legal Aid Commission at the outset because of the significant additional hours requested. The Commission dealt with this application at its meetings on February 25, 1994, March 15th and April 21st. Ms. Burke attended the last meeting, which confirmed the disposition ultimately accepted by Mr. Day.

There certainly was no misconduct on the part of the Legal Aid Commission or its agents. Nor was there any dereliction of duty. Correspondence was answered promptly and decisions were taken. However, a narrow perspective was demonstrated in not seeing the "bigger picture" beyond the immediate tasks at hand. **A more proactive exercise of discretion could have been of considerable assistance to Mr. Dalton and to the administration of justice.**

In late December of 1990, approximately one year after Mr. Dalton's conviction, the Senior Staff Solicitor sent a memorandum to the Provincial Director stating:

> ...I would have no hesitation in providing a certificate on this matter. I think it is likely that the Court of Appeal will order a new trial on this matter.

The likelihood of a new trial being ordered should have generated a certain sense of urgency that transcended process and focused on alleviating Mr. Dalton's unacceptable situation. In particular, there were good reasons to look beyond the solicitor-client relationship, both from Mr. Dalton's perspective and from the perspective of the unacceptable standard of legal service provided (or not provided) through Commission funding. Moreover, there was a breakdown in communicating to Mr. Dalton the nature of the service that the Legal Aid Commission was providing to him.

(ii) **Eaton Legal Aid:**

On August 9, 1990, the Provincial Director sent Mr. Eaton an application form for legal aid, which was forwarded to Mr. Dalton on September 27th. In spite of being incarcerated in New Brunswick, Mr. Dalton was able to return the completed form together with detailed additional information by letter dated October 4th. On October 22nd, the Provincial Director wrote again requesting considerable, additional information and Mr. Dalton responded with further detail by letter dated November 20th. Mr. Dalton was preoccupied with a custody application involving his children over the next few months. However, by the end of March 1991, all of the detailed financial information had been provided by Mr. Eaton, as well as by Mr. Dalton.

It is difficult to imagine how someone, without Mr. Dalton's intelligence and familiarity with financial detail and documentation, would have been able to meet the application requirements, in similar circumstances. Such cases were not before me but **I recommend that some form of outreach program be provided through the Legal Aid Commission to ensure that delay does not occur simply because of the incapacity of prisoners to cope with the application process.**

By letter dated April 8, 1991, the Provincial Director advised Mr. Eaton that the Commission would "issue a certificate to you" to conduct the appeal for Mr. Dalton. Mr. Dalton received a copy of this letter and it may well have been the basis for his misunderstanding about the nature of legal aid funding. While the certificate is issued to a specific lawyer, it represents funding for the benefit of the client. Mr. Dalton did not understand for some time, that he was entitled to retain another lawyer on the same terms of this certificate, after Mr. Eaton withdrew from his case.

This information should have been conveyed to Mr. Dalton at the outset. It could well have led to him requesting a new lawyer during the period from May 14, 1991 to February 5, 1992, when he wrote four unanswered letters to Mr. Eaton. It was six more months before Mr. Eaton replied, by withdrawing from the case.

Of more immediate concern, however, was the "claw-back". Mr. Eaton was also advised by the Provincial Director that his remuneration would commence only after he had contributed 215 hours of work. The basis for this condition was that Mr. Eaton had received payment directly from Mr. Dalton in conducting the trial at a rate higher than that authorized under the Legal Aid Regulations. The calculation was as follows:

- Determine the number of hours contributed at the trial and preliminary inquiry and multiply these by the legal aid rates.
- Subtract this total from the fees actually received for services.
- Divide the excess by the legal aid rate to determine the number of hours "owed back" under a legal aid certificate.

The Legal Aid Regulations specifically require that a solicitor, previously employed by an applicant, must present a detailed statement of previous services and fees. The rationale of this provision is to prevent a lawyer charging excessive fees that require the client to require legal aid prematurely.

In the circumstances of this case, the application of this "claw-back" was patently unreasonable. Mr. Eaton's calculated hourly rate for the preliminary inquiry and trial was not excessive and, indeed, was within $12.00 of the legal aid rate. Moreover, he had an intimate knowledge of the case which would require a new lawyer to be paid many additional hours for preparation. In any event, common sense dictates that a lawyer in private practice cannot be expected to contribute 215 hours *pro bono* for the privilege of obtaining a certificate at legal aid rates.

The Provincial Director had the discretion not to apply the "claw-back" in this case. He should have exercised that discretion, perhaps in consultation with the Commission. In fairness, however, he did appear to encourage Mr. Eaton to appeal and the Appeals Board rendered a decision 17 days later reducing the "claw-back" from 215 hours to 10 hours. The Provincial Director also:

- applied the higher current rate than the one at the time of the trial in making the calculation;
- accepted Mr. Eaton's general estimate of hours and services rather than requiring a detailed taxation; and
- accepted (with the assistance of advice from staff counsel) a sparse opinion from Mr. Eaton in relation to the merits of the appeal.

A brief presented on behalf of the Legal Aid Commission pointed out that the legal aid systems of most provinces have a "claw-back" provision requiring the exercise of discretion on a "case by case" basis. Quebec and Nova Scotia do not have such a provision. They do not take into account any previous fees paid for legal services. The brief indicates that as a result of this issue arising in the Dalton case, the Legal Aid Commission has revised its "claw-back" policy as follows:

> Applicants who have paid funds to a private lawyer prior to applying for legal aid are to be referred to the Legal Aid Taxing Officer (Provincial Director/Senior Staff Solicitor) in deciding the contribution required, if any.
>
> The Taxing Officer shall consider the amount paid, the hours billed and the rates charged by the private lawyer. In establishing the reasonableness of the number of hours billed reference may be made to the Legal Aid Tariff and to staff lawyers experiences in similar cases. The Taxing Officer may also consider the going rate for private lawyers for the type of work billed considering the lawyer's experience and the complexity of the matter.

The availability of the "claw-back" mechanism may be of assistance in extreme cases. However, it is important that it be invoked only through a true exercise of discretion based on realistic factors and common sense.

(iii) Unrepresented Period:

Following Mr. Eaton's withdrawal by letter dated August 5, 1992, Mr. Dalton wrote to the Provincial Director on September 14, 1992 asking "where matters stand" with respect to his application of October 1990. His vague inquiry was probably related to his understanding that the legal aid certificate was conditional upon Mr. Eaton's representation.

The Provincial Director responded by telling him that:

> ...the Appeals Board agreed to authorize a legal aid certificate to Mr. Eaton to represent you on your appeal. The work in relation to your appeal is handled by Mr. Eaton...

He suggested that any further information be obtained from Mr. Eaton since the Commission "has no further involvement" in the appeal.

The Provincial Director did not know that Mr. Eaton had withdrawn. Nor was he aware that Mr. Dalton was confused about the nature of his entitlement under the certificate. However, the terse and rather strange nature of the inquiry, in the circumstances, warranted a more proactive response. It had been 17 months since the Appeals Board had authorized the certificate. It had been 21 months since the Senior Staff Solicitor had advised of the likelihood of a successful appeal.

In these circumstances, at least a telephone call to Mr. Eaton was in order, if not to Mr. Dalton. As an institution, one might have expected some

follow-up for tracking the progress of files. **The Commission does have an obligation of accountability for administering public funds, albeit with due respect given to solicitor-client relationships.**

However, at that time the Commission had no mechanism for monitoring whether a certificate was actually taken out after it was authorized. Nor did it monitor the progress (or lack of progress) made on files where legal aid was authorized. I understand that a policy has since been adopted by the Commission requiring that Area Directors or the Provincial Director must review any certificates under which there has been no activity for a period of six months. Now that much of the legal aid workload is borne by staff lawyers the monitoring of progress on files is, no doubt, easier. **However, the Commission must take a strong position in relation to delay. There is no interference in a solicitor-client relationship by insisting that legal services be provided in a timely fashion, particularly in criminal cases where the client is incarcerated.**

Mr. Dalton decided to focus his efforts directly on the Court of Appeal and on January 25, 1993, wrote to the Registrar, stating:

> ...While I had undertakings of legal counsel from the Newfoundland Legal Aid Commission and the solicitor who acted as defence counsel at trial such assistance has failed to materialize.

He sought assistance in bringing forward his appeal unrepresented. The Deputy Registrar, Madonna Morris, provided Mr. Dalton with the information requested.

However, she also took the initiative to contact the Legal Aid Commission and Mr. Eaton to ascertain the situation. She wrote to Mr. Dalton on March 24th, advising him that although Mr. Eaton had withdrawn, he was entitled to be represented by another lawyer. He responded by stating that his legal aid authorization "appears to be a conditional approval to fund the specific services of Mr. Eaton" and that neither the Commission nor Mr. Eaton had responded to his requests for clarification.

The Deputy Registrar then responded that she sought further clarification from the Commission and that if he retained another lawyer, the conditions related to Mr. Eaton would not apply. Her "impression" was that "unconditional legal aid would now be approved for counsel of your own choosing.". **It is rather ironic that Mr. Dalton should have to obtain information about the nature of his legal aid assistance through the intermediary of the Court of Appeal rather than directly from the Commission.**

By letter dated April 26th, Mr. Dalton responded that he would renew his efforts with the Commission but, based on past experience, was not optimistic. He requested further advice in relation to proceeding unrepresented. On the same date, he wrote to the Provincial Director and asked three specific questions:

- "Does the Appeals Board approval extend to other counsel and if so what limitations or restrictions would apply?"
- "Also is the Commission able to provide a list of solicitors who are both qualified and willing to attend to the requirements of any appeal for Legal Aid funding?"
- Alternatively does the Commission have staff qualified to attend to this long-outstanding matter?"

In his response, the Provincial Director ignored the first two questions, leaving Mr. Dalton still uncertain as to whether he could choose another lawyer to replace Mr. Eaton on his certificate.

The Provincial Director did respond to the third question by letter dated May 13th. He indicated that a staff lawyer, Wayne Jennings, would be interested in taking the appeal. He invited Mr. Dalton to contact Mr. Jennings directly or through the Provincial Director. It is understandable that Mr. Dalton's suspicion of the Legal Aid Commission would be increased by this exchange. He was entitled to know all of the options available in accordance with his specific inquiries. **While the Provincial Director may have thought a staff lawyer was the simplest and most desirable solution, his response was not respectful of Mr. Dalton as a client.**

(iv) Day Legal Aid:

On July 8, 1993, Mr. Dalton wrote to Mr. Day, placing his hopes in him. The delay occasioned by Mr. Day and his "stalling" in relation to the issuing of the legal aid certificate were discussed *supra*, at pp. 34-5. He first wrote to the Commission on July 20th enquiring as to Mr. Dalton's status with respect to legal aid. The Provincial Director responded the next day indicating that representation under the existing certificate would be available and inviting a request for additional hours.

Mr. Day did not respond until January 31, 1994. As indicated earlier, the Provincial Director involved the Legal Aid Commission directly in Mr. Day's application and a final decision, accepted by Mr. Day was obtained in its letter dated April 22nd. On June 2nd, the Commission did take a proactive step and wrote to Mr. Day indicating Mr. Dalton's file had been brought forward as a matter arising out of previous minutes. (The Commission had

dealt with the file at three previous meetings). Mr. Day was asked whether he would accept the certificate.

By letter dated June 9th, Mr. Day requested further information which was promptly provided by the Provincial Director by letter dated June 16th. **When nothing further was heard, he wrote again on October 28th, 1994. While this follow-up is welcome, the letter closes on a discordant note:**

> **...If we should be issuing a certificate we would like to have it issued. If there is no certificate to be issued we would like to close our file.**

It is troubling to contemplate that if Mr. Day had then declined the certificate, Mr. Dalton's file simply would have been closed. It was then almost four years since the Commission was advised of the likelihood that a new trial would be ordered and almost five years since Mr. Dalton had been imprisoned.

There are limits to the extent to which the Legal Aid Commission may actively pursue representation on behalf of applicants. However, cases of blatant injustice such as this one warrant a special response. As it turns out, the letter in question prompted Mr. Day to accept the certificate in his response dated November 22nd. The following year passed without progress in completing the factum.

On January 12, 1996, in desperation, Mr. Dalton wrote to the Minister of Justice explaining his circumstances and asking that corrective action be taken. Copies were sent to the Chief Justice, the Provincial Director and Mr. Day. Mr. Day promptly wrote to the Justice Minister directly to indicate that he had matters in hand. On February 8th, the Provincial Director wrote directly to Mr. Dalton, referring to Mr. Day's response and adding:

> It would appear that Mr. Day is prepared to continue assisting you on your appeal and I am assuming that there is nothing further that you can wish of the Commission at this time.

No doubt, Mr. Day's senior status and reputation were factors in the ready acceptance of his further assurances.

(v) Kennedy Legal Aid:

I have already observed that Mr. Kennedy may well have had the appeal heard earlier had he taken sole carriage of the case from the time of his retainer on April 3, 1997. On that date he requested that Mr. Day's certificate

be transferred or a new certificate be issued to him. The Provincial Director responded the next day by offering to have a staff lawyer take over from Mr. Day. He pointed out that a new policy, effective July 2, 1996, required that all new applications and reassignments had to be handled by full-time staff members.

While this position was understandable in view of the policy, Mr. Dalton's circumstances warranted exceptional efforts to accommodate him. The Commission did demonstrate some flexibility in allowing Mr. Kennedy and Mr. Day to work out an arrangement to share Mr. Day's certificate. However, it was ultimately transferred to Mr. Kennedy at the intervention of the Chief Justice and that would have been the desirable result at the outset.

(vi) Conclusion:

It was submitted that for the Commission to require staff lawyers to represent legal aid recipients was a denial of the basic right to counsel of choice. I do not subscribe to that view. The vehicle for delivering legal aid services is a policy decision properly within the realm of government. The independence of counsel is fundamental but the manner of achieving that principle may vary. No evidence was presented in relation to any perceived lack of independence on the part of Legal Aid Commission staff counsel.

The Legal Aid Commission cannot be directly faulted for contributing to any significant delay in relation to Mr. Dalton. At times it was insensitive to the injustice he was experiencing. It could have been more proactive in monitoring the progress of files once legal aid had been approved. It certainly could have communicated to Mr. Dalton the exact nature of his entitlement once legal aid had been approved.

I adopt the submission that a simple pamphlet should be made available to explain legal aid to laypersons. Whenever possible, communications from the Commission to counsel should also be copied to their clients. Finally, the Provincial Director, Regional Directors and staff counsel should be conscious of perceiving injustice when it occurs and should bring such injustice to the attention of the Commission for proactive resolution on an urgent and practical basis.

(c) The Director of Public Prosecutions (Crown):

The approach of the Crown in conducting appeals launched by the accused was described in the "Submissions & Report" of counsel for the Public Prosecutions Division on the Systemic Phase. I find this description to be helpful and quote at length:

> The Crown has historically been chary of interfering with the prosecution of a Defence appeal from conviction. An appellant was thought to be responsible to prosecute his or her own appeal, and best situated to determine the timing of it. This was especially so when the appellant was continuing to serve his or her sentence, for public safety and general and specific deterrence considerations were being addressed. If an appeal was not pressed, it was generally not questioned by the Crown, because it was understood there was a reason for it. Among such reasons were impecuniosity, waiting for decisions on relevant cases from superior courts, changes of counsel (new counsel requiring time to be briefed and educated on the evidence and issues) and perhaps even the appellant's acceptance of the guilty verdict. This deference to convicted appellants was appreciated and generally honoured by local criminal law practioners.

In addition, if a new trial were to result, the accused could benefit from the deterioration of evidence through the passage of time. While this may be an advantage for the accused it would be a concern for the Crown. The emotional effect of delay on victims and witnesses is also a concern for the Crown.

Prompted by the tragic circumstances of Mr. Dalton, and perhaps by this Inquiry, a new Crown policy was adopted in relation to appeals to the Court of Appeal in August of 2004. It includes the following provision:

> When counsel on behalf of the defence or if unrepresented, the accused, has not filed its factum in accordance with the time period prescribed by the Rules, counsel on behalf of the Attorney General shall write to the other party inquiring whether it intends to file a factum.
>
> If a period of 30 days passes with no response or if a response is received which indicates that a period greater than 30 days is required to file its factum then counsel on behalf of the Attorney General shall, in the absence of the other party requesting an extension by the Court; apply to the Court pursuant to s. 10(2) of the Rules for a remedy.

In this context, Rule 10(2) of the Criminal Appeal Rules permits the Crown to apply for a remedy where the appeal has not been perfected on behalf of the accused within six months of the filing of the transcript. The possible remedies include striking out the appeal, specifying a time for perfecting the appeal and fixing a date for the hearing of the appeal.

The "Submissions and Report" document describes a more proactive role for the Public Prosecutions Division. Where there is an appeal by an unrepresented

prisoner, Crown counsel is now required to file a request for a transcript. The Special Prosecutions Office (responsible for appeals) has established a diary dating system to bring matters forward, possibly culminating in the Rule 10(2) application just described. In addition, the monitoring of transcript production is required, with a written inquiry after two months and follow-up after each subsequent month.

Finally, where a prisoner informs the Court of Appeal that counsel is required to pursue an appeal, arrangements have been made for this request to be forwarded to the Special Prosecutions Office. An affidavit is prepared for the prisoner and arrangements are made to convey the appellant from the place of incarceration to the Court. An application then may be heard for the assignment of counsel pursuant to section 694.1 of the *Criminal Code*.

I find these systemic initiatives to be positive. Moreover, in my experience, the Crown practice at the time of Mr. Dalton's appeal was not unusual in Canada, generally. In terms of the general role of Crown counsel in conducting appeals, the cause of delay cannot be attributed to the Crown for the delay in Mr. Dalton's appeal. Once Mr. Kennedy took charge of the appeal, he received full co-operation and timely responses from Mr. Gorman, on behalf of the Crown.

I address the further role of the DPP in his role as an advisor to the Minister of Justice under the next heading.

(d) The Minister of Justice:

On November 22, 1994, Mr. Day advised the Legal Aid Commission that he would accept the certificate to represent Mr. Dalton, who was also advised. In spite of Mr. Day's assurances, another year passed without completion of the factum. On January 12, 1996, Mr. Dalton sent a letter to the Minister of Justice. The responses of Mr. Day and Mr. Petten, to the copies of that letter that were sent to them, are described *supra*, at pp. 36 and 50, respectively.

Mr. Dalton's letter to the Minister of Justice is rational, clear and objective. He provided details of his conviction and the filing of his Notice of Appeal on December 27, 1989, and added that:

- Over the following six years he had been unable to have his appeal heard;
- His trial lawyer, David Eaton, had failed to live up to his undertaking to conduct the appeal;
- He had corresponded with the Legal Aid Commission, the Law Society and the Court of Appeal but he still was no closer to a hearing;
- Following protracted negotiations with the Legal Aid Commission, David Day "was formally engaged to represent me in April 1994";

- He had been repeatedly assured that all that was required was for a factum to be filed but "...it clearly has taken far too long."
- He was caught in the dilemma that his eligibility for day parole would arrive within the year but an outstanding appeal would doom any chance of success;
- His impression was that the problem of delay in appeals was greater in Newfoundland than in other provinces and the Brian Smith case was another example;
- He believed these "...unwarranted delays are not deliberate..." but that they "...point to serious deficiencies in the administration of justice..."

Mr. Dalton concluded by asking the Minister to take action to remedy these ongoing "injustices".

The letter did, indeed, raise serious concerns about the administration of justice, as follows:

- The inability to have an appeal heard over six years after filing a Notice of Appeal;
- The failure of a senior lawyer to live up to a serious undertaking;
- A further delay of almost two years on the part of his current lawyer;
- The harsh consequence created in the parole process through appellate delay;
- The unsuccessful attempts to seek help from the Court of Appeal, the Legal Aid Commission and the Law Society;
- Systemic appellate delay.

The Minister of Justice, who could not be expected to follow up personally, asked a senior official to look into these serious allegations and to provide an appropriate response. The senior official was Colin Flynn, who was DPP at the time. Mr. Flynn wrote to Mr. Dalton to say that he had confirmed that Mr. Day was representing him and that if he had any "concerns or complaints" about his representation, they should be addressed to the Law Society. He concluded:

> We cannot intervene further in this matter as if must rest with you to make the appropriate overtures to those appropriate officials.

This suggestion was not very helpful particularly when Mr. Dalton stated he had already approached the Law Society to no avail.

A few days later Mr. Flynn, wrote again to say that they had received correspondence from Mr. Day specifying that he now had a draft factum prepared and wished to meet with Mr. Dalton within the next sixty days. He concluded that

Mr. Dalton should contact Mr. Day's office to obtain any further details "...as it would not be appropriate for me to do so."

This view of the inappropriateness of delving too deeply into Mr. Dalton's concerns was emphasized by counsel for the Crown in her submissions before this Commission. She stressed that in an adversarial system, the Crown must not interfere with the conduct of the defence case. There are many reasons why appeals may not be pursued expeditiously (some of which were referred to in the previous section). The Crown must not attempt to come between the client and defence counsel. If there were a problem between them, the client could go to the Law Society and Mr. Flynn's correspondence specifically raised that possible avenue of pursuit for Mr. Dalton.

Moreover, Mr. Day had given very specific assurances that he had everything in hand. No doubt his stature and reputation as a senior lawyer provided Mr. Flynn with added reassurance. He did not know that, at the time, Mr. Day was the problem.

However, there were reasons why Mr. Dalton's letter should have been taken more seriously and triggered a more vigorous reaction. Why has the appeal not been heard after six years? Why did Mr. Day say that he was retained in January of 1995 when Mr. Dalton said he was "formally engaged" in April of 1994? Did the reference to the Brian Smith case indicate that there really was a bigger problem? What were his dealings with the Court, Legal Aid and the Law Society and why could they not resolve this problem? If Mr. Day was retained in 1995, what about the previous five years?

With respect to counsel for the Crown before this Commission, it is far too narrow a perspective for the DPP to be characterized only as a prosecutor in an adversarial system. Where a grave injustice is occurring, there is an obligation to look beyond the solicitor-client relationship and address that injustice. Counsel for the Attorney General was quite frank in acknowledging that the failure to make a further inquiry on behalf of the Minister of Justice did materially delay the perfection of Mr. Dalton's appeal.

The following observations are taken directly from the *Crown Policy Manual* of the Department of Justice of the Government of Newfoundland and Labrador. They are, of course, not unique to this jurisdiction. The same basic principles apply throughout Canada and derive from the British heritage of our criminal justice system.

The Minister of Justice, in his capacity as Attorney General, is "...the chief prosecutor for all criminal matters." In his capacity as Minister of Justice, he has "...superintendence of all matters connected with the administration of justice..." Of

course, these responsibilities are subject to the jurisdictional constraints imposed constitutionally within a federal state. **The issues raised in Mr. Dalton's letter clearly relate to responsibilities as Minister of Justice rather than as Attorney General.**

The responsibilities of the DPP mirror those of both the Attorney General and the Minister of Justice. They are described, generally as follows:

> The Director of Public Prosecutions carries out the Attorney General's day-to-day responsibilities for the conduct of all criminal and quasi-criminal prosecutions within the Province...He or she is also responsible for providing advice to the Attorney General on all criminal and quasi-criminal matters.

Although the office of the "Attorney General" is referred to with respect to both of these responsibilities, it is obvious that the latter relates to the role of the Minister of Justice. This is clear from the directives which elaborate on these general responsibilities. **The fourth of these provides that the DPP shall:**

> **Alert the Deputy Attorney General to potential problems relating to the general administration of justice, including the courts, the police and enforcement of legislative provisions.**

The issues raised by Mr. Dalton fall squarely within this requirement. This responsibility was not fulfilled.

I realize from my past experience, both as Chairman of the Canada Law Reform Commission and as Chief Justice of Canada, that many letters are written to persons holding certain offices related to the administration of justice. Some of the authors are obviously, mentally unstable. Some have a complete lack of understanding of the nature of the criminal justice system. A few perceive widespread bias, conspiracy and corruption. However, all of us within the system must be vigilant not to lose sensitivity to pleas that are legitimate.

Indeed complaints which may demonstrate misunderstanding may also contain the core of a legitimate concern that warrants a response. But the importance of the lesson in Mr. Dalton's case is that he could not be heard in spite of being educated, articulate and intelligent.

(e) The Law Society:

The transfer of Mr. Dalton's files from Mr. Eaton to Mr. Day was discussed *supra*, at p. 32. When Mr. Dalton became concerned that Mr. Eaton may have been further delaying matters by not fully co-operating, he decided to write to the Law Society. In his letter dated January 11, 1994, he stated:

> I wrote to Mr. Eaton for the files on November 22, 1993 and again on December 23, 1993, however, I have not received any answer from him. Please do what you can to get these files for me and send them to Ms. Sandra Burke...

The Legal Director of the Law Society, Joan Myles, wrote to Mr. Eaton on January 18th, forwarding a copy of Mr. Dalton's letter and stating:

> Unless Mr. Dalton advises otherwise I will leave matter to be resolved directly between you and Mr. Dalton.

This is a rather curious response since the very reason that Mr. Dalton wrote to the Law Society was that matters were **not** being resolved between himself and Mr. Eaton. The Legal Director also wrote to Mr. Dalton on the same date and enclosed a copy of her letter to Mr. Eaton. She stated:

> I trust this matter can be satisfactorily resolved between you and Mr. Eaton, perhaps with Ms. Burke's assistance.

She asked that Mr. Dalton advise her if he should "encounter further difficulty".

On June 6th, Mr. Dalton again wrote to the Law Society to say that most of the files had been transferred but "one substantial file, the general correspondence file has not". He concluded:

> In a final attempt to obtain my file and eliminate a formal complaint I request you again endeavour to affect the transfer.

As a result, the Legal Director again wrote to Mr. Eaton on June 16th, enclosing a copy of Mr. Dalton's most recent letter and adding:

> Please resolve this matter between you and Mr. Dalton and Ms. Burke.

While these responses from the Law Society suggest a bureaucratic indifference, there is a broader concern.

Mr. Dalton's initial letter to the Law Society dated January 11th, not only referred to the transfer of files. It also explained his plight up to that time. He stated:

> I have now been in prison over four years and nothing has been done towards my appeal apart from filing the Notice of Appeal.

He explained that the trial transcript was available in October of 1990. He explained that Mr. Eaton had represented him at trial and undertook to conduct the appeal but

in August of 1992 wrote to advise Mr. Dalton that he would not be able to find the necessary time to fulfill his undertaking.

It is true that Mr. Dalton was not attempting to file a formal complaint. He simply wished to transfer his file to his new lawyer so he could move things along. However, the Law Society is responsible for the governance of the legal profession in its provision of service to the public. Chapter II of the current *Code of Professional Conduct* provides that lawyers should serve their clients in a "conscientious, diligent and efficient" manner. This means:

> ...that the lawyer must make every effort to provide prompt service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

By virtue of accepting responsibility for the self-governance of the legal profession, the Law Society has an obligation to the public to ensure that adequate service is provided.

I am not alleging misconduct on the part of the Law Society or its agents. However, Mr. Dalton's letter stated:

- He has been in prison for four years since the filing of his Notice of Appeal and nothing had been done since then;
- The lawyer who had filed the notice and undertaken to conduct the appeal had abandoned him;
- Another lawyer had agreed to look at his case, but only with the "possibility" of undertaking to represent him.

This certainly expressed that an injustice was occurring within the realm of the Law Society's responsibility.

I understand that the practice of the Law Society has evolved and today Mr. Dalton would be contacted in similar circumstances. His letter would be viewed as potentially reflecting more serious issues that should be explored, even though the files were transferred and no complaint was filed.

(f) The Court of Appeal:

(i) Madonna Morris:

Madonna Morris was the Deputy Registrar of the Court of Appeal during most of the period in question. She normally corresponded directly with Mr. Dalton in response to his inquiries. However, she would consult the Chief Justice to obtain instructions before responding. In the event that no

instructions were provided, she would advise the Chief Justice of her proposed response before sending it.

Ms. Morris always responded to Mr. Dalton in a timely manner and provided him with whatever information and materials he requested. However, she did more. She always tried to help resolve the underlying problem instead of just responding to a specific request.

When Mr. Dalton wrote, on March 3, 1993, to request that his hearing proceed without a factum, she took the initiative to contact the lawyer of record, David Eaton, and then the Legal Aid Commission. She then advised him that, while Mr. Eaton wished to withdraw, legal aid had been approved and he was entitled to be represented by another lawyer. She added:

> It is the Court's position that you should avail of legal representation because of the obvious complexities of a matter such as this one, involving in the main, issues of law.

Obviously, this sentence was directed by the Chief Justice.

Over the following years, Ms. Morris continued to correspond with Mr. Dalton, and prompted by his concerns, followed up with Mr. Day's office and the Legal Aid Commission to confirm Mr. Day's representation of Mr. Dalton. Her follow up with Sandra Burke, of Mr. Day's office, was described *supra,* at pp. 38-9, and was instrumental in Mr. Kennedy, ultimately, being retained.

(ii) The Court:

Section 684(1) of the *Criminal Code* provides that:

> A Court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused...where...it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

This provision was not a factor in relation to Mr. Dalton because of the decision of the Chief Justice in *Rideout v. The Queen* (unreported, 17 May 1990), which sets out the requisites for the exercise of this discretion to appoint counsel. Essentially, it holds that an accused must exhaust his right to obtain legal aid before section 684 may be invoked. In my respectful view, this is a sound approach. However, since legal aid was approved for Mr.

Dalton on April 25, 1991, and subsequently increased to meet his needs, this section could have no application to him.

The practice of the Crown in relation to appeals was discussed *supra*, at p. 52. Basically, the Crown ignored defence delay in pursuing appeals and left matters entirely in the hands of defence counsel. The exception was where the appellant was on bail. I specifically asked the DPP whether a closer eye was kept on such a situation, and he responded:

> ...naturally, and as a result we would make some efforts to contact their counsel on, I can't say on a regular basis, but on some basis to see what they were doing, whether they were pursuing it and so forth, and I guess we were, we were a little bit more dogged in our approach to it. Those who were incarcerated and had either been denied bail or not applied for bail or whatever, we didn't have the same concern.

In such circumstances, of course, there is no concern that the person on bail might commit an offence.

The *Criminal Appeal Rules* have special provisions which permit an appeal to be heard without the necessity of filing a factum where the appellant is incarcerated and unrepresented. In spite of the information provided by Ms. Morris about his entitlement to legal aid, Mr. Dalton was sceptical and by letter dated April 26, 1993, asked for further assistance in having his case heard as a prisoner appeal. This time he received a reply directly from the Chief Justice, who advised Mr. Dalton that he had instructed the Registrar to proceed as requested. However, he added:

> I strongly recommend that you should make further effort to secure the services of a lawyer.

He referred to the limitations on the Court of Appeal and the special rules governing the introduction of fresh evidence. He noted that since legal aid had been authorized, Mr. Dalton should not have difficulty in retaining a lawyer.

It is apparent that the Court genuinely felt that Mr. Dalton would be best served if he were represented by counsel. There appears to be a hope and expectation that matters would sort themselves out and that Mr. Dalton would be represented by legal counsel. However, the Court chose a passive role rather than getting to the root of Mr. Dalton's problem. It was not until the hearing on October 28, 1997, that the Court made a proactive intervention. All three judges addressed questions directly to Mr. Dalton, who expressed

his frustration with Mr. Day. The Court then intervened directly to have Mr. Day's certificate transferred to Mr. Kennedy.

However, the basis for a proactive intervention had been established almost five years earlier in Mr. Dalton's letter dated January 25, 1993, when he first requested to proceed, unrepresented, in the form of a prisoner appeal. In that letter he stated:

- the Notice of Appeal had been filed over three years earlier and no action had been taken;
- the trial transcript had been available for some time;
- the defence counsel who conducted the trial and the Legal Aid Commission had undertaken to provide assistance but it had failed to materialize.

Four years in prison, with no sign of improvement, should have sent a strong message to the Court that there was a serious problem.

The Court should have called a meeting of all involved and applied Rule 16(4) which then provided that the Registrar could apply to a Judge to:

- quash the Notice of Appeal;
- dismiss the appeal;
- set a time for hearing the appeal;
- **issue such other order as he sees fit.**

Just as the Crown practice was to ignore delay in defence appeals, the Court was also reluctant to intervene.

Such a meeting, involving Mr. Eaton, the Director of Legal Aid and the Crown could have addressed the central question as to how representation for Mr. Dalton could be expedited. Moreover, if the Court had taken such an initiative at the outset, it could have also followed up to ensure that timelines were observed. However, there is a historical context for the non-intervention of the courts in such circumstances.

(iii) Historical Context:

In all fairness to the Court, I would be remiss if I did not share with you my personal knowledge and experience of the judicial attitudes that restrained judges from intervening in such circumstances. As Chief Justice of Canada from 1990 to 2000, I was also the Chair of the Canadian Judicial Council. This body is composed of all of the Chief Justices of Superior Courts in Canada, including the Tax Court. In 1990 one of the first things I did was to set up a Delays Project, which resulted in a report released to the Canadian

Bar Association in Halifax on August 23 1992. One of the recommendations of the Trial and Court of Appeal Committees was "In general terms, each Court should accept more responsibility than it now does for supervising and controlling appeals from their commencement through to final disposition."

This recommendation triggered great debate at Council. Since time immemorial the policy of the Courts, notwithstanding rules enabling them to look into cases that were moving at an unacceptable pace, was to leave the carriage of the case to the parties, actually the lawyers. Notwithstanding the recommendation quoted above many Courts took years to gradually overcome their reluctance to interfere, especially when the lawyers involved were senior as was the case with Mr. Day.

(iv) The Current Rule:

Rule 10 currently applies to Non-Compliance with the Rules. Rule 10(2) provides:

> 10(2) Where a party to an appeal or counsel fails to perfect the appeal within a period of 6 months after the filing of the transcript or, where no transcript is filed, within a period of 12 months after the filing of the notice of appeal, or a party or their counsel otherwise fails to comply with these Rules, the Court, on application of any other party to the appeal or of its own motion, on giving to the parties such notice, if any, as the Registrar is able to effect, or without notice if reasonable notice cannot be effected, may:
>
> (a) strike out the appeal;
> (b) direct the appellant to perfect the appeal within a specified time;
> (c) fix a date for hearing of the appeal; or
> (d) make any other order as may be just.

These time limits raise a concern. They suggest that the Court is not authorized to inquire into a transcript prior to 12 months elapsing. It also suggests the Court must ignore the failure to perfect an appeal for at least six months after the transcript has been filed.

These provisions could shield unnecessary delay. For example, the Court should be encouraged to inquire into delay in producing any transcript, perhaps with a proviso such as "having regard to the length of the case." Also, the Court should call in the parties the moment a party is out of time in filing its factum.

There may well be good reasons for the delay, in which case, the Rules permit an application for their relaxation. Where no such reasons exist, counsel should be required to proceed or face the consequences. I share these, my thoughts, with the highest of respect for the members of the Court who realize of course that courtesy within the profession is sometimes at the expense of the parties.

(v) Transcripts:

I would like to expand on the delays that sometimes unnecessarily occur as regards transcripts. Indeed, the problem of delay in criminal appeals due to delay in the preparation of transcripts has plagued the criminal justice system of Newfoundland and Labrador for many years. It was a significant factor in the release from custody of Mr. Parsons following his murder conviction, while awaiting his appeal. The reasons of Marshall J.A. *in R. v. Parsons (1994) 365 A.P.R. 69, at 71*, contain the following passage:

> However, the entire record of the somewhat lengthy trial is not yet available. Mr. Parsons' counsel has filed with his materials a letter from the supervisor of the Court Reporter's office that in the normal course the entire transcript will not be available for up to eighteen months. Even if ordered expedited, she states that it could not be produced in less that nine months.

Expedited transcripts are not a solution to delay since they only serve to alter priorities. As Chief Justice, Clyde Wells stated to me in his detailed letter dated June 13, 2005 [Annex 6]:

> 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.

This approach is merely "robbing Peter to pay Paul" and should be reserved for the most egregious circumstances.

When Mr. Dalton met with his trial counsel, Mr. Eaton, following his conviction, he was told that it would take roughly a year before the transcript would be available and another six months to file the factums and hear the appeal. His Notice of Appeal was filed on December 27, 1989, and the Court of Appeal received the six volumes of transcripts on September 13, 1990. This is a period of just under nine months, which was better than expected but far from acceptable.

Madonna Morris is the Registrar for the Court of Appeal and was Deputy Registrar during the period from Mr. Dalton's Notice of Appeal to the judgment ordering a new trial. She testified on September 23, 2003, that the problem of delay in relation to transcripts had not changed from Mr. Dalton's time. In her view, the basic problem related to the inadequate dedication of human resources to transcript preparation. While civil transcripts may be prepared by outside agencies, criminal transcripts are required to be done by court staff, who continue to do some civil transcripts as well as to serve as court clerks.

The information provided to the Commission by the Supreme Court and the Provincial Court [Annex 7] tells a tale of budget-slashing over the years with serious adverse consequences for the timely preparation of transcripts. It is apparent to me that inadequate resources have been allocated to the problem of transcript delay. **I strongly recommend that the Government of Newfoundland and Labrador commit sufficient resources to resolve this problem (and without withdrawing necessary resources from other components of the administration of justice).** I do not agree with the submission on behalf of the Attorney General that the nine months it took to prepare the transcript did not significantly contribute to the unjust delay Mr. Dalton experienced. **Particularly where an appellant is incarcerated, transcription should commence almost immediately upon the filing of an appeal notice and continue on a dedicated basis until completion.**

Ms. Morris also testified that counsel are increasingly following the spirit of the amended *Criminal Appeal Rules* (2002), which encourage transcription of only the portions of the evidence that will be referred to on the appeal. While this is promising, it is a limited solution. If the person conducting the appeal did not act on the trial, all of the evidence would have to be reviewed. Listening to the oral recording of a long trial is a much slower process than reading a transcript.

As we approached the Systemic Phase of this Inquiry, I learned that the problem of delay in criminal appeals due to transcription delays was under active review by the Chief Justice of Newfoundland and Labrador, the Honourable Clyde Wells. His detailed letter, referred to above, contains his analysis of the problem and avenues that are being pursued. He indicated that transcript delay statistics for the past 14 months showed a significant improvement over previous years. However, delays of up to 9 or 10 months still occur.

I was encouraged to learn that in 2004, a Court Administration Advisory Board was established. This board is intended to facilitate discussions between the courts and the Justice Department with respect to the

needs of the courts. The concern with respect to transcript delay has been raised in that forum and will be the subject of further attention.

In view of the current review of this matter by Chief Justice Wells, I offer no comment with respect to the specific avenues being explored. It is preferable that a local solution be found by those more familiar with local conditions, particularly, when an active process is underway.

There is, however, one specific recommendation I wish to make in order to clarify an issue raised in Chief Justice Wells' letter. This related to the interpretation of section 682(2) of the *Criminal Code*, which provides:

> (2) A copy or transcript of
> (a) the evidence taken at the trial,
> (b) any charge to the jury and any objections that were made to a charge to the jury,
> (c) the reasons for judgment, if any, and
> (d) the addresses of the prosecutor and the accused, if a ground for the appeal is based on either of the addresses,
>
> shall be furnished to the court of appeal, except in so far as it is dispensed with by order of a judge of that court.

In his letter to me he described a suggestion he made at a Benchers meeting in October 2003 and again at the mid-winter meeting of the Newfoundland Branch of the Canadian Bar Association in 2004:

> 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.

Of course this would not be possible nor probably desirable in certain cases, such as "prisoner" appeals or often when the lawyer handling the appeal was not the trial lawyer. Also, in criminal matters if S. 686(1)(b)(iii) of the *Criminal Code* is a <u>serious</u> issue most of the transcript will be necessary. Also if the appellant is the accused, a ground invoking 686.1(a) would also require much of the transcript. But I cannot imagine that in most cases <u>all</u> of

the evidence would be required. Also in my experience there are numerous cases where the grounds for appeal do not in the least require a full transcript. Many cases require a few short passages of, for example, a judge's ruling on a question of law, or charge to the jury, or even a passage thereof. Such error is not of the kind where 686(1)(b)(iii) would overcome the ordering of a new trial or an acquittal.

In my 22 years as an appellate judge a great many cases were dealt with by our being taken to a few passages of the transcripts, leaving me wondering why the taxpayers or the litigants had to foot the bill for sometimes well over 100 volumes of transcript and proceedings, and in many copies. **I therefore urge the lawyers to consider seriously, as officers of the court, this proposition suggested by their Chief Justice.**

Chief Justice Wells also raised the issue as to whether his disc proposal would satisfy the requirements of S. 682(2) of the *Criminal Code* which require a "copy or transcript of the evidence. " Out of respect for your Court of Appeal I shall refrain from expressing my view of the matter.

However, I recommend that the Lieutenant Governor in Council make a reference under S. 13 of the *Judicature Act* to the Court of Appeal of Newfoundland and Labrador asking the Court's opinion as to whether a disc or tape would satisfy the requirements of S. 682(2) of the *Criminal Code* which requires 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."

4. Conclusion:

(i) The System:

A common feature running through Mr. Dalton's sad journey was the narrow focus of so many of the actors. How could they appreciate the injustice that was occurring before their eyes when they did not see him as a person and did not listen to him? Senior Counsel (Hearings), Mr. Avis, expressed it well in his submissions when he said: "prisoners have no voice". He recounted his personal experience working in a penitentiary:

> They all kept saying to me: "Nobody hears what I say. Nobody pays attention to me. Nobody believes me...". Nobody was listening to Mr. Dalton. Mr. Dalton spelled out in correspondence to everyone what the problem was.

Mr. Eaton had difficulty coming to terms with his procrastination and simply left a number of letters unanswered. Mr. Day had difficulty coming to terms

with his procrastination and his medical condition. Ironically, his excellent reputation gave credence to his false assurances to Mr. Dalton, to the Legal Aid Commission, to the Court of Appeal, to the Crown and the Minister of Justice and to his own colleagues. Neither lawyer saw Mr. Dalton's situation in sufficient light to admit, at the outset, that they simply were not up to the task but that the situation was urgent.

The Legal Aid Commission applied its policies with respect to the claw-back and staff counsel rigidly and without contemplating the additional stumbling blocks they created for Mr. Dalton. They did retreat on both fronts with the assistance of the Appeals Board and the intervention of the Chief Justice, respectively. Instead of responding to Mr. Dalton's request for clarification about his option of retaining another lawyer, the Commission attempted to impose a staff lawyer on him.

The Crown and, through the DPP, the Minister of Justice, did not see the insult that Mr. Dalton's situation was to the due administration of justice. Nor did the Law Society recognize that at the core of this injustice was inadequate legal representation. Again they listened to Mr. Day and ignored Mr. Dalton and the stark reality that he placed before them.

Mr. Dalton engaged in ongoing correspondence with the Court of Appeal since his letter of January 1993, when he requested assistance to proceed unrepresented and explained why. In spite of a substantial paper trail of delay and the corresponding frustration of Mr. Dalton, the Court did not become proactive until almost five years later, when it intervened to have the legal aid certificate transferred to Mr. Kennedy. With respect, the Court needed no greater prompt than Mr. Dalton's letter of January 1993, to call a meeting of Crown and defence counsel and resolve the problem.

The Deputy Registrar, Madonna Morris, listened to Mr. Dalton. She followed up on the issues raised in his letters by contacting those involved directly, although she was under the direction of the Court, which chose a passive role. Mr. Day's junior counsel, Lisa Burke, understood Mr. Dalton's situation after she went to the courthouse to examine his file which was not accessible to her in her own law office. She took the initiative to tell Mr. Dalton that Mr. Day was not capable of solving his problem and she arranged for Mr. Kennedy to take charge. Mr. Kennedy certainly listened to Mr. Dalton and acted in an exemplary fashion.

However, many of the individuals and the institutions they represented often saw only the narrowest of issues for which they were specifically responsible. They did not recognize that their contributions were only meaningful in the context of the criminal justice "system". Each

of us has responsibility not only for our own specific tasks but also for the results ultimately reached by the "system".

This is not a new problem for the criminal justice system. The following passage is taken from an essay written by G.K. Chesterton almost 100 years ago, after he had served on a jury. He was impressed by the fresh perspective that a jury could bring to the work of professionals who could become insensitive because of familiarity:

> Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things... And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment they only see their own workshop.

The criminal justice system did not "see" Mr. Dalton for almost eight years and, <u>for that, we are all responsible.</u>

(ii) Ronald Dalton:

In ordering a new trial for Mr. Dalton, the Court of Appeal was very critical of the delay in his case. Mr. Justice Marshall stated:

> That concern would not dissipate if a retrial concluded with a reconfirmation of the initial trial's result.

Counsel for the Attorney General elaborated:

> ...no person, whether they be ultimately guilty or innocent deserves to wait eight years to have their appeal. No one deserves to sit in jail while the sword of Damocles hangs over their head, for eight years awaiting the eventual outcome.

Mr. Dalton withstood his tortuous situation with remarkable magnanimity. It is difficult to imagine what more he could have done in the circumstances to advance his cause.

His correspondence reflects a calm, objective and rational approach. When he felt he could get no further with his lawyers or with legal aid, he was polite but persistent in seeking to be heard personally by the Court of Appeal. He made the best of the draft factum he had received, made some additions and filed it. It was that persistence that ultimately led to the escape from his quagmire.

Mr. Dalton's correspondence is the more impressive when it is appreciated that it was conducted while in prison. All of his correspondence would have been opened and copied. Telephone access was difficult and haphazard. He suspected that even solicitor-client conversations were monitored. He corresponded by hand, when necessary, and by typewriter when he could gain access to one. He occasionally had access to a photocopier but often had to re-write his letters by hand for transmission to those who received copies and for his own records. He did not have access to facsimile transmission. Incoming faxes were transmitted through the director of the institution.

Throughout his incarceration he also faced additional personal problems such as the application for custody of his children. He also had to deal with the daily rigours of prison life. There were times that he did not have access to a pen or paper. He had been confined to solitary confinement on one occasion for 45 days in a solitary cell with only a bed. He had been so confined on other occasions as well for periods of up to two weeks.

This disciplinary action was often taken in response to conduct he felt was necessary in order to survive in a maximum-security prison environment. In addition, the prison could be subjected to a general "lockdown" because of a murder, stabbing or some other incident. What was accomplished by Mr. Dalton under those conditions was nothing short of remarkable.

During the course of the submissions by Mr. Simmonds, on behalf of Mr. Dalton, I made the following comment, in relation to the delay in the hearing of his appeal:

> I agree with you that Mr. Dalton bears no responsibility. He was as diligent as one can be when one is in a penitentiary...

My subsequent, detailed review of all of the evidence, strongly reinforces that conclusion.

CHAPTER 3: GREGORY PARSONS

1. Introduction:

Term 1(a) of the Terms of Reference authorizes me:

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

In addition, Term 4 authorizes me to make:

> ...any findings respecting practices or systemic issues that may have contributed to or influenced the course of the investigation or resulting prosecution in the case of Gregory Parsons...

As mentioned in Chapter One, *General Introduction*, some systemic issues will be addressed in this chapter, as they arise.

It is possible for a person to commit a criminal offence, to be tried and to be acquitted even though the person is actually guilty. A finding of "not guilty" may mean no more than that the Crown has not been able to prove its case "beyond a reasonable doubt". This is **not** such a case.

Gregory Parsons played no part whatsoever in the murder of his mother, Catherine Carroll. He is completely innocent. His innocence was established by DNA evidence which placed another male at the scene of the murder. That individual ultimately was apprehended, confessed and was convicted.

The conviction of innocent people has been established with increasing frequency in Canada in recent years. The Supreme Court of Canada recently referred to "a disturbing Canadian series of wrongful convictions" commencing with Donald Marshall Jr. in 1971 and including David Milgaard, Guy Paul Morin, Thomas Sophonow and Gregory Parsons: *The United States v. Burns* [2001] 1 S.C.R. 283 at paras 97 *et seq.*, commonly referred to as the *Burns and Rafay* case. In each of these wrongful convictions, a Royal Commission, such as this one, was established to determine what "went wrong" in order to determine how such gross miscarriages of justice can be avoided in future.

The most recent reports in the Morin and Sophonow inquiries have built upon the Marshall Inquiry Report. The Milgaard Commission has not yet reported. I, and the people of Newfoundland and Labrador, are fortunate to have the findings of these earlier reports to draw upon. The Morin Commission was conducted by my

good friend, and a former colleague on the Quebec Court of Appeal, the Honourable Fred Kaufman. The Sophonow Commission was conducted by another good friend and a former colleague on the Supreme Court of Canada, the Honourable Peter Cory. I have made liberal reference to their reports in order to avoid attempting to "re-invent" the wheel.

These reports and other literature identity a number of recurring features in wrongful conviction cases. These include:

- A crime which is horrible and alarming, giving it a high profile in the community and creating public pressure to find and convict the perpetrator immediately;
- An absence of direct evidence, leading to reliance upon "circumstances" which are subjectively interpreted to draw inferences of guilt; (frequently such inferences are logically weak and are, occasionally, "far-fetched");
- Reliance upon highly questionable evidence such as "jailhouse informants";
- The "demonizing" of a suspect, who may be a "loner", "outsider" or member of a minority group;
- Exaggeration of adversarial roles on the part of the police and prosecutors, leading to "noble cause corruption". This involves the justification of improper professional practices in order to achieve the perceived "correct" result.

All of these features may contribute to the malaise of "tunnel vision" which, in turn, may reinforce them, creating a vicious circle.

Tunnel vision is rarely the result of malice on the part of individuals. Rather it is generated by a police and prosecutorial culture that allows the subconscious mind to rationalize a biased approach to the evidence. Moreover, it is mutually reinforcing amongst police officers, amongst prosecutors and in the interaction between these groups of professionals. It may even affect judges.

Commissioner Kaufman described tunnel vision as:

> ...the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to the information.

Commissioner Cory elaborated:

> Tunnel Vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes

> tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.

Once "locked in" to the theory of their case, it is not difficult to understand how some police officers, with "noble" motivation, may move from mere interpretation of the evidence to more malignant practices. These could include "assisting" witnesses in their recollection, ignoring relevant evidence that does not support their mission and using coercion to attempt to obtain admissions from the single suspect, whose guilt is assumed.

Many of these consequences became visible in the case of Gregory Parsons. It is important to emphasize that these were not the result of personal malice. This "disease" is transmitted through individuals but it does not mean those who carry it are evil. There is no question that the conduct of the professionals "infected by this virus" has inflicted profound pain and suffering on the victims...the accused, family and friends. However, in the case of Gregory Parsons, I perceive that it has also caused genuine anguish to those professionals who were misguided by tunnel vision, for the pain and suffering it has caused.

I agree with the submission of Association in Defence of the Wrongfully Convicted (AIDWYC), that "the causes of wrongful convictions are fundamentally systemic". Commissioner Kaufman also emphasized systemic problems:

> The case of Guy Paul Morin is not an aberration...What I mean is that the causes of Morin's conviction are rooted in systemic problems, as well as the individual failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in future.

It is important, therefore, when considering the tragic plight of Gregory Parsons, to bear in mind that many of the individual failings within the criminal justice system may have been driven by systemic forces, primarily, tunnel vision.

2. Chronology of Events:

(a) Background:

Gregory Jacob Parsons was born on September 19, 1971. His older brother Todd was born on September 18, 1969. His parents were separated in 1977, when Gregory was 6 years of age. They were divorced in 1979, when his mother resumed

using her maiden name of Catherine Carroll. His father, Jacob Parsons told the police that during the marriage, she abused alcohol and prescription drugs and suffered from psychiatric problems. In the last few years of the marriage she had taken drug overdoses and attempted to commit suicide by trying to jump from a moving car and to hang herself. On one occasion, she stabbed him in the ribs with a knife.

After separation in 1977, Jacob Parsons had custody of their two sons until 1981, when they moved in with their mother. In March 1981, Jacob Parsons moved to Yellowknife, N.W.T., where he continued to reside until the murder of Catherine Carroll in January 1991.

In March 1983, the children were made wards of the Director of Child Welfare after Catherine Carroll had been found drunk in her home. The children were returned two weeks later under a one-year supervision order. However, Todd moved in with his grandfather from October to the following February. Todd had difficulty living with his mother and spent time living at the Mount Cashel Orphanage and then with his aunt before moving to Yellowknife to join his father in 1988.

Gregory also visited his father in Yellowknife at the time and was invited to stay. His father offered him lodging and employment. However, Gregory testified that he knew he had to return to his mother because she needed him and she was also a big part of his life. He recalled her battles to overcome alcoholism when he was very young, as well as the bitter divorce and her determined court struggles to regain custody of her sons.

Although Catherine Carroll was an alcoholic, she had not relapsed since 1988. She was prescribed numerous medications from various doctors for her depression and anxiety. During the twelve months prior to her death, she was prescribed 7,723 pills, many of which she accumulated. She also "hoarded" food and beverages. Her freezer was full of out-dated food and she kept numerous cases of Diet Pepsi under her bed. Her home reflected an obsessive need for meticulous cleanliness and order. There was ample evidence of bizarre behaviour on her part, often attributable to alcoholism relapses, taking or withdrawing from medication and her personality disorders.

Gregory Parsons' testimony provided insights into her behaviour:

> She had her problems and she was a very lonely lady, and she'd say anything to get a bit of attention.

He felt she must have sought and received sympathy when telling people that she was afraid of him. But she also could be crafty in using such allegations for other purposes:

> ...my mother also struggled with compulsive disorders and if my mother seen something, she wanted it and she knew the system. She knew the system inside out. So if she figured that the next door neighbour got their apartment painted, she was getting her apartment painted. Now if the cost of getting it painted was to say that my son got the house tore up, so be it. If she wanted new locks...things were fanatical with her. Whatever she wanted, she would go to extremes. But on the other hand she was extremely loving.

The many statements made by Catherine Carroll about fearing Gregory Parsons, because of his alleged threats and assaults, played the central role in his conviction.

He explained that she always welcomed his friends:

> We were always around the door, we were always in the yard, we were always in the basement and that is what my mother wanted. If we were down in the basement having a couple of beers, 16 and 17 years old, she was at peace. At least she knew where we were.

Many of the other children in the neighbourhood, who were not part of his circle of friends, became involved in criminal activity. Gregory and his friends were downstairs playing music or "hanging out" while other were on the streets getting into trouble.

However, her generosity could also turn to resentment or a vehicle for getting attention. For example, she would complain to others about the noise Gregory and his friends made. She invited a person, who had no place to stay, to use her couch. Within two weeks, she complained to the police that he was stealing from her home. After befriending her next door neighbours, she accused them of stealing her newspaper money. Her compulsive behaviour caused her to make demands on her son that she insisted be fulfilled immediately. He gave, as an example, her demand that he immediately replace her extensive stockpile of Diet Pepsi because the aspartame had gone bad over time.

Although, he was only 18 years of age in the year prior to his mother's death, Gregory Parsons had done remarkably well in coping with his mother's behaviour. He had a good reputation in the community as was witnessed by the extensive "petition" gathered in support of his release on bail while in custody. This was also confirmed through the interviews conducted by the second police investigation, following his acquittal. He would take out garbage for disabled people in the

building where he lived. He would also mow lawns and shovel snow for elderly neighbours.

He tried to pursue his schooling and considered himself a good student but he had to work. He dropped out of Grade 12 three years in a row because of his carpet cleaning business, which he started at age 16. The demands of the business meant he seldom attended classes. The Christmas period, when exams were held, was the busiest time.

By March 1990, the demands of his mother were becoming very difficult for him and he moved into an apartment shared with some friends. However, since he was experiencing financial difficulties and his relationship with his mother had improved, he moved back in with her in August. Her demands immediately increased and he moved into another apartment with some other friends a few weeks later. Tina Doyle testified that his mother twice asked him to move out in the summer of 1990.

Gregory Parsons had been dating Tina Doyle since he was 16 years of age. He also became close to her family, who treated him as a son. Arrangements were made for him to move in and live with them in the New Year.

Tina Doyle worked at a Royal Bank office. In November, Catherine Carroll tried to reach her by telephone. When her call was not returned, she called the bank manager to complain that Tina was "giving out bank secrets". Ms. Carroll later admitted that this was untrue but was done out of annoyance with Tina. Both Tina Doyle and Gregory Parsons were understandably upset. Although he had just turned 19, he took the initiative of going to see his mother's psychiatrist to discuss her bizarre behaviour.

Gregory Parsons continued to maintain a good relationship with his mother while he resided outside of her home. He visited her regularly and spoke to her by telephone. On New Year's Eve he visited her in late afternoon for approximately twenty minutes and mentioned that his father was in town since he had sighted him earlier at a shopping mall. Tina Doyle waited in the car during the visit since her relationship with Catherine Carroll was still strained because of the telephone call to her manager the previous month.

Gregory spent that evening at Tina Doyle's home, where they looked after her younger brother. He telephoned his mother shortly after midnight and wished her a happy New Year. He intended to stay overnight and was sleeping on the couch when Tina's father came home around 3:00 a.m. Harold Doyle was a taxi-driver and soon received a call from a friend who was unable to get a ride home. The morning was extremely cold and there were many people in the streets seeking a taxi. He agreed to help out his friend.

Tina then suggested that Gregory take the ride to return to his apartment to tend to his dog, who had been alone since early the previous evening. He agreed that was a good idea and accompanied her father on the ride and then was dropped off at his apartment at approximately 4:00 a.m. After letting his dog out, he turned out the light and went to sleep. While he was sleeping, his mother was laying dead on her bathroom floor.

Gregory Parsons slept in until early afternoon on New Year's Day. After a New Year's supper at Tina's aunt's house, at about 7:00 p.m., he went to visit his mother, accompanied by Tina and her brother, who both waited in the car while he rang the doorbell and knocked on the door. When there was no answer, he assumed she was out visiting and they returned to the aunt's house.

On January 2nd, he called his mother a number of times but received no answer. At approximately 10:30 p.m., he returned to her home with Tina, who again waited in the car. When he received no response to his knocking, he gained entry to the house by "popping" out a front window. He was led upstairs by the dog, who was barking. The bathroom door was closed and locked and he released the lock by punching it. He discovered his dead mother, Catherine Carroll, covered in blood. He ran outside and screamed to Tina Doyle that his mother was dead. He then called 911.

(b) The Murder Investigation:

Gregory Parsons and Tina Doyle waited in the hall where he also made telephone calls to a priest, his aunt and Tina Doyle's father. Two firefighters soon arrived and were directed to the bathroom where they found Catherine Carroll lying dead in a large pool of dried blood. Two ambulance attendants then arrived with a medical doctor resident and a medical clerk. They were followed by a series of police officers, a pathologist, a priest and Tina Doyle's father, who all entered the house (a total of 18 persons). Gregory Parsons and Tina Doyle were questioned briefly in the hall, by the police. They left the house shortly before midnight.

Any visitor to Catherine Carroll's home that morning would have noticed that it was meticulously clean and orderly. There were two significant exceptions. The first was the horrific scene in the bathroom. The second was a basement window that had been damaged. A latch that had been broken off the window frame was lying on the floor and the curtain rod was hanging down along with the curtain itself. The police concluded from a superficial visual examination that the window could not have been the point of entry for the murderer. They assumed that it had not been disturbed for some time and that it was too small to allow a person to enter.

Less than four hours later, at 3:35 a.m. on January 3rd, Gregory Parsons and Tina Doyle received a telephone call from Sergeant Alban Singleton (now Inspector), the "lead investigator", who requested that they come to the police station. They arrived shortly before 4:00 a.m., were separated, and Tina Doyle was interviewed by Sergeant Singleton and Constable Paul Hierlihy (now Sergeant) while Gregory Parsons waited. At 5:15 a.m. they began to interview him and concluded shortly before 8:00 a.m. when Gregory and Tina left the police station.

Gregory Parsons' recorded statement is less than six pages long. In the statement, he was honest in describing how his mother would "nag" both him and his brother, causing both of them, ultimately, to move out. He was specifically asked if he had ever assaulted his mother and responded honestly by describing an incident arising out of her compulsive behaviour. After he had moved out of her house, she called to tell him she wanted his remaining belongings out immediately. Shortly afterwards, she called to tell him she had placed them on the front lawn. However, when he came to collect them, his VCR was not included:

> When I went to get my VCR she said I couldn't have it so I held her arms and walked her backwards after she wouldn't enter the living room. While walking her backwards she fell and hit the coffee table hurting her upper back.

He took her to the hospital to have it examined.

In his statement, he also spoke of her compulsive behaviour in stockpiling groceries, her threats to commit suicide, her alcoholism, psychiatric problems and medication. He was asked if he had ever noticed a broken window in the basement and responded:

> There was a pane partly broken but a pane was always over it. There was **always** a curtain over it. [Emphasis added].

He also stated that he had not been in the home since before Christmas.

The police ignored his statement about the window curtain and did not ask him to examine the state of the window that morning. If they had, they would have learned that it was a frequent point of entry and exit for him and his childhood friends. One of them was the person who murdered his mother.

Early that afternoon, Catherine Carroll's lawyer, Stephen Roy, was advised by a police officer acquaintance of the nature of her death. He attended at the police station and gave a statement around 4:00 p.m. He recounted that she had complained to him of her "problems" with Greg and would call him about these problems. He stated:

> On one occasion she told me how Greg held a knife to her and he told her that some day he would kill her and when he did he would cut her up in small pieces.

He said he advised her to lay a criminal charge, which she declined to do. He understood she did take steps to obtain a peace bond but did not follow through. He advised her to have her locks changed and assumed she had done so. She later advised him that "Greg had a key" and that she seemed surprised about this.

Also, early that afternoon, the police obtained a statement from her psychiatrist, Dr. Omesh Kashyap. He also spoke about the "conflictional" relationship between Gregory Parsons and his mother:

> I feel that he had tendencies toward violence towards her...I do know that the fear she expressed over the past three months were that she was afraid that he was going to hurt or kill her.

It is difficult to appreciate why Dr. Kashyap would accept her description of their relationship at face value in light of his original assessment of her some six years earlier:

> She had a tendency to exaggerate and dramatize all the problems that she has gone through in her life...In conclusion, she obviously demonstrates personality problems in the way of being demonstrative, manipulative, self-destructive and easily excitable. These traits go along with a histrionic personality type and when this is combined with the stormy life that she has led and the drinking and drug problem that she was involved with, it does not make her an easy case to deal with by any means.

If this analysis had been taken seriously, it would have provided the basis for an accurate assessment of her false statements, which accused and ultimately convicted her son.

Dr. Kashyap subsequently moved from St. John's and could not be located. He did not testify at the trial.

It appears that after receiving these two statements, less than 24 hours after discovering the body, Sergeant Singleton and others directing the investigation were satisfied that it was Gregory Parsons who killed his mother. A number of consequences flowed from that conclusion:

- No serious efforts were made to investigate alternative explanations. In particular, no reliance was placed on Gregory Parsons as the person most likely to lead to discovering the murderer.

- Evidence inconsistent with the guilt of Gregory Parsons was ignored or minimalised.
- Evidence consistent with his guilt was exaggerated in importance.
- Evidence that was irrelevant was treated as supporting his guilt.
- Investigative measures such as the questioning of witnesses and the search for the weapon were skewed in favour of establishing his guilt.

In sum, the investigators were securely ensconced in the tunnel.

Gregory Parsons was asked to return to the police station at 5:15 p.m. that evening for a further interview. During that interview, his behaviour was interpreted as being highly suspicious when asked about a cut on his hand. He was co-operative and removed strands of hair from his head for testing. He agreed to take a polygraph test the next day but immediately prior to the test, was subjected to questioning that he described as verbally and mentally abusive. He subsequently was advised that he failed the test.

The subsequent "analysis" of his reaction to the polygraph results and other statements can only be described as absurd. For example, Gregory Parsons thought his mother had committed suicide and responded to the polygraph results by saying that the autopsy would show it was not a murder. This was interpreted as establishing that he knew she died of a heart attack brought on by blood loss, which was the autopsy finding. It was also viewed as "very suspicious" that he reported his telephone conversation with his mother shortly after midnight as ending with her saying "Goodbye". Apparently since he was to visit her later that day, she should have said: "See you tomorrow" or "See you later". In contrast, "Goodbye" had an air of finality!

The incident involving the VCR, described in Gregory Parsons' statement, had resulted in Catherine Carroll applying for a peace bond against him. He wrote a letter in response to her allegations and met with the Justice of the Peace who was to deal with the matter. His mother did not pursue it. The letter provided a brief description of his mother and the childhood abuse suffered by him and his brother. The submissions on behalf of Mr. Parsons stated:

> To the objective reader, the peace bond letter contains the words of a frustrated but loving teenaged son who is crying out for help for his troubled mother. To the police and the Crown it became a damning piece of evidence that proved that Mr. Parsons hated his mother.

Sergeant Singleton simplistically described it as providing insight into the motivation for Gregory Parsons to kill his mother.

The theory then percolating in Sergeant Singleton's mind, and ultimately finding expression in his report, was that Gregory Parsons had returned home at 4:00 a.m., became enraged at his mother, took a serrated table knife, walked the more than two kilometres to her home, entered with a key in his possession, murdered her, locked the doors on leaving and returned home. In support of the theory that this had occurred at approximately 5:00 a.m., he sought to establish that a light was on in his apartment at that time. Mr. Parsons tended to leave a light on for his dog when he was away so this would establish he was absent rather than in bed sleeping. Sergeant Singleton also sought to establish that a neighbour heard noises in Catherine Carroll's apartment at approximately 5:00 a.m., which would be consistent with this theory.

In the days that followed the murder, over two dozen people gave statements that Catherine Carroll had told them about trouble she was having with her son Gregory, that he had threatened her and that he had assaulted her. No one had actually seen any such conduct on the part of Gregory Parsons and all of the allegations arose from the same troubled source, Catherine Carroll. However, the vivid description of the feared attack, which was described by Stephen Roy, and the frequency of these allegations reinforced the certainty of the police theory in their eyes. In addition, there was evidence that Catherine Carroll had applied for a peace bond against Mr. Parsons. Although it was abandoned, even that was interpreted as evidence of manipulation or coercion on his part.

On January 9th, Sergeant Singleton and his partner, Constable Hierlihy, met with the Director of Public Prosecutions (DPP), Colin Flynn, and the Assistant DPP, Bernard Coffey to discuss the strength of the case against Gregory Parsons. This meeting was arranged by Superintendent Leonard Power (retired as Chief and now deceased), head of the Criminal Investigation Division and Lieutenant Alex Kielly (now retired), the officer in charge of Operations for that Division. Since the evidence was entirely circumstantial, a great deal turned on the admissibility of the hearsay statements, particularly those in which the deceased expressed fear of her son. The police officers were advised that a recent decision of the Supreme Court of Canada made it likely that such hearsay would be admitted and, if so, a conviction also was likely. There was no critical assessment of individual statements, nor any attempts to weigh their probative value against their prejudicial effect.

Bernard Coffey was the point of contact for the police throughout this investigation for providing legal advice. He assisted in preparing warrants and actually attended at the police station on the night of the arrest.

On January 10, 1991, at 8:35 p.m., Gregory Parsons was arrested, read his rights, handcuffed and brought to the police station by Sergeant Singleton. Gregory Parsons testified before me that, apart from finding his mother dead, his treatment

following his arrest was the most horrifying thing he had to endure. It was: "Degrading, Humiliating." As soon as the door of the police cruiser closed:

> ...the mind games began, the mental abuse, the torture...Gets me back to the station, strips me down to my underwear, haves me holding out my hands. This went on for hours. I'm telling you into an hour of it I felt like I never slept in days or weeks. It was the most mentally draining thing I've ever had to endure.

Constable Hierlihy played the "good cop" who would be alone with Gregory Parsons and reassure him that there seems to be truth in his responses. Sergeant Singleton would then come in and ask "what kind of sick bastard would kill and rape their mother?".

At approximately 10:45 p.m., his lawyer, Robert Simmonds arrived and told the police his client was exercising his right to remain silent and would have no further comment. After he left, the officers obtained advice from Bernard Coffey that they could continue their interrogation and they did:

> ...so during this mental torture, all I would say to them is, gentlemen, I'm exercising my right to remain silent. I said this thousands of times, basically begging them to put me in jail...

There was conflicting evidence as to how long he remained stripped of his clothes, and in his under shorts, as the interrogation continued.

Eventually, he was given a white paper suit and a pair of very large police boots with no laces and his hands were cuffed behind his back. It was 2:20 a.m. when he was required to walk up the hill from the police station to the lockup. It was bitterly cold and there was:

> ...a snowstorm with snow up to my waist...and as I was walking up to the lockup I was falling face first into the snow, and they thought it was the most comical thing they've ever seen, look at the Ghostbuster, look at the Ghostbuster. I was drenched. I was freezing. I was shivering...

He could not recall whether he was given clothes when put in a cell but he did recall having blankets. It was "four or five days" before he was permitted to have a shower.

(c) Judicial and Related Proceedings:

(i) Judicial Interim Release:

Bernard Coffey, on behalf of the Crown vigorously opposed bail for Gregory Parsons even though its theory was that the entire motive for this murder was his intense hatred for his mother. If that were the case, there would be little concern about him being a danger to the public. The presiding judge certainly seemed to have some concerns about the accused being the right person. He commented on his background and then said to an expert witness:

> ...and in every respect, he seems to be an unremarkable young man, and I look at the photos here of the deceased, his mother, and it belies I guess, that you could believe that somebody who's essentially unremarkable and never been involved or in trouble before could commit such a crime. Is that the classic matricide type of person? Is it possible that a person can be sort of an unremarkable individual suffering from no obvious mental or physical disabilities and then just explode?

The witness' response was not very helpful, but Justice Halley, in that passage, asked a fundamental question reflecting common sense. Gregory Parsons was released on bail on January 21st.

(ii) Disclosure:

Gregory Parsons' preliminary inquiry did not commence until over a year later, on February 19, 1992. Meanwhile, Mr. Simmonds sought disclosure of the Crown's case against his client. Bernard Coffey, on behalf of the Crown, permitted access to most of the witness statements and other documents in its possession. However, this disclosure was made under highly unusual and stringent conditions. The file was not to be photocopied but it could be re-typed. It took 61 hours for Mr. Simmonds' assistant to transcribe the documents.

No satisfactory explanation was provided for imposing this requirement. Other responsibilities prevented Mr. Coffey from conducting the preliminary inquiry on behalf of the Crown. A private lawyer, Mark Pike, was retained for that purpose and Mr. Pike simply provided copies of all of the relevant documents to Mr. Simmonds.

(iii) Conflict of Interest:

At the bail hearing, Mr. Coffey alleged a conflict of interest on the part of Mr. Simmonds but this was rejected by the presiding judge. At the outset of the preliminary inquiry, he again sought the removal of Mr. Simmonds as defence counsel because of an alleged conflict of interest.

The position of the Crown was that Gregory Parsons' father was intended to be called as a Crown witness and Mr. Simmonds had earlier represented him in a dispute with his former wife, Catherine Carroll, over maintenance payments. Jacob Parsons had signed a comprehensive and irrevocable waiver of any solicitor-client privilege arising out of that matter. Gregory Parsons also signed a consent and declaration of full knowledge of all of the past and anticipated circumstances. Each of them had obtained independent legal advice prior to signing.

The judge conducting the preliminary inquiry rejected the Crown's motion. The Crown then sought judicial review in the Supreme Court of Newfoundland which also was unsuccessful. The Crown then appealed to the Newfoundland Court of Appeal.

The appeal was dismissed orally at the hearing and written reasons followed. The Court stated that although conflicts often arise from "possibilities", they must be based on "some evidentiary foundation", and that simply did not exist in this case. Even if a conflict were to be assumed, the interests of Gregory Parsons and Jacob Parsons were addressed by the waivers. With respect to the public interest:

> ...public confidence in the criminal justice system might well be undermined by interfering with the accused's selection of the counsel of his choice.

The Court criticized the entire basis for the motion:

> With respect the Crown's position appears to be founded on conjecture and assumption...

Indeed, it appears the Crown went so far as to raise an additional argument that defence counsel might also be called as a witness in future. This was based solely on his testimony on the discrete and preliminary issue of the conflict of interest!

Ultimately, Jacob Parsons was never called as a witness.

(iv) Preliminary Inquiry:

On July 31, 1992, Gregory Parsons was committed to stand trial for first-degree murder by Judge O.M. Kennedy. He provided detailed written reasons for his decision. It is important to bear in mind that the threshold for committal on a preliminary inquiry is very low. The test is whether there is **any** evidence upon which a reasonable jury, properly instructed, **could** convict. The judge is specifically precluded from **weighing** the evidence, as must occur at the trial.

Judge Kennedy concluded that most of the hearsay statements were admissible under an exception to the Hearsay Rule which would limit their relevance. They could be used as evidence of Catherine Carroll's "state of mind" (her fear of her son) but they could not be used to prove that he had made threats to her or actually harmed her. He ruled that the statements were not admissible under the authority of *R. v. Khan,* [1990] 2 S.C.R. 532, which would have allowed their use for the latter purpose as well. Although Judge Kennedy found there was sufficient circumstantial evidence to meet the minimal test for committal, he also made some observations that related to the strength of the Crown's case, even though his role did not allow him to "weigh" the evidence.

He referred to the testimony of Justice of the Peace McDougall, who had dealt with the peace bond application:

> Mr. Parsons spoke to Mr. McDougall about his mother. He mentioned her drinking problems and addiction to drugs. The whole theme of Mr. Parsons' conversation as Mr. McDougall recalled it was "what can I do to help her, I don't want to hurt her, I want to help her."

Judge Kennedy also described the testimony of a forensic psychiatrist, Dr. Nizar Ladha:

> He found no evidence of a mental disorder and no evidence of a social personality disorder. Dr. Ladha stated that the literature on matricide indicated that people who commit such an offence often **if not pretty well all the time** suffer from a serious mental disorder. [Emphasis added].

However, these observations gave no pause to the police or the Crown to ask whether they had the right person.

He commented specifically on the testimony of Isabel Crane, who was Catherine Carroll's closest friend and who spoke with her daily by telephone:

> Although the Court is somewhat concerned about her ability to recollect accurately or to perceive accurately, her memory and perception of events are not so questionable or suspect as to cause her evidence to be excluded.

The weight to be assigned to such evidence was another matter. He also declined to exercise the overarching discretion to exclude evidence whose probative value is outweighed by its prejudicial effect, but added:

> In a jury trial the prejudicial effect may have to be scrutinized more closely.

The private lawyer, acting for the Crown at the preliminary inquiry, testified before me that the prosecution was "a weak circumstantial case".

(v) The Trial:

The Trial of Gregory Parsons for first-degree murder commenced on September 23, 1993, before a judge and jury. The file had been transferred to another Crown attorney, Catherine Knox, who began actively working on the case in late July or early August. Although she was an experienced trial lawyer, she faced a formidable task in preparing in time for the trial, at which 119 witnesses were called over three and one-half months.

At the outset, a *voir dire* was conducted by the trial judge to determine the admissibility of the hearsay statements made by Catherine Carroll. These statements included expressions of her fear of Gregory Parsons and allegations that he had threatened and actually assaulted her. Perhaps the most prejudicial was the alleged statement to her lawyer that he held a knife to her, threatened to kill her and would cut her up in small pieces. Some also alleged that she had changed her locks because of her son and expressed her fear that he had obtained a key. These statements were made to her lawyer, doctors, a police officer, a priest, a justice of the peace, housing authority employees, taxi drivers, friends and neighbours and teachers and students from Compu College, the community college where she took classes.

Some 53 witnesses were called on the *voir dire* with respect to these statements. Although he could have been an important witness in relation to the admissibility of these statements, Gregory Parsons was not called as a witness on the *voir dire*. In order to be admissible in evidence, each of the statements would have to pass the test of "reliability" established by the Supreme Court of Canada in *R. v. Smith*, [1992] 2 S.C.R. 915. This requires

some "circumstantial guarantee of trustworthiness" to overcome the fundamental unfairness of convicting a person on hearsay statements. Otherwise, the statements may have been made in circumstances rendering them unreliable and, since the maker of the statement is dead, there is no opportunity to cross-examine in order to demonstrate that unreliability.

The judgment of the Supreme Court of Canada in the *Smith* case, which I delivered, contains the following passage:

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable"...

The mere fact that similar statements were made by the declarant on numerous occasions does not enhance the reliability of any of them.

It is sometimes overlooked that, in addition to the two hearsay statements that were admitted in the *Smith* case, a third hearsay statement was rejected. In relation to that third statement, I said of the declarant:

> She was, therefore, at least capable of deceit.

This characteristic of the declarant, Catherine Carroll, is analyzed in some detail, *infra*, at pp. 111 *et seq.*, under the heading, *Hearsay Statements of the Victim.*

The *Smith* case also stated that even where the circumstances "negate the possibility" that the statement is unreliable, the trial judge has a further responsibility. That responsibility is to exercise the over-riding discretion of trial judges:

> ...to exclude the evidence when its probative value is slight and undue prejudice might result to the accused.

The *Smith* decision was not designed to make it "easy" for trial judges to admit hearsay evidence. It imposes on them a stringent obligation to analyze the evidence and to exercise sound judgment.

A review of Mr. Simmonds' argument on the *voir dire* reveals a convincing demonstration of the contradictions and inconsistencies in Catherine Carroll's statements. He also demonstrated that they contained complete fabrications verging on bizarre behaviour. He also offered possible explanations for the unreliability of her statements such as seeking attention and failing to take her medication. In my view there were no "circumstances

which substantially negate the possibility" of unreliability. **Indeed, the circumstances establish that these statements were unreliable.**

However, without any meaningful analysis of the reliability of these statements, the trial judge ruled them all to be admissible. Nor did he engage in the required exercise of his discretion as to whether their probative value was outweighed by their prejudicial effect.

The Crown also sought to introduce a tape recording of a song composed by Gregory Parsons and six of his friends as part of a band. The words to the song included:

> Kill your fuckin mother, kill your fuckin father. Stab once, stab twice. Ha, ha, ha, ha. Kill your parents.

There was evidence by another friend that the song did not have any particular significance but was done as a joke in imitation of "trash" music, which generally features "death and destruction". The tape had been made over two years prior to the murder and there was no evidence it was played with any malice or bad feeling by Gregory Parsons towards his mother. The trial judge purported to weigh the probative value of this evidence against its prejudicial effect but again ruled the evidence to be admissible.

A third significant error was made by the trial judge. This arose out of these comments made by Crown counsel in her closing address to the jury:

> ...you have to ask yourselves the following question, if Greg Parsons didn't cause his mother's death who did?

This statement is obviously improper since it suggests the accused has an obligation to establish that someone other than him had committed the murder. The trial judge ruled against defence counsel's objection and added:

> I think the remark by Ms. Knox was a rightful and a legal remark to make. As a matter of fact, I think she would have been negligent not to have made it.

He declined to give the jury any specific direction in relation to this comment.

The relationship between Crown and defence counsel deteriorated over the course of the trial. Many issues were hotly contested. Defence counsel was of the view that the trial judge had systematically and unfairly ruled against him and had made disparaging comments towards him.

The trial judge commenced his charge to the jury on February 9, 1994. On February 15, 1994, the jury returned a verdict of guilty of second-degree

murder. Gregory Parsons was sentenced to imprisonment for life with no eligibility for parole for fifteen years.

(vi) The Court of Appeal:

Gregory Parsons appealed his conviction and applied for judicial interim release pending the appeal. With detailed reasons by Marshall J.A., the Court of Appeal granted bail and he was released.

Bail pending an appeal from a murder conviction, particularly a gruesome murder, is unusual. However, the reasons given, amply support the decision by taking into account:

- the grounds of appeal;
- the eighteen month delay (possibly nine months if expedited) that would be required to obtain the transcript;
- the character of the accused, the unique nature of matricide and the absence of any psychiatric disorder on his part;
- the entirely circumstantial nature of the case rendering any possible error likely to be fatal to the conviction;
- the extraordinary community support demonstrated toward Gregory Parsons.

The last factor was demonstrated by a statement signed by some 300 residents in the community where Tina Doyle and her parents resided. It is a distinct community where he also resided for most of the time pending and during his trial. The statement, in effect, welcomed his potential return and had no concerns for public safety in that regard. Support was also expressed in some 31 affidavits from relatives and friends. These expressed support for his release, willingness to assist him in complying with release conditions, undertakings to report any breach of such conditions and pledging assets in support of his release.

However, the Crown applied for a review of the decision of Marshall J.A. by the full Court. The review was conducted by a panel consisting of Morgan, Gushue and Steele JJ.A. They referred to the "lengthy and well-reasoned decision" of their Colleague and dismissed the application on the merits.

His appeal was not heard until two years later, on March 11, 1996. The Newfoundland Court of Appeal quashed the conviction and ordered a new trial on the basis of the three significant errors on the part of the trial judge: (1) The hearsay statements should not all have been admitted into evidence. (2) The "kill tape" should not have been introduced into evidence. (3) The

jury should have been recharged to diminish the adverse effects of the Crown attorney's statement as to "who did?".

With respect to the hearsay statements, O'Neill J.A., on behalf of the Court said:

> No attempt was made by the trial judge to examine and rule on the effect which the admission into evidence of any statement made by the deceased would have on the admission into evidence of a similar statement made by her to another witness, nor as to the cumulative effect of the admission into evidence of all these statements.

The Court declined to rule on the admissibility of any particular statement but had no hesitation in concluding that a serious redundancy was created by accepting all of the statements.

> Further, it does not appear that, in deciding to admit all the out-of-court statements into evidence, the trial judge entered into that balancing of the probative value of these statements with, in my view, the highly prejudicial effect which the sheer volume and repetition of this evidence would have on the jury, an effect which could not be displaced, or even lessened to any meaningful extent, by any instructions to the jury.

The Court left for the new trial judge, the task of analysing each of the statements and determining which, if any of them, would be admissible.

With respect to the Kill tape, O'Neil J.A. stated:

> The trial judge...recognized the principle of balancing the probative value against its prejudicial effect but does not seem to have applied it to the particular circumstances.

He added that, in considering all of the evidence related to the tape, there were some very serious deficiencies in its probative value:

> The prejudicial effect is a very great one and, in my view, substantially outweighs whatever probative value there might be.

Such an error could not be corrected by any instruction to the jury as to how such evidence should be considered.

Counsel for Gregory Parsons on the appeal raised a number of concerns about the conduct of Crown counsel at the trial. The Court

addressed only her statement to the jury asking who did commit the murder if it was not the accused. In this respect, the trial judge should have recharged the jury as to its real function and:

> ...disabused them of the notion that they could somehow conclude that the accused was guilty because it may not appear from the evidence that some other person might have done it.

The conviction was quashed and a new trial ordered.

The Crown then sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. The application was denied. Surprisingly, at least at first blush, Gregory Parsons consented to the application, even though he had been successful in having his conviction quashed. He was confident that if the Supreme Court of Canada heard the case, it would rule **all** of the hearsay evidence inadmissible. It would then be in a position, unlike the Court of Appeal, to enter an acquittal rather than merely order a new trial.

He was of the view that the Supreme Court of Canada never intended that its decision in the *Smith* case should be used to convict an innocent person on such patently unreliable and dangerous evidence. In my humble opinion, he was right!

(d) Awaiting A New Trial:

(i) Fulfilling Release Conditions:

Gregory Parsons was released on bail both pending his appeal and while awaiting a second trial. He testified that while this allowed him to be with his family and, certainly was better than incarceration, he was not completely "free". He was constantly in fear that he might one day forget to "sign in" at the police station. When he did so, he was subjected to snide comments and "mind games". For example, an officer told him he could not find his file, which meant there must be a warrant out for his arrest. He waited long enough for panic to set in before laughing and producing the file. Also, bail conditions changed and during one period, he was required to telephone the police to explain his every movement.

On one occasion he was told he had not signed in the previous day. The clerk said that she had let the police know this so they could take the necessary action (of arresting him). Gregory Parsons knew she was mistaken and asked her to check the files of everyone who had signed in the previous day. When she did so, she discovered her error.

The police frequently followed him and his family. On one occasion, while attending church, his father-in-law was called back before entering and was required to show his driver's license. Mr Parsons had a small sports car that was easily recognizable. After being frequently pulled over by the police, he sold it.

Without a job to support his family, he attempted to start a gym business, where people would come to work out. Police officers would make a point of parking their squad cars with their lights shining into the gym. Two RNC officers, wearing side arms came into the gym during the peak evening hour looking for one of his customers. Operating his gym was a very pleasant experience for Mr. Parsons. It had a light, social atmosphere but, ultimately, the police harassment led to him having to cease operations. Two incidents, in particular, will be examined in greater detail.

(ii) The Assault Charge:

There was no evidence before one to suggest the police conduct described in this section was part of any "plan" on the part of the RNC. But it did reflect an attitude on the part of some police officers that Gregory Parsons deserved to be harassed.

During the period while he was awaiting his new trial, Gregory Parsons would occasionally encounter Corey Evans, who had a lengthy criminal record. Since he knew Mr. Parsons was free under bail conditions, Mr. Evans would taunt him, knowing there was no fear of retaliation because of the risk of him being incarcerated for breach of conditions. In mid-April of 1997, Mr. Parsons was at a club with a friend when Mr. Evans approached them and again taunted him. The friend stepped between them, and when Mr. Evans became more aggressive, the friend knocked him out. The attendants at the club removed Mr. Evans but also asked the friend to leave. When Mr. Parsons and his friend left, they saw Mr. Evans outside, but he merely shouted some obscenities and fled in a taxi.

The next day, Gregory Parsons was looking after his young child at his father-in-law's home when the police arrived. They took him into custody and charged him with assault causing bodily harm. He was incarcerated pending his appearance in court, which received extensive media coverage.

Apparently, the police had simply accepted the complaint from Corey Evans at face value and without any proper investigation. Several witnesses gave statements indicating that Mr. Parsons had not committed the alleged assault. The statements given by Mr. Evans contained several inconsistencies. While Mr. Parsons was again released on bail, more stringent conditions were

imposed and the charge was not withdrawn. Instead, a stay of proceedings was entered, for no apparent reason.

Gregory Parsons filed a complaint with the Public Complaints Commission alleging that the investigation was improper and that reasonable grounds did not exist to charge him. The Commission upheld this complaint and the officer responsible, Constable Donald Maloney, received a suspension.

However, this incident had further adverse consequences for his business. Younger members, in particular, would stop coming to the gym, presumably because of concerns on the part of their parents. In the context of his circumstances at the time, this incident created additional stress for Gregory Parsons, his family and friends. It was extremely unfortunate. The stay of proceedings denied him an opportunity to be exonerated publicly, which could have been very significant for his then pending trial.

(iii) Drug Charges:

Gregory Parsons testified that, in addition to working out at his gym, he would smoke cannabis to relieve his stress and help him to sleep at night. Since he had very little money, his family's recreation would consist of camping on weekends. On a Friday near the end of July 1997, with his car fully packed to go camping, he stopped by his gym and relieved an employee who left for lunch. A couple of friends appeared and the three of them decided to "have a draw".

Meanwhile, the police received a complaint that a man had tried to sell a (presumably stolen) VCR to a woman in a graveyard. Constable Mike Adams (now Sergeant), of Police Dog Services was driving his cruiser in the area in question when he noticed the three men standing along the side of the gym. He thought one of the three "fit the description" of the person reported as trying to sell the VCR. Although he did not see a VCR, he felt an illegal transaction was occurring. He stopped the car, got out with his dog and ran toward the three men.

There were differing versions as to whether a warning was given, but Mr. Parsons ran from the area with the dog in pursuit. He threw away his money belt before being taken down by the dog, which was biting his ankle and lower legs. He was in excruciating pain and was kicking and squirming to get free, which likely caused the dog to become even more aggressive. By the time the dog was called off, it had done considerable damage to his legs. He spent three weeks in a wheelchair and on crutches.

Although he was treated in hospital, his leg became infected while he was incarcerated. The injuries left permanent scarring and damage. This vicious and sustained attack cannot be justified either by the police officer's suspicion or by the small amount of cannabis found in the money belt. In my view, the situation was seen as an opportunity to harass Gregory Parsons, and it was seized to excess. His consequent incarceration dealt the final blow to his gym business.

The Crown also saw this as an opportunity in relation to Mr. Parsons. It sought to revoke his bail and have him remain in custody pending his trial. One of his release conditions had specifically required:

> That he refrains...from the possession or consumption of non-prescription drugs.

The charges of cannabis possession also could be treated as an indictable offences.

Green J.A. provided detailed and convincing written reasons in rejecting the Crown's arguments. He agreed with defence counsel's characterization of Mr. Parsons' flight:

> ...as a stupid mistake in light of the stresses that anyone in the position of Mr. Parsons over the past six years would be facing.

He also rejected the Crown's "unspoken stereotypical assumption" that because Mr. Parsons sought psychiatric help in coping with stress, he was "out of control". He added:

> Here, Crown counsel seeks to squeeze out of the evidence more than what is supported by reasonable interpretation.

The Crown also argued an example should be made of the accused for deliberately flouting a court order by sending a proper message to the public. Green J.A. responded:

> This overstates the correct position. It confuses the notion of punishment for past acts and its potential general deterrent effects...with the focus on bail misconduct review.

He was not prepared to deny the accused's Charter right to reasonable bail under this "guise of ensuring confidence in the administration of justice". He did however increase the total cash deposit required by $5,000.00.

(iv) Acquittal:

By July of 1997, the effectiveness of DNA testing had greatly improved from the time of the Catherine Carroll murder investigation some six years previously. By then, results could be obtained from a much smaller sample. In anticipation of Gregory Parsons' retrial, a number of exhibits were sent to the forensic laboratory for re-testing. Among them was Exhibit 63, a strand of hair that was found in the bathroom where the murder occurred. This exhibit actually had been included with the exhibits originally sent for testing but had not been tested due to inadvertence. Also included were finger nail scrapings and a towel and soap wrapper with blood on them.

In early 1998, the results came back that all of these exhibits contained DNA belonging to an unknown male and not to Gregory Parsons. On February 2, 1998, a stay of proceedings was entered on his murder charge. The Crown had to eliminate all persons present at the scene before entering an acquittal and this testing took longer than expected due to the delays with the laboratory. An acquittal was finally entered on November 5th and a public apology was made to Gregory Parsons for his wrongful conviction.

(e) The Second Investigation:

When the DNA evidence was received, the Royal Newfoundland Constabulary decided to commence a second investigation into the homicide of Catherine Carroll. Staff Sergeant Robert Johnston (now Deputy Chief) was designated to lead this investigation. Unlike the first investigation, the second team had the benefit of whatever time and resources it would take to conduct a thorough investigation. The strand of hair was ultimately identified as coming from a childhood friend of Gregory Parsons, Brian Doyle, who confessed to the crime and pleaded guilty following a "sting" operation in Ontario.

A fundamental error of the first investigation had been to eliminate the damaged basement window as the point of entry. This contributed to the exclusive focus on Gregory Parsons, particularly in the context of Catherine Carroll's statements about having the locks changed and her fear that her son had obtained a key. As part of the second investigation, Staff Sergeant Johnston actually attempted to enter through the window in question and, although he is tall, was able to do so.

The second investigative team also had the benefit of an important resource that was squandered in the first investigation. That was the son of the deceased, Gregory Parsons. The police did not seek his assistance in the first investigation because, from the outset, they concluded he was the killer. He testified:

> If they had to sit down and do it properly right off the bat, we want a list of people, we would have given them a list of people.

> One of the first names on that list would have been Brian Doyle. If they had asked me about the window, I would have told them about mom's excessive compulsive disorder.

His mother would not have allowed the curtain rod and curtain to be hanging out of place or the broken latch to be left lying on the floor:

> My mother wouldn't have a pillow an inch out of place. I don't know if you observed the pictures of my mother's living room. It was like a dollhouse.

He would have told the police that he and his friends (including Brian Doyle) used the basement windows to enter and exit:

> In going to the store, they'd just as easy to jump out through that window as they would walk up all the flight of stairs, but the police never knew that because the police didn't ask me...Brian Doyle lived two houses over in an identical house, structurally identical. We were masters of getting in through those windows, growing up, losing our keys.

If the police focus had not been so narrow in the first investigation, the ground search for the weapon would not have been restricted to the area between the home of the victim and the residence of her son. It would have been a perimeter search, which would have located the murder weapon in another direction, from the home of the victim, to the residence of Brian Doyle.

(f) Gregory Parsons:

(i) Personal Consequences:

It is difficult for someone who has not actually endured Gregory Parsons' ordeal to attempt to convey its personal consequences for him. Some of these already have been described. In this section, I wish to give greater voice to some of the personal information he felt it important to share with me and the public through his testimony.

When asked how he felt at the time of his conviction, he said:

> It was the end of the world to me. Everything I could do, I tried to do. We tried to do everything within our power, myself, my lawyers, my family. Everything was just lost.

And upon being taken from the court room to the jail:

> ...it's the loneliest feeling you ever feel, lying on a bunk, looking up at the writing on the bottom of the bunk above

> you and thinking this is what you're going to look at now for the rest of your life.

Looking further into the future, as an innocent person he would not be able to satisfy the requirements for parole:

> In order for me to get parole at some time in my life, I'm going to have to get up before a panel not only say I'm guilty, to say why I did it, how I did it. That would have never happened...I would have spent life in jail.

Through every stage of his long and tortuous battle he was never confident that things would all work out in the end. Every step was a battle only to be followed by another battle.

Mr. Parsons knew he was a good person and an honest person. But his honesty was turned against him in his first statement to the police and in his responses to the polygraph operator. When he heard the false hearsay statements about his alleged threats and assaults of his mother:

> It was horrible. I'm telling you I felt like a bastard, I felt like a bad bastard. Deep down, I knew I wasn't. I knew I was a good person, but I'm telling you, it really did me in.

On occasion, he sought relief through alcohol or cannabis but he escaped without acquiring an addiction. When he saw a psychiatrist, a variety of medications were prescribed but he did not like the side effects and did not continue to use them.

He was fortunate to have a great deal of family support. Although his father had started a new life in Yellowknife, both he and his second wife came to St. John's and stayed throughout the trial process:

> He did, and I appreciate it very much what my family done. The Parsons family, they put up money, signed sureties...my father moved here and everything at extreme costs to him, both financially and emotionally, and I've got nothing more than admiration and respect for what he done for me during the whole process as well.

His father-in-law, Harold Doyle (not related to the killer Brian Doyle), and his family were extremely supportive. They had invited him to live with them and he was in the process of moving when the murder occurred. Mr. Parsons has great respect for Harold Doyle:

> ...Harold would do anything for anybody. That's the type of gentleman he is...he's been like a father figure for me my whole life since I'm 16, and we hang out together, we worked out together, we done it all over the years...

He said of Harold Doyle's daughter:

> I've been with my wife since I was 16 years old. She's been my best friend, she's been my pillar, and I congratulate her and her family for me being able to be sitting here today.

Indeed, it was after his conviction and sentence of life imprisonment that she expressed her desire to go ahead with their marriage:

> My wife and I had put our lives on hold up to the point of my conviction and after that we tried to get on with life. She said she wanted to get married and she said you have to think about your education.

He was released on bail pending his appeal in the Spring of 1994 and, shortly afterwards they were married. They knew the risk involved:

> We as a family took a big gamble, and thank God, the gamble paid off. I don't know if I'd recommend it to people in a similar situation. It is a huge gamble and you wouldn't want it to blow up in your face, but thank God we did, and I did educate myself, and we did start our family. So even though we were behind at the end of it all, we weren't too far behind. At least we had our family. We had each other.

(ii) Catherine Carroll:

It was necessary for Mr. Parsons to speak about his mother's weaknesses in order to explain her conduct. Some of these have been recounted above. However, he emphasized: that she also had many good qualities; that he never assaulted her, and; that they loved each other.

He was proud of how she battled with alcoholism with considerable success. While this may have been replaced to some extent by a dependency on other medication, she also battled this. He also blamed some of the doctors who seemed to prescribe medication for her in excessive quantities. They shared happy times together and she always welcomed his friends.

When she behaved erratically by telephoning the bank and complaining about Tina Doyle, he visited his mother's psychiatrist to discuss what he viewed as a serious problem. He knew he had to take an adult role

at a very young age because of her mental conditions. At times her behaviour made her very difficult and he eventually moved out of her home but he continued to visit her and to call her by telephone.

Mr. Parsons was not aware that his mother was making all of the statements about fearing him and experiencing previous assaults by him. However:

> No matter what she said to people, she was not in fear of me. She wasn't. That was her way of whatever, getting attention or anything, but my mother was never in fear of me.

He added that:

> There's absolutely no truth to any of the hearsay evidence...There was never ever violence towards my mother, and there was never ever a witness that ever came forward or ever could, that said they ever seen violence between the two of us because it wasn't. We were friends, she had problems.

He explained that she always had bruises and that these could be brought on by heavy lifting, which she did in spite of her physical condition. He shares that condition of bruising easily and has been tested as a "bleeder". He was adamant that she never had black eyes but she would have "racoon eyes" from weight loss and dehydration. Her weight would go as high as 200 pounds followed by a loss down to 110 pounds.

At the time of his testimony, Mr. Parsons still had not had an opportunity to grieve her death. At times he still felt anger toward her for making such reckless statements that had such terrible consequences for him. Those feelings also were painful. However, he does remember her as "an extremely loving woman and a great friend". His testimony about his mother is convincing.

I believe that Mr. Parsons never assaulted or intentionally harmed his mother, throughout his teen-age years.

(iii) Compensation:

The issue of compensation for the wrongful conviction of Gregory Parsons is not included in my Terms of Reference. Indeed, on February 28, 2002, prior to the creation of this Commission, the Government announced its decision to compensate Mr. Parsons by making an *ex gratia* payment to him. However, in the course of the hearings, information became available that

suggested Mr. Parsons may have accepted this payment because of financial duress. I made a public comment to this effect.

After the last of the hearings concluded on June 10, 2005, I wrote to the Minister of Justice of Newfoundland and Labrador by letter dated June 13, 2005. In that letter I stated:

> The compensation of Gregory Parsons does not fall within my Terms of Reference and, therefore, I will not report on that issue. However, evidence did emerge during the Parsons' phase of this Inquiry touching on the circumstances of his compensation.
>
> The evidence revealed that at the time he accepted a settlement, he was in such dire need that he probably instructed counsel (possibly against counsel's advice, a matter I am not privy to) to accept a compensation that may not have been adequate.
>
> Since that matter falls outside of my Terms of Reference, I draw it to your attention in the event you may wish to re-visit Mr. Parsons' compensation in order to correct a possible injustice, even though a final settlement may have been agreed upon.
>
> Of course, I am not writing to you in my capacity as a Commissioner but simply to convey significant information, which has come to my attention.

On September 1, 2005, I was advised of media reports originating from St.John's that indicated the Government of Newfoundland and Labrador had substantially increased the compensation to be paid to Mr. Parsons. Mr. Parsons was quoted as stating that he was "satisfied" and that this satisfaction did not come from the money but from true closure.

(iv) Conclusion:

Gregory Parsons and the family and friends who supported him, including his lawyers, should be proud of what he has achieved. The premium that he and Tina Doyle placed on his education, in spite of all of their financial and emotional obstacles, demonstrated great foresight and determination. He excelled academically with many achievements. He is a firefighter with paramedic qualifications in the St. John's Regional Fire Department. He loves his work:

> ...I thank God I got in the Fire Department. I can't speak highly enough of what a great career to get into with a great bunch of guys. The camaraderie is unimaginable. I got the utmost support of them...

He wishes to take further courses in counselling troubled youths and makes good sense in suggesting what the so-called "criminal element" often needs is not degradation but respect.

At the same time, he realizes that he still faces challenges:

> There's still huge gap in my life, and I know that I have to work on that. Like, I don't go to counselling or anything. Maybe I do at the end of all this. I want to get this process behind me. But there's still a huge feeling of anger, of emptiness, of lack of remorse for my mother, of a feeling of vulnerability...

He knows his main challenge is "to work on my anger" and put this tragedy "behind me". At the same time, his family support "network" has broadened:

> My children don't want for anything, I'm pleased to say. They have a very happy life, and, basically, it brings me the utmost happiness every day. My youngest son tells me 100 times a day that I'm the best dad in the world. We go to the cabin almost every weekend. We do things together, and, basically, that's worth more to me than anything so when it comes to my family, I consider myself very lucky.

This passage is a tribute to the leap of faith made by Gregory Parsons and Tina Doyle when he was a convicted murderer, sentenced to life imprisonment, and they married.

The resilience of Gregory Parsons and those who supported him bears witness to the strength of the human spirit. This observation is not to be critical of those who have experienced serious injustice in our legal system and have not coped as well. When Mr. Parsons finished testifying, I made the following statement to him:

> At the time of your conviction, I was the Chief Justice of this country, the head of the system that convicted you, and I'm publicly inviting all those that were judges at the time to join me in accepting joint and several responsibility for the system having done to you what it did.

I wish to indulge in this opportunity to extend my apology to all of those who may have suffered injustice in our legal system while I held this role. Since the ultimate problem is inevitably systemic, those of us who form that system cannot simply say that any particular injustice has nothing to do with me.

I hope that the personal observations of Gregory Parsons in this section will help all of us involved in the criminal justice system to give pause. We should consider Oliver Cromwell's plea just before the Battle of Dunbar:

> I beseech ye in the bowels of Christ, think that ye may be mistaken.

Justice Learned Hand said decades ago that he would like to have these words written over the portals of every courthouse of the nation. It is an important reminder for all police officers, counsel and judges.

3. The Police Investigation: Analysis:

(a) Background:

The Royal Newfoundland and Constabulary had undergone an expansion in the early 1980s. It appears that while the initial training was adequate, continuing education was not. Many officers were assigned to units before being given the necessary training for their new duties. Sometimes, officers did not receive the training they needed until they had been part of that unit for years and some not at all. Some would receive the training for a given unit only to be almost immediately transferred. Seniority played a major role in contributing to this problem.

Under the Collective Agreement in place at the time, a more senior officer might be entitled to training in her functional area even though she might be expected soon to be re-assigned. A younger officer entering a unit might be denied appropriate training because of insufficient seniority.

This problem has been addressed in the 2003 Collective Agreement which provides:

> Priority will be given to employees working in or about to be transferred to an area related to the course content.

Selection for training is made by a committee composed of two members of management and two representatives selected by the Association. If the committee is unable to obtain a majority, the Chief of Police makes the selection. But the Chief is required to give reasons for the selection which is a valuable discipline.

I do not intend to provide details of every specific solution which has already been adopted in response to the identified problems. I merely use this as an illustration that the RNC (and the RNCA) have taken careful notice of problems identified by these proceedings. They have also taken steps to resolve those problems without waiting for my report. I commend them for this.

There are very few homicides in Newfoundland and Labrador, particularly cases such as that of Catherine Carroll, where the perpetrator is unknown. The RNC had expanded rapidly in the 1980s, reaching a peak of 391 uniformed officers in 1989. At the time of the Catherine Carroll murder, the force was relatively inexperienced, but particularly inexperienced in homicide investigation. The officers who held key positions in her investigation had between 7 and 11 years of service, apart from the analyst and the co-ordinator. For most of them this was their first homicide case.

For example, the forensic officer first assigned to the scene testified he felt totally inadequate and immediately sought assistance. A more experienced officer attended but the inexperienced officer still carried out the tasks. No system was then in place for any period of mentoring or for secondment to larger cities where homicide investigation experience would be available. Again the RNC has recognized the need for structured mentoring programs and is building them into training programs. However, they generally lack adequate resources.

Although the RNC had peaked in numbers, the lack of experience led to inefficiency at the time of the Carroll investigation. Officers from various units were assigned to the investigative team but under pressure to return to their units as soon as possible.

Another systemic problem identified was the virtual absence of recruitment over the 15 years following the peak of 391 in 1989. That number dropped to 298 in 2003 and rose to 312 over the course of this Inquiry. While much more experienced than in the late 1980s, the RNC is sorely in need of greater manpower resources. If all of the senior officers were to retire over the next few years, there would be few officers suitable to replace them. Many of those hired in the 1980s are now reaching retirement age. It is crucial that the hiring commenced during this Inquiry continue until the RNC is back to a strength adequate to meet its responsibilities.

(b) The Plan:

Superintendent Power was in charge of the Criminal Investigation Division at the time of Catherine Carroll's murder. He quickly assembled an investigative team dedicated to working only on this case. By letter dated January 4, 1991, he wrote to the officer in charge of operations, Lieutenant Alex Kielly, and sent copies to all of the assigned officers to advise them of their roles and what was expected of the

team. At the hearings before me only Sergeant Singleton and Constable Karl Piercey (now Sergeant) had any recollection of seeing this letter.

The investigative team consisted of the following:

- Co-ordinator: Staff Sergeant Gerard Kielly (now retired at rank of Lieutenant);
- Analyst: Staff Sergeant Derek Pike;
- Identification: Sergeant Eric Keating (now Staff Sergeant) and Constable Derek Tilley (now Sergeant);
- Exhibits: Constable Piercey and Constable Harvey;
- Four pairs or teams of investigators with the #1 Team consisting of Sergeant Singleton and Constable Hierlihy.

In creating this structure, together with the *modus operandi*, also described in the letter, Superintendent Power appeared to be adopting what is now known as the "major case management" model.

In this model, the three key positions are the Co-ordinator, the Analyst and the Lead Investigator. They are expected to take equal responsibility for leadership over the course of the investigation. The shared responsibility is expected to result in critical thinking and discussion amongst them in: Determining the initiatives and avenues to be pursued; Assessing and analyzing the evidence obtained; Ensuring the investigation is thorough, comprehensive and efficient.

The letter also elaborated on the manner in which the investigation was to proceed:

> In accordance with our operational plan all involved members will attend a Daily De-briefing Session at 9:00 AM in the Lecture Theatre (when available). At this meeting all reports, statements and results of assignments will be submitted to investigation co-ordinator.

The letter stressed the necessity of "probing interviews" and "detailed documentation". It specified that detailed written statements were to be taken from all potential witnesses. In addition to potential witnesses, detailed documentation was required for **all** persons interviewed, contacted or whose names surfaced in any way. **All** information and activities were to be documented on 1624 forms. These forms are also known as "Continuation Reports" and allow for subsequent elaboration on notes taken during operations over the course of a shift. The letter stressed the seriousness of the investigation and the importance of all investigators being "innovative" as well as "thorough".

(c) The Investigation:

(i) General:

At the trial, the officers testified at great length and with great confidence that the investigation ran smoothly and without error and that nothing was overlooked. In retrospect many of them realized how dysfunctional the investigation had been. One officer frankly testified before me that it was "a mess". Some now realize that they had neither the training nor experience to carry out the roles assigned to them, although they did not recognize this at the time.

The "team" concept never materialized. Sergeant Singleton emerged as the leader of the investigation in ongoing consultation with Superintendent Power and Lieutenant Alex Kielly. The Co-ordinator merely assigned tasks and the Analyst did no meaningful analysis. Attendance at the morning meetings was sporadic and these did not serve as a forum for sharing information or exchanging ideas.

Overall, documentation was inadequate: there was no record of meetings attended; persons reports were not properly completed and were not done every time a person was spoken to; some officers did not take notes; some notes were made on scraps of paper and later transferred to Continuation Reports; Continuation Reports were not always completed; detailed written statements were not taken from all persons interviewed; when assigned tasks or interviews, officers did not record why they had been assigned the task or interview; the forensic team had little or no contact with the investigators and no one was in charge of that unit.

There was evidence at the hearings that certain matters were not routinely documented at that time notwithstanding the general requirement of the Operational Plan. They included: whether or not officers attended the debriefings and other meetings; what was said at meetings with other officers, the Crown or experts; and the purpose of any given assignment.

The most serious problem arising from the breakdown of the operational plan was the failure by the police to analyze the hearsay statements of the deceased. The Co-ordinator and the Analyst were both taken off the case soon after the arrest of Gregory Parsons. The eight-day investigation did not provide time for a proper analysis of the evidence. No such analysis of the statements, in particular, was done by the Analyst, the Co-ordinator or the Lead Investigator.

Quite apart from specific tasks that were not done or were done badly, a larger problem is created by such a sloppy investigation. It creates an environment in which tunnel vision is left unbridled.

(ii) The Murder Scene:

Reference already has been made to the 18 people who entered the house on the night the body was discovered. These included at least 12 and as many as 15 who entered the blood-coated bathroom. No single officer took charge of the scene and directed the "traffic". The officer most senior in rank is expected to fulfil that role but senior ranks kept changing. The forensic unit was inexperienced and not co-ordinated. It was the first homicide investigation for everyone but Sergeant Keating, who did not take charge, and Sergeant Singleton, who had not previously acted as lead investigator.

Constable Piercey was assigned to handle the exhibits. At the time, the most junior person in the Identification Section was given this responsibility. He had received no training in forensics or identification procedures at that time. Over the course of the subsequent trial, as the evidence was tested and argued in the court room, Constable Piercey began to realize the many shortcomings of the force's forensic equipment and procedures. After the trial, he took the initiative to write to the head of the Identification Section, with his analysis of many of these shortcomings. This letter is attached as Annex 8 since it provides some useful insights into the state of the RNC forensic capacity at the time of this investigation. It also reflects a sincere desire to improve the capacity of the RNC to remedy the deficiencies that were revealed.

After the investigation was basically completed, Constable Piercey sent a number of exhibits to the crime laboratory for testing. Included was the hair fibre known as Exhibit 63, that came from the murderer, Brian Doyle. In practice, the laboratory might decline to test some of the exhibits it received because of time pressures or for other reasons. Ordinarily, the laboratory report would state which, if any, exhibits were not tested but this was not indicated in the report for these exhibits. In spite of this omission, it remained the responsibility of the person in charge of the exhibits to confirm which exhibits had been tested.

Constable Piercey was forthright in testifying that he had made this error and it should not have occurred. I recognize that this was his first time in charge of exhibits and his first homicide case. The DNA testing at the time was not capable of establishing that the hair came from Brian Doyle. However, examination of the hair might well have established that it did not come from Gregory Parsons. Fortunately, the further testing done in

anticipation of the second trial did establish that, and also led to identifying Brian Doyle.

At the time of the Carroll investigation, Constable Piercey had no training in relation to blood or footprint evidence. He has since taken a number of courses and elaborated in his testimony before me as to how much they had missed and how differently he would proceed with his current knowledge. He was not even looking for footprints at the time but now realizes that blood is an excellent medium for obtaining them. Often they are not visible to the eye but "latent" footprints and fingerprints are often the most valuable. Today he would take blood samples from the sink which were "out of place" from the rest of the scene. He would have rigorously pursued blood from a source other than the victim because of the nature of the attack. He gave a number of other examples, as well, to demonstrate how much potential forensic evidence was not pursued. The contamination at the scene likely would not occur today.

At the time, the Identification Unit was isolated or "self-contained". They did not attend the morning meetings but would today, when there is much closer communication between the forensic and other investigators. The RNC forensic capacity is still weakened by inadequate resources, including the general manpower problem referred to above, limited ongoing training and equipment needs.

I found Constable Piercey's evidence to be particularly helpful. I understand he was also very co-operative and generous in assisting my staff. The letter he wrote following the trial and also informed by his discussions with defence counsel is commendable.

(iii) The Basement Window:

The murderer, Brian Doyle, stated that he had entered through the basement window. This was also confirmed by the condition of the window, which was completely inconsistent with the manner in which the home was kept. It is also highly consistent with the testimony of Gregory Parsons that Brian Doyle had entered through that window on many occasions when they were younger. Ruling out the basement window as the point of entry was a fundamental error.

Constable Tilley and Constable Wayne Harnum (now Sergeant) examined the window, noticed cobwebs and dust in the tracks of the vinyl slider, and determined that the basement window was not a point of entry. They determined that the window had not been opened in quite some time. They concluded that the break in the window was too small for anybody to

climb through. These conclusions were confirmed by Sergeant Keating, Staff Sergeant Victor Gorman (RCMP), Constable John Harvey (now employed with the OPP) and Staff Sergeant Philip Noseworthy (now retired at rank of Inspector). Prior to the charge being laid on January 10, 1991, Sergeant Singleton requested the assistance of Constable Piercey to re-examine the window in order to satisfy himself once more that the window had not been the point of entry. He opened the window, causing the dust and cobwebs to be pushed over to the left, and also concluded the window had not been opened recently.

Once the police ruled out the basement window as the point of entry, the field of potential suspects was considerably narrowed. With no other signs of forced entry, the focus of the investigation shifted to someone with whom Catherine Carroll was familiar. In order to explain the damage to the window, in the context of the neatness of the house, Sergeant Singleton theorized that Gregory Parsons had staged a break-in. The only support for such a theory was his overwhelming personal certainty that Gregory Parsons was the murderer.

There were many problems with the examination of this window:

- No adequate photographic record;
- No protection of the window to preserve the evidence;
- Relying only on brief visual observation;
- Inferring that cobwebs indicated absence of recent disturbance (a spider can replace a web within 20 minutes);
- Inferring the presence of dirt without tracks in it, established absence of recent disturbance (the outside pane was broken allowing dust to blow in and settle);
- Assuming it was too small to permit entry without actually attempting to enter.
- Ignoring the disarray of the window in the meticulously clean home.

Other errors were also made. Police notes refer to a piece of broken glass observed in the window well but it was not collected and there was no explanation as to what became of it. All officers who testified before me in relation to the window agreed that the basement window was not properly examined or preserved.

(iv) Interviewing Witnesses:

When officers were sent to the neighbourhood to interview potential witnesses, no direction was given to them. No "canvas" questionnaire was prepared. This was the practice at the time and has now changed. They would ask if anyone saw anything suspicious but this is a meaningless question. They would conclude that someone has nothing to offer, but to do so in the early stages of an investigation, is a judgment call based on very little information. No one was routinely asked their whereabouts on the night in question, including Brian Doyle, the murderer.

There was a decision not to interview children. Some people in the neighbourhood were not interviewed at all, including a neighbour, referred to at the hearings as "Mr. X", who should have been a prime suspect, but was missed. Catherine Carroll took hundreds of taxi rides with some 40 drivers from Bugden's Taxi alone and yet only three were interviewed, all of whom gave damaging evidence. There were 54 persons associated with Alcoholics Anonymous which Catherine Carroll attended and only a few were contacted. The significance of her unreliability is discussed in the next section, dealing with her hearsay statements.

When canvassing, officers would routinely speak to everyone in the home at the same time rather than separately. Even when people had important information, signed statements were not always taken or the information was not always adequately or accurately recorded. Gregory Parsons' second interview was not properly recorded even though, by then, the interviewers were confident he was the murderer.

Since communication was limited and few knew the whole picture, it is no surprise that some officers did not know what follow-up questions to ask. In addition to the absence of co-ordination, poor interviewing techniques were apparent. The absence of objectivity is also a reflection of tunnel vision. Gregroy Parsons' interviews are the most significant in this respect. A variety of distorted interpretations were placed on some of his statements which follow-up questions could have clarified.

Almost no one recorded the purpose of the assigned interviews. There are four significant times regarding a statement: arrival time, when the interview began, when it ended, and when the officer(s) left. These were not recorded in many of the interviews. Who is present should be recorded and all officers present should sign the statement. This also was not done in many instances. The statements did accurately record the location of the interviews, which may be important in some circumstances.

The vast majority of the statements taken during the investigation were narratives with or without a few questions at the end. Narrative statements by themselves have numerous potential defects with which all the officers tended to agree: there is usually some discussion at the beginning that is unrecorded but may have been significant; there are often questions, hints, clarifications and discussions throughout that are unrecorded; narrative statements are more difficult to compare and analyze than true version statements (question and answer); not everything that is said can be recorded; the officer may change the language or summarize. In light of these problems, all of which affect the statement's accuracy, cross-examination with respect to narrative statements can be very unfair and misleading.

Taking true version statements is not always possible and can be very time consuming. A narrative, if in the person's actual words, followed by questions and answers, may be the most "natural" way for people to give statements. All officers agreed, generally, that all statements should be electronically recorded if possible but lack of resources, primarily the manpower to type the transcripts, was seen as the problem.

In my view, there are great advantages to electronically recording all interviews in major crime cases, even if they are not always transcribed. Even if statements are taken just as they are now, having a recorded tape, even as a "back-up", would be valuable in completing "continuation" reports and in resolving disputes about what actually was said. The cost of providing small recorders would not be great and if one wrongful conviction for a serious crime can be avoided, the cost will be worthwhile. I recommend that all police station interviews be recorded by camera and that field interviews be audio-taped in all major crime investigations.

In addition, the Guy Paul Morin Inquiry Report contains many recommendations for interviewing, note-taking and statement-taking. I recommend that the RNC review these, with a view to incorporating them into its policies.

(v) Consequences:

No useful purpose would be served in documenting further specific errors or in "pinning the blame" on individual officers for them. The original plan was well-conceived but never executed. The Co-ordinator did not co-ordinate and the Analyst did not analyze. In fairness to them, Sergeant Singleton's emergence as the key "player", outside of the "team" concept, may well have been nurtured by his supervisors, Superintendent Power and Lieutenant Alex Kielly. They had a "hands-on" role in the direction of the investigation and may well have contributed to Sergeant Singleton's tunnel

vision. Although they were unable to testify, it is not unfair to find that they deserve to share responsibility with Sergeant Singleton, for the narrow direction that the investigation took.

The investigative team lacked training and experience. But most of all, it lacked objective critical analysis through leadership. It was a ship adrift. Without the discipline of an institutional structure, supervised *modus operandi* and leadership, it was extremely vulnerable to tunnel vision.

(d) Tunnel Vision:

Once the basement window was eliminated as the point of entry, a "break and enter" seemed implausible. The police also concluded that the autopsy ruled out a sexual motive for the attack merely on the basis that no semen, vaginal trauma or foreign pubic hair was found. This left the police quite impressionable when they received reports of statements by the victim that she feared Gregory Parsons because he had assaulted her and threatened to kill her. As pointed out in the Chronology of Events, once they received the statements of the victim's lawyer, Stephen Roy, and her psychiatrist, Dr. Kashyap, the "investigation" effectively ended. There was no critical analysis of those two statements or any other evidence. All further efforts were directed solely to establishing the guilt of Gregory Parsons.

A number of illustrations of specific police conduct were described in the Chronology of Events. These included the manner of the interrogation of Mr. Parsons and the taking of his polygraph examination, the interpretation of his statements and his peace bond letter, the failure to conduct a proper ground search which would have discovered the murder weapon and the failure to draw upon his knowledge to assist in a proper investigation.

I now wish to explore four broader areas of central importance to the investigation. These are: the Hearsay Statements of the Victim; the Interviewing of Key Witnesses; Contradictory Evidence that was Ignored; and Trivial and Worthless Evidence that was Aggrandized.

(i) Hearsay Statements of the Victim:

The admissibility of the statements made by Catherine Carroll, that her son assaulted her and threatened to murder her, was discussed *supra*, at pp. 86-7. I observed that far from meeting the *Smith* test of "reliability", the circumstances establish their unreliability. The Court of Appeal declined to rule on the admissibility of any particular statement but concluded that the trial judge clearly erred in admitting all of them. In particular, there was a failure to weigh their probative value against the "highly prejudicial effect" of admitting them.

It was generally conceded that without the admissibility of at least some of these statements, Gregory Parsons would not have been charged with the murder of his mother. They likely were the strongest factor in convincing the jury that he was guilty, particularly when he did not testify to deny their truth. I, therefore, wish to elaborate upon the nature of this evidence from three perspectives: the Condition of the Maker of the Statements; the Nature of the Statements, themselves; and the Absence of Expert Assistance.

The Condition of the Maker of the Statements, Catherine Carroll, should have been obvious to the police. An enormous amount of information was available to them. A good starting point was the initial assessment of her by Dr. Kashyap, *supra,* at p. 78, which referred to:

- a tendency to exaggerate and dramatize;
- personality problems;
- being demonstrative, manipulative, self-destructive and easily excitable;
- a histrionic personality type;
- the drinking and drug problem.

The police appeared to give no weight to this assessment but, instead, accepted at face value what Catherine Carroll told Dr. Kashyap as reported in his statement to the police.

In fairness to the police, Dr. Kashyap also appeared to accept her statements at face value. In other words, Catherine Carroll had the ability to "manipulate" her own psychiatrist, even though he assessed her as tending "to exaggerate and dramatize", to be "histrionic" and to be "manipulative".

In spite of his initial assessment, and based only on what she said, he described Gregory Parsons as:

- having behaviour problems related to anger and temper;
- using abusive language;
- assaulting her;
- having tendencies of violence towards her.

He added that she had recently expressed fear that he was going "to hurt or kill her". Dr. Kashyap was to provide the police with a detailed letter about his patient but left the country and could not be found.

The police knew that Catherine Carroll was an alcoholic but had not relapsed since 1988. Her children were briefly removed from her care in the

early 80's because of her alcoholism. They learned that she suffered from depression and anxiety for which she was prescribed numerous medications and had been hospitalized in the past. It was reported by many people that Catherine Carroll had also attempted suicide. Indeed, the first reaction of many upon hearing of her death, including Gregory Parsons, was to inquire whether or not she had committed suicide.

The police recovered some 4000 pills from her home and she returned another 3-4000 to Dr. Ciaran O'Shea in November 1990. Some of the prescription bottles dated back to 1986. During the twelve months prior to her death, Catherine Carroll was prescribed 7,723 pills.

Photographs of Catherine Carroll's home indicated an obsessive need for cleanliness and order. She threw out garbage every day. Her clothes were individually wrapped and hung or folded in drawers. Many articles still had the tags on them. Christmas presents from past years were still wrapped. Her freezer was full of out-dated food and it was reported that as soon as she ate something she would replace it. She had numerous cases of Diet Pepsi under her bed. The police photographs from her kitchen showed the cupboards were extremely orderly with the food items lined up with labels pointing in the same direction. The quantity and dates of prescription drugs in the house was also indicative of hoarding behaviour.

In talking to her former neighbours, the Fowlers, the police learned that Catherine Carroll had done some truly bizarre things in the past. For instance, they were told that one time she sent one of her sons to their door to complain that the Fowler boys had beaten up her car and asked them to pay for it. She was referring to an old discarded heap that was in the neighbourhood for some time that the children used to play in. She had confrontations with the Fowlers about their respective children and reportedly used to encourage her children to fight with the Fowler boys. At one point Catherine Carroll took out a peace bond against Mr. Fowler. This was never followed up as the Fowlers moved from the neighbourhood.

Catherine Carroll had also applied for a peace bond against her other son, Todd, and against a former boarder. She had made a complaint against her former husband, Jacob Parsons, for making threatening phone calls. When investigated, this complaint was not substantiated.

Shirley Dooley, one of Catherine Carroll's fellow students at Compu College, reported that Catherine Carroll asked her to call her Marie because her ex-husband used to call her Cathy. This was not mentioned by any other person that the police spoke with regardless of whether they were newly acquainted with Catherine Carroll or whether they knew her for some time.

Shirley Dooley also reported that Catherine Carroll told her that she had experienced three recent attempted break-ins which she described in great detail. Catherine Carroll had not reported these to the police. She also told Michelle McKenna that she was receiving phone calls from a male caller threatening to kill her. She had not made a complaint to the police about this either.

It should have been apparent to the police that Catherine Carroll made a wide variety of false statements in the months prior to her death. In November 1990, she phoned the manager of the bank where Tina Doyle worked to complain she was "giving out bank secrets". Ms. Carroll later admitted this was false and was done because she was annoyed with Ms. Doyle.

Many of the false statements seemed to have no apparent motive other than to gain attention:

- She told Dr. Kashyap she had Gregory Parsons fired from his job, although he was self-employed.
- In the Fall of 1990, she told a number of people she had been released recently from hospital after hip surgery. Her medical records only revealed hip surgery in 1985.
- She told people she was getting her hair done to see her lawyer, Stephen Roy, on December 31, 1990, to receive a $40,000.00 settlement for her personal inquiry claim. Not long before that time, she visited another lawyer to seek his representation on the basis she was not happy with Mr. Roy.
- She made a complaint of discrimination against an instructor at Compu College, that was established to be completely false.
- She told Isabel Crane her telephone soon would be cut off because her son had made numerous long distance telephone calls to Yellowknife she could not afford. The police investigation found this to be totally fabricated.
- She told numerous people she had to visit the doctor on December 28th because she glued her fingers together. A doctor did treat her for dermatitis that day but was adamant her fingers were not glued together.
- She received medication from eleven doctors over the 12 months prior to the death, including the same drugs from more than one doctor. This required conscious and deliberate misrepresentation to the doctors.

- She falsely told the Department of Social Services her son was still living with her, to continue to receive a higher allowance, even though he had moved out.

There are numerous additional examples, but these suffice to illustrate the police should have been extremely cautions in accepting anything she may have said as true. Her statements went far beyond being "careless" with the truth.

It appears Catherine Carroll was attempting to wean herself from her medication in the months prior to her murder. There was considerable evidence of her mental and physical deterioration during that period. This may well have exacerbated some of her personality traits described by Dr. Kashyap six year earlier: exaggeration, histrionics, manipulation...No doubt, the more dramatically she could describe her son's alleged threats and violence, the greater the shock and sympathy she might generate from her audience.

However, in his testimony, before me, Gregory Parsons gave an additional possible explanation. Catherine Carroll knew how to "play the system". She knew how to manipulate the doctors who supplied pills, she knew how to obtain authorization for extra taxi services and she may well have been manipulating the housing authority. He testified that if a neighbour had her home painted or new locks installed, she would want the same and would be obsessive and unrelenting in pursuing such an objective. If it meant her doing some interior damage for that purpose, that would not surprise him.

Perhaps this was a factor, interacting with her unusual personality and abuse of her medication. If that was the case, it is rather ironical that the false statements she created to obtain the locks were corroborated as being true, in the eyes of the police, by the installation of those locks.

The Nature of the Statements, themselves, would have raised concerns, had they been carefully analyzed and compared. Quite apart from the lack of precision as to their time and content, there were internal inconsistencies.

For example, the statements included those of two instructors and four fellow students of Compu College. In November 1990, she showed them bruises on her arms and gave a variety of explanations. She told one student that her son hit her, then she changed the explanation to him pushing her and causing her to fall. Finally, she left him out completely, claiming the bruises were from carrying his heavy weights up the basement stairs. She told

another student the bruises came from him chasing her with a hammer. She again changed the cause to her lifting his weights.

Some of the statements related to Catherine Carroll having her locks changed because of her fear of her son. However, one of her fellow students described an incident when she was visiting in Ms. Carroll's home. Gregory Parsons came to see his mother and she seemed happy to see him. She also locked the door behind him after he was in the house. A number of additional inconsistencies existed in relation to the locks and keys.

Catherine Carroll certainly was unreliable. She made bizarre statements which were untrue, such as the gluing together of her fingers. A number of other lies were referred to above by way of illustration. She not only lied but she lied about her son's conduct towards her. When seeking the peace bond, she told a justice of the peace he knocked her to the floor and stormed out, abandoning her, even though she was lying on the floor unable to get up. This was established to be entirely false by hospital records which showed that he had brought her to the hospital for examination the same day. This contradiction also confirms his version of this entire incident expressed in his first statement to the police.

In view of these lies, the unpredictability of her medication, her psychiatric problems and other bizarre behaviour, it is difficult to appreciate how **any** of these hearsay statements could meet the test in the *Smith* case, of being:

> ...made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken...

The individual and cumulative effect of these statements was highly prejudicial to Gregory Parsons at this trial.

The Absence of Expert Assistance left a gap in assessing the credibility of such a complex person as Catherine Carroll. In view of the central importance of her statements and the strong indications of her unreliability and lack of credibility, it would have been highly desirable for the police and the Crown to seek expert advice about her. I include the Crown because Bernard Coffey appeared to be available to Sergeant Singleton on an ongoing basis to provide legal advice. They knew she had been seeing a psychiatrist regularly up to the time of her death. In my view, the investigation was deficient in simply accepting that the statements must have been true because otherwise a mother would not say such things about her son. There was no significant probing or analysis of the effect of her

troubled history, psychiatric condition, alcoholism and medication upon her relationship with her son.

Sergeant Singleton and Mr. Coffey met with a forensic psychiatrist, Dr. Nizar Ladha, almost a week after the charge was laid. According to Sergeant Singleton's notes: "We discussed the case and his feelings about the mind of a person who would do such a crime". I agree with the submission of Senior Inquiry Counsel (Hearings) that this likely was not what occurred, or if it did, the investigators did not take his views very seriously. If they did, they would have known that Gregory Parsons was not the kind of person who would commit matricide.

Dr. Ladha testified at the bail hearing two days later that the majority of those convicted of matricide would have a major mental disorder such as schizophrenia or endogenous (biological) depression. The minority would include people with personality disorders or alcohol problems. He described the attack as involving:

> ...a tremendous amount of intensity and rage...One would have to hypothesize that there was a great deal of anger and hostility and perhaps panic...

It was this last description which became the preoccupation of the investigators since it fit their theory of the crime. The subsequent examination of Gregory Parsons by Dr. Ladha revealed no condition that would fit the expected profile.

Dr. Ladha was never consulted regarding Catherine Carroll. Her psychiatrist, Dr. Kashyap, was interviewed but the entire focus was on her alleged fear of Gregory Parsons, his violence, and her fear the he was going to hurt or kill her. When Dr. Kashyap disappeared, no attempt was made to engage another person with the appropriate expertise to conduct a thorough review of Catherine Carroll's condition and its likely effect on her conduct.

Indeed, the manner in which experts were consulted in relation to both the Parsons and Druken investigations lacked rigour. For example, no notes were made of the discussion with Dr. Ladha. No discrete material was presented for his review. No specific opinion was requested of him. Nor was any report requested.

The documentation presented by the RNC at the Systemic Phase, in relation to Major Case Management at the current time, is impressive. It contains the following component related to expert evidence which might be sought outside the force:

> ... all external professionals consulted should be provided with a written request outlining the scope of the requested involvement, including a notation that a written response is required. These recommendations will form part of a new policy on consultation with external professionals.

Such evidence can make an important contribution to investigations but requires attention to considerations such as: Identifying the need; Identifying the appropriate expertise required (and an expert); Defining the information to form the basis for the opinion; Properly framing the request. I recommend that the RNC establish a policy, and possibly a protocol, for assisting officers in acquiring outside expertise.

Throughout the investigation and the prosecution the police and Crown counsel made numerous inferences that affected their assessment of Catherine Carroll's reliability and credibility. Other inferences also affected their view of Gregory Parsons' guilt.

These inferences included the following: Catherine Carroll's substance abuse problems were in the past; she was not taking any or all the drugs or at least not to excess; a mother would not say such things about her son unless they were true; Gregory Parsons' demeanour was evidence of guilt; and Catherine Carroll's concern over the locks and they keys was due to her fear of him.

Senior Commission Counsel (Hearings) requested to call two experts to demonstrate the kind of insights they could contribute in relation to family dynamics and drugs and behaviour. There was considerable resistance from some of the parties and, I may say, I was also quite sceptical about the utility of such evidence. However, I ultimately agreed to hear these experts and do appreciate how such expertise might have been of some assistance in an investigation such as this by questioning the kinds of assumptions that are a part of tunnel vision.

Dr. Denis Kimberley is a social worker who studied, taught, lectured, wrote articles and contributed to text books, and had a clinical practice, all related to his areas of expertise. He was qualified by me to give opinion evidence in the areas of alcohol and addictions, mental health and addictions, child maltreatment, family dynamics and trauma.

Mr. Stephen Pinsent was a psychologist, with a master's degree, who had been a guidance counsellor, and educational therapist, and in practice for over 20 years. He had extensive training and experience with family counselling and dysfunctional family dynamics, which would include some knowledge of alcohol and addictions. He had testified many times and at all

court levels in Newfoundland and Labrador. He was qualified by me in the areas of alcohol and drug addiction, mental health and addiction, child maltreatment, obsessive-compulsive disorder, memory and trauma, and general psychology.

Dr. Kimberley and Mr. Pinsent were two of the few independent objective witnesses called at the Inquiry. They were engaged independently. Without seeing each other's reports they came to most of the same conclusions and there were no significant differences in their opinions. Neither of them was challenged in cross-examination by counsel nor were their conclusions weakened.

Their evidence was to the effect that based on their review of the statements, Catherine Carroll's background, her mental health and addiction issues, and the complex family dynamic involved, that **they would be very concerned about the reliability and credibility of Catherine Carroll's hearsay statements.**

Dr. Kimberley felt that further investigation was warranted. He would like to have known more about the circumstances of the mother-son relationship at the time the statements were made, details of the drugs actually taken, and a more elaborate history of the relationship derived from interviews with Gregory Parsons and other family members.

At the outset of this section, reference was made to the opinion of Dr. Kashyap with respect to Catherine Carroll's manipulative, deceitful and histrionic personality as well as her alcohol and drug problems. The police and Crown comfortably ignored this diagnosis on the assumption that since it was made six years prior to the murder, it was no longer relevant.

Dr. Kimberley and Mr. Pinsent's evidence was that when a person gives up drinking their personality and behaviour may not change and often does not, especially without treatment. Moreover, in Catherine Carroll's case she simply changed addictions and **they felt that what Dr. Kashyap said in 1984 would have been true in 1990.**

The quantity of the pills Catherine Carroll hoarded was so extraordinary that it demanded an explanation beyond the simplistic inference that she was not consuming them. Dr. Kimberley's evidence about the significance of whether or not she took the drugs was very important. He testified that it was not especially relevant whether she was taking them as prescribed, not taking them as prescribed, or not taking them at all. Each scenario would present its own difficulties with someone who had a mental illness and/or an addiction problem. His opinion on her credibility and

reliability did not depend on the quantity she did or did not take. He did however suggest that she probably did take some, would take some then stop taking them, and would go on binges from time to time.

Common sense may tell us that a mother would not tell people her son assaulted her and threatened to kill her, unless it was true. The difficulty is that our "common sense" is informed by our personal experiences which seldom include people with the personal difficulties and complexities of Catherine Carroll. Very few people other than professionals such as Dr. Kimberley and Mr. Pinsent are likely to have encountered a person with Catherine Carroll's tortuous life history and related demons. Dr. Kimberley and Mr. Pinsent did not see any of her behaviour, what she said or the possibility that it was untrue, as that unusual in view of her mental health. This information alone would have been useful for the police and Crown to know.

(ii) Interviewing Key Witnesses:

Gregory Parsons could verify his presence with others on New Year's Eve and until 4:00 a.m. the following morning. At that time, he was dropped off at his apartment by his then girlfriend's father, Harold Doyle. When he was alone, he put his dog out then went to bed, rising early that afternoon.

The police, therefore, sought to establish that the murder was committed at approximately 5:00 a.m. and that Gregory Parsons was not at his apartment at that time. The evidence of the time of the murder came from a neighbour, Tina Chafe, who claimed she heard a noise in Ms. Carroll's home at that time. The evidence he was not at his apartment derived from his light being on. When he was away from his apartment, he would leave his light on to comfort his dog. When he returned at night, he would turn the light off. Therefore, if the light was on, he was not home.

In his testimony before me, Mr. Parsons made it clear that, shortly after 4:00 a.m. that morning, he was in bed and the light was out. Information obtained years later from Brian Doyle also establishes that the murder occurred after midnight but much earlier than 5:00 a.m.

The interviews with Rose Marshall in relation to the light being on or off were conducted by the team of Staff Sergeant Eli Hewitt (now retired) and Constable Jason Sheppard (now Acting Sergeant). Staff Sergeant Hewitt was an experienced officer at the time, who took no notes and who had no recollection of any of the events, when testifying before me.

Rose Marshall lived in the same house as Gregory Parsons and, over the holidays, had Keith Kenney staying with her. They arrived home at approximately 5:00 a.m. on New Year's Day. Mr. Kenny had very little to drink earlier, while Ms. Marshall was frank in testifying that she was "drunk". They were both interviewed on January 3rd, and asked whether Gregory Parsons was at home when they arrived.

Rose Marshall responded: "I don't know. I guess so, his light was off". However, Keith Kenney said the light was on, which would mean Gregory Parsons was not at home at the time. On January 8th, Mr. Kenney attended at the police station for a second interview, in which he again stated the light was on. He embellished his earlier statement by adding:

> The dog was in the bedroom whining. When Greg is home the dog settles down and is quiet...

He added:

> The dog was whining and I think restless.

The 45-minute statement was recorded in approximately 1-½ pages.

Earlier the same day, Rose Marshall was contacted at the Burger King where she worked, was picked up by Staff Sergeant Hewitt and Constable Sheppard and escorted to the police station. She was questioned from 12:30 p.m. to 2:40 p.m. In the 7 ½ pages typewritten statement, she qualified her earlier statement by saying:

> I think the light was on but I'm [not] sure.

When she testified at the trial, she expressed resentment at being "pressured" by the police and by being asked the same questions over and over. She said:

> When I was first questioned that was my clearest memory right there.

She felt pressured by Staff Sergeant Hewitt and Constable Sheppard to change her recollection. I believe her feelings were justified. It is apparent that these officers were using heavy-handed tactics to influence a witness to provide evidence more favourable to the police theory.

Anne Marie Johnson is Rose Marshall's sister and lived in an adjoining house at the time. She was also interviewed by Staff Sergeant Hewitt and Constable Sheppard, on January 6th. No statement was taken from her but Constable Sheppard's report of the interview states:

...she never noticed if any lights were on...

Ms. Johnson was not called as a witness at the preliminary inquiry. Based on Constable Sheppard's notes, that appeared reasonable since it did not seem she would be able to cast any "light" on this issue. However, after learning what her sister had experienced, she agreed to be interviewed by Mr. Parsons' counsel. This was some 1 ½ years after the murder, following the preliminary inquiry.

Anne Marie Johnson was adamant that when she returned home at 5:00 a.m., she looked to the upstairs of her sister's home and it was "black". There was no light on. When Constable Sheppard's note was put to her, she had no explanation. The rest of the report appeared to be accurate but the comment that she did not notice whether the lights were on was incongruous. Nor did she hear the dog "whining". She had very little to drink that night because she knew she would have to care for her young children when she returned home. Her last drink was around midnight; some five hours earlier.

In the course of preparation for the hearings before me, my staff discovered Constable Sheppard's original handwritten notes of the interview with Anne Marie Johnson. They state, unequivocally: "no lights on 5:00 a.m." Constable Sheppard testified that this really meant that she never noticed whether the lights were on. I have three problems with his interpretation: That is not what the words say; That is not what she so forcefully testified to at the trial; Her testimony was accurate because we know from Gregory Parsons that the light was off.

Staff Sergeant Hewitt took no notes. Constable Sheppard's report of the interview is contradicted by his original handwritten notes. Once again, the absence of rigorous investigative techniques, in this case note-taking, can lead to the mishandling of important evidence.

Tina Chafe was the witness who claimed to hear noises near 5:00 a.m., suggesting that was the time of the murder or, at least, Catherine Carroll was still alive at the time. The documentation of her interviews was confused. Her testimony at trial was much different from the statements she gave to the police. Senior Commission Counsel (Hearings) described the transformation as follows:

> A casual observation of something that was not that unusual and took a matter of moments, becomes much more than it was. The length of time it took goes from seconds to minutes. What was not that unusual becomes "really strange." Initially she did nothing other than listen. At trial she has a glass against the wall and tries to wake

> up her boyfriend. Her description of the sound is different.

She indicated that she heard a sound like furniture moving on the stairs. In view of her initial statement that there was nothing unusual about Catherine Carroll being up all hours of the night, it is likely she simply confused the dates. That conclusion is reinforced by the actual time of the murder established by Brian Doyle.

Tina Chafe's evidence is an example of why it is important to take signed statements from all persons interviewed. Her first statement was critical. She appears to be a witness who wanted to please or was interested in being the focus of some attention. She certainly was not subjected to the "probing interviews" and "detailed documentation" mandated in the operational plan originally established by Lieutenant Power.

Staff Sergeant Hewitt and Constable Sheppard were also assigned to interview Isabel Crane. They did so on January 5th, when her son, John Crane, was present but "had nothing to offer" according to Constable Sheppard's notes. The next day she was re-interviewed with respect to the alleged threats related to her by Catherine Carroll as being triggered by Gregory Parsons seeing his father in a Mall on New Year's Eve. Ms. Crane could not remember and no statement was taken.

On January 9th, she was again interviewed and her attention was again focused on the telephone conversation she had with Catherine Carroll on New Year's Eve. The one-page statement includes the following:

> Q. Is this conversation with Cathy the same time she told you that Greg had said he seen his dad at the Mall and that he would get her?
> A. Yeah, yeah.
> Q. What did Cathy Carroll say that Greg told her?
> A. He said, he seen his father and his wife at the Mall and I'm going to get you and get you real good this time.
> Q. What time did you receive this phone call from Cathy on New Year's Eve?
> A. It was around 5:00 – 6:00 o'clock. It was before she called me when the guns were going off.

These leading questions obviously were meant to confirm the threat and the timing of the evening before the murder. On January 21st, her son, John Crane, was interviewed to establish that he had answered the telephone call in question on New Year's Eve.

The interviewing of Isabel Crane has some similarities to the interviewing of Rose Marshall. The police simply kept going back to potential witnesses to obtain evidence that supported their theory.

There is another concern with respect to the statements of Isabel Crane. Both the 3 ½ page first statement and the one-page second statement have starting times but not ending times. Her inability to recollect on the second attempt and leading questions on the third raise concerns about her reliability. The judge who heard her testimony at the preliminary inquiry expressed concerns about her ability to perceive or recollect accurately, *supra*, at p. 85.

At the trial, she was examined in her hospital room and much of her testimony was read to her simply for her confirmation. The questionable foundation of her evidence at the investigation stage ultimately found expression in her trial testimony in spite of all of its frailties.

(iii) Aggrandizing Worthless and Trivial Evidence:

A common feature of tunnel vision is to treat innocuous evidence as incriminating and to exaggerate the significance of marginally suspicious evidence. Reference was made earlier to the significance given to Gregory Parsons' comment that the autopsy would show it was not murder and the "finality" of his mother ending their last conversation with "Goodbye", *supra*, at p. 79. A few more examples (but not all of those available) are provided here to emphasize how unreasonable they are when assessed objectively.

Much was made of Mr. Parsons' "suspicious" demeanour during the period after he found his mother's mutilated body. His alleged lack of emotional response was treated as circumstantial evidence of his guilt. At the same time, his 911-telephone call, which was highly emotional and suggestive of panic was interpreted as an attempt to set up an alibi. The record of the call indicates he said:

> My mother she's dead...Come to 16 James Place, I was trying to get in touch with my mother for two days. She's up on the bathroom floor, oh my God.

The logic appeared to be that the reference to trying to get in touch with her for two days was gratuitous. It was unnecessary to mention this when calling for help. Therefore, it must have been included deliberately to reinforce his (presumed false) version of events after the murder.

In fact the 911 call was evidence of a strong emotional response. The actual evidence demonstrated that he reacted in a variety of ways, at times emotional and at times subdued, as though in a state of shock.

Constable Roger Kennedy (now retired at rank of Sergeant) was one of the first police officers to attend at the scene of the murder. He testified before me that Mr. Parsons was "visibly upset" when he spoke briefly with him, emotional at times then quiet, with his head down. In his testimony at the trial, Constable Kennedy said:

> He seemed as if there was no expression on his face when he did look up on this one or two occasions on his face. Someone that was a little upset, it appeared he was upset over something at that point.

It probably had something to do with just having discovered his dead mother lying on the bathroom floor, with 53 knife wounds on her body and covered in blood.

When Mr. Parsons used the telephone to contact his relatives and inform them of the death, he appeared "normal" to Constable Kennedy:

> Like there was no indication of emotion at that time as of crying or, he spoke clearly as it would seem over the phone.

The officer had attended the scenes of many sudden deaths, including some as horrific as this one. On cross-examination he said:

> ...different persons react differently in conditions like this and over the course of my several years operating the van I had done several and some persons are just not talkative or empty looks...

In my view, this observation, informed by his practical experience is accurate and is also informed by common sense. Different people react in different ways.

Indeed, the same person may react in different ways. A priest who attended at the scene, but did not know Gregory Parsons, described him as "emotionless". Tina Doyle testified that when he first came out of the house after he discovered his mother, he was white, shaken and screaming. A number of police officers added that he was not crying or emotional. In other words, a variety of reactions or "demeanours" were observed by various people at various times.

However, even if they had all agreed that no emotion was demonstrated, this is not relevant to whether or not he was profoundly shaken by his mother's death, let alone that he had killed her. We know that people react differently. We also know that reactions are sometimes immediate and sometimes constrained, only to erupt much later. To interpret meaningless "demeanour" as proof of guilt is, rather, proof of tunnel vision.

There was evidence from independent witnesses that Gregory Parsons had been in a fight on Christmas Day with Paul Marshall and gave him a bloody nose. The blood on Mr. Parsons' sock and shoes could only be identified as being human and could not be matched to Catherine Carroll. Mr. Marshall's blood was not tested and compared to the spots on the sock and shoes. Despite the absence of any evidentiary basis, the blood was assumed throughout to be that of Catherine Carroll. A very obvious explanation corroborated by several witnesses, was simply ignored.

The fight occurred because Mr. Marshall insulted Mr. Parsons' fiancée. The evidence indicates that Mr. Marshall was more than willing to fight. The police theory was that the attack on Catherine Carroll was the result of extreme anger and the police were constantly searching for evidence that Mr. Parsons exhibited such anger. The view that this assault was an example of such anger is not borne out by the facts. This was a typical teenage fight but was seen to be much more than it was.

Other "junk" evidence relied upon was related to the installation of new locks and the possession of keys by Gregory Parsons. It merely contributed to the raising of additional "suspicion" with very little coherent probative foundation in the context of inherent contradictions and alternative explanations.

(iv) Contradictory Evidence Ignored:

There was no evidence that the shoes had been cleaned. Having regard to the amount of blood on the bathroom floor, it is reasonable to assume that Mr. Parsons' shoes would have been covered in blood, especially the soles. This was ignored. There was no blood found outside the bathroom on the carpet or anywhere else on the floor. This was never explained at the time.

The police, essentially Sergeant Singleton, theorized that Gregory Parsons had taken a knife from his house when he left to kill his mother. The police were instructed to search the residences of Gregory Parsons and Tina Doyle for serrated edge knives. Sergeant Singleton testified before me that he

felt Mr. Parsons would want to be armed on entry into the home. This would also enhance the "planned and deliberate" nature of the attack.

Constable Piercey testified that during his search of Catherine Carroll's residence there was a single serrated edge knife missing from a set of 14 still in the original box, in drawers, in her kitchen. Yet the police maintained their theory that he brought a knife from his home in spite of the single missing knife, from the victim's collection. In fact, Brian Doyle said he used the missing knife from her home to kill her and that was the knife found during the second investigation one-half kilometre from her home in the opposite direction from Gregory Parsons' residence, and in the direction of Brian Doyle's residence.

The peace bond incident warrants closer examination to illustrate how evidence obviously favourable to Gregory Parsons was ignored. On October 15, 1990, Catherine Carroll swore an Information alleging on October 13th, her son:

> ...did grab me and knock me to the floor and did destroy household possessions...

She also told the Justice of the Peace who received the Information that he stormed out of her home, leaving her lying on the floor, without regard for her physical wellbeing.

The police were able to confirm that she was lying because hospital records established that Mr. Parsons had taken her to the hospital to examine a bruise on her back. That lie on her part also lent credibility to the version of events given by him in his detailed letter responding to her peace bond allegations. This also was the same version given in his first statement to the police. The police were aware that she had sworn numerous other informations over the years against neighbours, a boarder, her other son, Todd, and her former husband. Many of these were abandoned. When she failed to appear in court for the peace bond hearing, the police assumed she was manipulated or coerced by her son not to proceed.

The letter written by Gregory Parsons in response to his mother's allegations is heart-rending. It honestly and openly tells the story of the abused children of an alcoholic and drug-addicted parent. It tells of the pain and anger that he has experienced because of his mother but the police saw only the anger and interpreted it as hatred for his mother. They did not see or believe his closing comments which were:

> I have no intention of trying to hurt this woman, just to help her if I can...I am planning to see her doctor and

> psychiatrist to tell them my side of the problem and as a result I hope they can deal with her problems in a more constructive way than in the past.

The letter demonstrates unusual maturity for a person who had just turned nineteen. He was entitled to be angry with his mother but there is no evidence of hatred towards her.

Even if the police were not perceptive when reading this letter, they had further evidence of the kind of person Gregory Parsons was when they took the statement of the Justice of the Peace. After confirming that his letter had been received, Gregory Parsons arranged to meet with him and this was the reaction of Earl McDougall J.P. in his statement to Sergeant Singleton:

> Let me say here and now that when Gregory Parsons came to see me that afternoon, I was pleasantly surprised to say the least. I was more or less prepared to meet a tough young man or in other words, a real delinquent young man. I was very much mistaken. He was aware that I had known his mother for a number of years through my position with the court, and he appeared to be a level headed young man who showed a deep concern for his mother. The main thrust of his visit was to try and make sure that the Judge who would hear the application for a peace bond by his mother would read his letter and hopefully recommend some type of help for his mother.

It is interesting to observe that a judicial officer, outside of the "tunnel" had no trouble making an objective and accurate assessment while the police could not. Flags of caution were also waved by other judicial officers.

At the first bail hearing, Justice Halley asked whether it was possible that such an "unremarkable" young man who had never been "in trouble" could commit such a horrendous crime against his mother, *supra,* at p. 82. In his decision following the preliminary inquiry, Judge Kennedy referred to the testimony of McDougall J.P., which was similar to his statement to Sergeant Singleton. He also commented on the weakness of a key Crown witness, Isabel Crane, *supra,* at p. 85. Finally, he observed, with respect to the forensic pathologist:

> Dr. Ladha stated that the literature on matricide indicated that people who commit such an offence often **if not pretty well all the time** suffer from a serious mental disorder. [Emphasis added].

He added that Dr. Ladha's examination of Gregory Parsons revealed no evidence of a mental disorder and no evidence of a social personality disorder. All of this evidence, favourable to Gregory Parsons was simply ignored.

A critical juncture in focussing exclusive attention on Gregory Parsons as the murderer was the elimination of both robbery and sexual assault as the motive for the attack.

The elimination of the basement window as the point of entry was discussed *supra*, at pp. 77 and 106. The house was "very tidy" and valuables such as the VCR and the typewriter were not disturbed so robbery was eliminated as a motive. The damage to the basement window had to be explained so Sergeant Singleton theorized that Gregory Parsons had done the damage to "stage" a break-in. There was no evidence to support this theory.

The elimination of sexual assault as a motive may not have been a reflection of tunnel vision as much as a superficial approach to this possibility. The forensic pathologist who conducted the autopsy found no physical evidence of sexual assault *i.e.* no semen, foreign pubic hair or trauma to the vagina. Sergeant Singleton interpreted this as meaning there was no evidence of a sexual assault. This might be a logical inference if one thinks of sexual assault as being restricted to vaginal intercourse. Even then, there are other possible explanations. The attacker may not have ejaculated and entry might have occurred without bruising or leaving pubic hair. There may have been an attempt that was thwarted, resulting in rage.

What is more important than whether there was such a sexual assault was whether there was a sexual motivation for the attack. This broader consideration would equally distance the crime from a matricide. There was considerable evidence to suggest sexual motivation for the attack.

Rather than reflecting a sudden rage, the attack was extended over 53 slash and stab wounds, many of them superficial. In other words, the attacker appeared to derive some perverse pleasure out of watching his victim suffer and then die. Such perversion may well be sexually motivated. The victim was scantily clad. The nature and location of some of the wounds may have been indicative of a sexual motive. Finally, the body was left "posed" with the legs spread in a sexually suggestive manner.

This is not to say that the police had proof of a sexual motivation for the attack. Rather, there was some evidence of a sexual motivation that was simply ignored. The evidence was more subtle than the presence of semen or vaginal bruising but it was present and warranted further investigation.

(e) The Police and Crown Theory:

I have used the word "police" frequently, rather than referring to the lead investigator, Sergeant Singleton. That is because the responsibility for tunnel vision in this case must be shared by all of those involved in the investigation. The manner in which the operational plan broke down was referred to *supra,* at p. 104. Sergeant Singleton took central control of the investigation but his superiors, Superintendent Power and Lieutenant Alex Kielly were directly involved with him on an ongoing basis.

The investigation into the murder of Catherine Carroll culminated in a lengthy and detailed report prepared by Sergeant Singleton which includes a section entitled; "Investigator's Findings" and another entitled, "Singleton's Theory". At the time, he was proud of the hard work he had devoted to this investigation and his perceived success. It was his first homicide case as the lead investigator. The report is subjective and speculative in many areas and lacks rigour. In assessing conduct and events, it uses words like "strange" and "suspicious".

The following are some examples of the "reasoning" in the report:

- The murder was "planned and deliberate" because New Year's morning was selected as the time i.e. when it would not be strange to see a person walking at 5:00 or 6:00 a.m.
- In his first statement, Gregory Parsons did not say that he actually went to bed at 4:00 a.m., only that he was dropped off at that time and woke up early that afternoon.
- He must have taken Tina with him in order to have a witness present on the occasion of finding the body.
- It was "ironic" that in their last telephone conversation that his mother mentioned having a smoke, when an unsmoked cigarette was found in the bathroom garbage can.

In addition to such "suspicious" circumstances, the report also refers to the other examples of tunnel vision discussed earlier. When testifying before me Sergeant Singleton acknowledged many of the errors documented in this chapter, agreed that his treatment of Gregory Parsons was improper, accepted responsibility and expressed his regret.

In contrast, the Assistant DPP, Bernard Coffey, who appeared to be unusually close to the actual investigation, did not recognize his tunnel vision. Constable Piercey testified that this was the first investigation he experienced when a Crown attorney actually participated and attended at the police station (for 4-5 days). On January 4th, Mr. Coffey was designated as the contact person for the police in obtaining legal advice and drafting warrants. He attended the meeting on January

9th, with the DPP and senior police officers, to discuss the strength of the Crown's case against Mr. Parsons and, particularly, the admissibility of the hearsay statements of the deceased. However, his role went further. He attended at the police station on the night of the arrest and advised the police that they were entitled to continue their interrogation after Mr. Parsons had asserted his Charter right to remain silent.

On January 14th, Mr. Coffey attended a meeting with Sergeant Singleton, his partner, Constable Hierlihy, and the two pathologists, Dr. Avis and Dr. Hutton. The next day, he visited the home of the deceased with the same officers and Constable Piercey as they checked the refrigerator, freezer and other areas. On January 16th, he accompanied Sergeant Singleton in visiting Dr. Ladha, partly to prepare for the imminent bail hearing. Sergeant Singleton also testified as to various meetings with Mr. Coffey.

It is difficult to imagine they were not having on-going discussions about the course of the investigation or that Mr. Coffey's conversations were restricted to questions of law. This conclusion is reinforced by Mr. Coffey's handwritten notes which indicate that he "bought in" completely to the police theory, and contributed to it, including some if its most far-fetched features.

What this investigation and Sergeant Singleton desperately needed was an objective, critical, contrarian view. It did not emerge within the police force. The failure of Bernard Coffey to provide it may suggest he got too close to the investigation.

Shortly before drafting this segment of my report, I received a letter from Mr. Paul Noble, Legal Counsel to the Royal Newfoundland Constabulary, dated November 4, 2005. He advised me that a new policy had been drafted to address the police-Crown relationship that had been endorsed by the current Chief of Police and the DPP. This Police-Crown Relationship Policy emphasizes that, while cooperation and effective communication between the police and the Crown is essential, the policing function is "fundamentally distinct" from the prosecution function. Accordingly:

> 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.

In complex or challenging investigation the RNC may call upon the Crown to identify a Crown Attorney to provide ongoing legal advice in an investigation. However, that person:

> ...will not be involved in the prosecution once a charge has been laid.

The full policy, which also addresses other issues in the police-Crown relationship, is attached as Annex 9 to this Report. It provides another commendable example of parties to this Inquiry taking initiatives to address identified issues even before my own findings and recommendations were made public.

(f) Conclusion:

The good news for the public of Newfoundland and Labrador is that the Royal Newfoundland Constabulary, the RNC Association and many individual police officers approached this Inquiry in an honest and professional manner. Many have gained a great deal of insight and wisdom from this tragedy. Mistakes have been acknowledged and there is strong motivation to establish and maintain a police force whose standard is excellence. The second investigation indicates that is a realistic goal.

At the Systemic Phase of this Inquiry, the RNC submitted a comprehensive, detailed and impressive Report in relation to:

- History, Expansion and Future Planning;
- Investigations, Methodology and Major Case Management;
- Training;
- Human Resources;
- Financial Resources;

and a number of other issues related to policing in Newfoundland and Labrador. I recommend that this document be placed in a public repository such as public libraries in centres throughout Newfoundland and Labrador so that citizens may have ready access to this important information about their policing.

In the words of RNC Chief Deering, when he testified before me:

> This report reflects the progress we have made in the past 12 to 14 years and represents the blueprint for progress we hope and need to make in the future. From the wholesale adoption of the Major Case Management Model to the modernization of our Forensic Identification Section to our exciting new training partnership with Memorial University of Newfoundland and in may other ways ... we are doing everything within our means to move the RNC forward.

Energy has been focused on both recruit and in-service training. The bar for entry into the RNC has been raised substantially. A regular training day has been worked

into each nine-week shift schedule rotation. Specific training initiatives have been implemented regarding interviewing techniques and forensic investigation.

I am impressed by the education program established with Memorial University with its combination of academic and practical training. Every effort should be made to encourage officers to obtain the degree and diploma, following the preliminary certificate of completion. The personal performance development plan (PPDP) with its mentoring, coaching and counselling features, will pay valuable dividends in continuing to improve the quality of policing in Newfoundland and Labrador.

This momentum should be carried one step further. Policing standards should be developed respecting qualifications, initial and ongoing training and criminal investigation. These should be adopted by legislation.

This Report provides encouraging information to confirm that the RNC is on the right track. But it also demonstrates that it is only at the start of its journey towards excellence. I wish to comment on one specific aspect of this Report, related to the Parsons' investigation experience, and one more general observation in support of this Report.

Under the heading of Major Case Management, there is a section entitled, *Contrarian View* where an analogy is drawn between the "scientific method" and police work. The observation is made that:

> Scientists know that the best way to have their research findings accepted is to do everything possible to disprove their own hypothesis.

The absence of such a "contrarian" or "truth-scrutinizing" role was the fatal flaw in this investigation. Everyone simply "jumped on the bandwagon" or "looked the other way". The Report states that this role should be assigned to the leadership role of the case manager. It is by no means a weakness, but is a strength, of leadership to ask: "Are you sure we are not mistaken"?

My more general observation is in relation to the allocation of financial resources. Some important increases have occurred in the allocation of resources to policing over the course of this Inquiry. However, much more is required. The Report identifies many areas where the only thing holding back progress is financial resources. The Government should allocate greater financial resources to the development of the RNC through acquiring and improving equipment; utilizing technology; arranging secondments for experience and training; and increasing manpower.

A society that treats its administration of criminal justice as a low priority eventually pays the price. The personal cost of this tragedy to Gregory Parsons, his family and friends; The financial cost of a measure of compensation to him; The financial cost of this Inquiry; these are examples of the price to be paid for taking "shortcuts" in the administration of justice. On the other hand, the second investigation demonstrates that Newfoundland and Labrador has the capacity to create and sustain a police force that is second to none and every effort should be made to do so.

4. Judicial and Related Proceedings: Analysis:

(a) Introduction:

Item 5 of my 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...

As I stated in my Ruling on the Terms of Reference, these words express constitutional limitations, which apply to every provincial commission of inquiry that is reviewing criminal proceedings. I may review the same subject matter as that of a criminal investigation or trial but I do so for a different and legitimate provincial purpose.

That purpose is to examine the factors that have led to the results in question. Such a commission tells the Government and the public what happened and why. It makes recommendations to avoid adverse results occurring in future. In doing so:

> 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.

As with the police investigation, I will not review the judicial and related proceedings exhaustively but will highlight some of the salient aspects which likely contributed to the wrongful conviction of Gregory Parsons.

(b) Role of the Crown:

(i) General:

Any discussion of the Role of the Crown counsel in Canada almost inevitably begins with this passage from the Supreme Court of Canada decision in *R. v. Boucher*, [1955] S.C.R. 16, at para 26:

> It cannot be over-emphasized that the purpose of criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it also must be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness or judicial proceedings.

In her written submissions, counsel for the Public Prosecutions Division of the Department of Justice (DPP's Office) also quoted from the decision of the same Court in *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 21, which illustrates that the Crown also must participate as an advocate in an adversarial process:

> It is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability.

The dual responsibility of acting as an advocate in an adversarial process and yet never "winning or losing" appears to be inherently contradictory.

In a paper prepared by the Deputy Attorney General of Manitoba, Bruce MacFarlane, he elaborates on the appropriate "boundaries" for Crown counsel:

> Prosecuting counsel are entitled to press fully and firmly every legitimate argument tending to establish guilt, but must be accurate, fair and dispassionate in the conduct of the case. Tempered advocacy, not unbridled partisanship,

> must guide the prosecutor's actions and words. Moreover, a criminal trial is not a personal contest of skill or professional pre-eminence: prosecuting counsel must resist any notion that the object of the prosecution is to secure a conviction or, put simply "win".

Mr. MacFarlane testified before me and stressed the importance of modifying Crown "culture" or "attitudes". I was impressed by a number of the initiatives taken by his department in this respect.

The emphasis on attitudinal change is well placed and the reference to "culture" properly emphasizes a more systemic approach. The reality is that Crown attorneys are human beings and many criminal trials have stressful and emotional features. Human nature often makes it difficult for professionals working in an adversarial system under such conditions to avoid being "competitive".

James Lockyer, one of the founding members of AIDWYC, also testified before me and elaborated on some of his experiences and observations in relation to "Crown culture". AIDWYC also provided a written brief which referred to some of the literature and pointed to two institutional concerns that can encourage Crown attorneys to depart from their responsibility for achieving justice in favour of the goal of "winning".

The first is the emphasis given to successful prosecutions as a standard for measuring professional performance. Although the study cited for these concerns is American, my own practical experience in a variety of roles within the Canadian criminal justice system affirms that proposition. A prosecutor who is not "winning" a significant number of cases will be viewed as lacking in advocacy skills or exercising poor judgment in proceeding with charges. It is also counter-intuitive to suggest that after all of the time and effort devoted to the preparation and presentation of a case, an attorney would normally be indifferent to the outcome.

The second concern relates to "psychological and personal barriers" that it is suggested are shared by many prosecutors:

> ...a commitment to public service and protection; personal morality; a certain "gung ho", "macho" or crime fighter *persona;* and ideological identification with law enforcement.

Reference is made to a number of factors which have been identified as reinforcing these characteristics. The most prominent is probably the

relationship and reliance upon the police and the teamwork that is necessary for a successful prosecution in major cases.

I am not endorsing the accuracy or prevalence of this description of Crown culture. It does, however, suggest the kind of pressure that Crown attorneys may have to be vigilant to resist. As a practical matter, a Crown attorney may be perceived as "letting down the team" in refusing to proceed with a charge laid in a horrific crime after a lengthy investigation when the police are absolutely confident they have the right person. Potential pressure may be felt not only from the police and Crown colleagues but also from the media and the public.

In other words, a Crown attorney may be susceptible to many of the same systemic factors which lead to tunnel vision on the part of the police. These were canvassed in the Introduction to this chapter, *supra*, at pp. 71-2. As the AIDWYC brief stated:

> ...Crown counsel fall prey to similar temptations in order to shore-up a weak case. Too often, as here, they uncritically inherit the police brief. Rather than scrutinize it carefully because of its evidentiary infirmities, they compensate by pushing the limits, thereby risking what, too often, is a wrongful conviction...The weaker the case, the greater the incentive to overreach.

This danger is compounded by the unique role of the Crown in the criminal justice system. The following passage is from an article by one of the Crown Attorneys in the Parsons' case, Wayne Gorman, written when he was the Director of Public Prosecutions:

> ...Crown prosecutors exercise immense power by the use of discretion throughout the entire trial process. It is one of the hallmarks of our quasi-judicial status and the distinguishing factor that separates them from the judiciary and defence counsel. No other participant in the Canadian criminal trial process wields such immense power.

In addition to this power, the stature of a Crown attorney must be considered. Unlike defence counsel, the Crown is able to say in its opening address to a jury, that the Crown neither wins nor loses but is there to present all of the relevant evidence in a fair manner.

The role of a Crown Attorney requires not only professional skills and judgment but also courage. Often the working conditions include difficult

time pressures and limited resources. It may be particularly difficult for less experienced Crown attorneys to exercise contrarian thinking. Experienced Crown attorneys, in leadership roles must foster critical thinking and independence in their younger counterparts. A Crown attorney, like a judge, must not only exercise good judgment but must also be willing to make unpopular decisions.

(ii) Advising the Police:

Reference was made to the role of Bernard Coffey in advising the police from the first days of the investigation, *supra*, at p. 129. This culminated in a meeting with the police on January 9th, 1991, also attended by Mr. Coffey's superior, Colin Flynn, then Director of Public Prosecutions. The exact role played by each of these lawyers is not clear. What Sergeant Singleton and the other officers took away from this meeting was that:

- the hearsay statements might well be admissible under recent case law, and, particularly, the *Khan* case; and,
- if admitted, there would be a good possibility of a successful prosecution.

The next day, Gregory Parsons was charged with the first-degree murder of his mother.

The recent Police-Crown Relationship Policy, *supra*, at p. 130, and Annex 9, makes clear that, "All charging decisions rest with the police", and that, prior to a charge being laid:

> ...the advice provided by a Crown Attorney will be limited to legal advice on specific legal issues only.

The policy also establishes a protocol for obtaining such advice. All requests must be made in writing except in "exigent circumstances". Where that is necessary, a written request must still be made at the first available opportunity.

In my view, this policy is most welcome and would have resulted in a more stringent analysis had it been in effect at the time of the Parsons investigation. The criterion for the police to lay a charge is whether, on the available evidence, there are reasonable grounds to believe that the person has committed an offence. This is a low threshold.

The *Crown Policy Manual* states that, in providing legal advice to the police:

> ...if there is concern about the strength of the evidence available, then the Crown should express that opinion to the police. This involves a higher standard than one of the reasonable grounds to believe. It involves a question of the success of the prosecution based on the sufficiency of the evidence, the credibility of the various witnesses, the capacity of the witnesses...

If the Crown is in a position to assess the strength of the evidence, even before a charge is laid, the Crown must also advise the police about the probability of a conviction. It is obvious that Messrs. Coffey and Flynn were not in a position to assess the strength of the evidence and particularly the statements during the January 9th meeting. It would not have been possible to do so since there was no police analysis of the statements that could have been presented to them.

The *Crown Policy Manual* recognizes that:

> ...it would be an unusual case where the Crown will know the strength or weakness of the evidence at first instance. Rather, the usual practice is for the Crown to assess these factors prior to the preliminary inquiry or trial. In such circumstances, the same question must be answered – the probability of a conviction.

In the case of Gregory Parsons, then, this responsibility became that of the Crown attorney who would conduct the preliminary inquiry or trial.

(iii) Deciding to Prosecute:

The policy recognizes that the roles of the police and the Crown, respectively, are very different once a charge has been laid:

> ...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.

Under the policy, if a Crown attorney has been assigned to provide ongoing legal advice in a major investigation, that attorney "will not be involved" in a subsequent prosecution. Again, this is a sound approach since it provides a

second opportunity for a lawyer to assess the strength of the case put together by the police, but in much greater detail.

However, at the time of the Gregory Parsons prosecution, no such policy existed and it was expected that Mr. Coffey would conduct the preliminary inquiry as well as the trial.

Other responsibilities prevented Mr. Coffey from doing so and the conduct of the preliminary inquiry was contracted to a private lawyer, Mark Pike. It still was expected that Mr. Coffey would take the trial but another commitment resulted in the trial being assigned to another Crown Attorney about a month before it was to commence. As a result, there never was a critical assessment of the Crown evidence, within the DPP's Office, prior to the Parsons trial, to determine whether there was a reasonable probability of conviction.

As we have seen, the trial itself, was no assurance of quality control. In *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, then Madam Justice Berverley McLachlin, writing for the majority stated:

> ...Our colleague relies greatly on the facts that the preliminary inquiry judge concluded there was sufficient evidence to send the appellant to trial; that the trial judge did not direct a verdict of acquittal; and that the jury convicted. However, these events post-dated the prosecutor's decision, and were in each instance decisions governed by different considerations. More importantly, the trial was, as found by the unanimous Court of Appeal in the criminal case, deeply flawed. In our opinion, the prosecutor cannot bootstrap his own position on the basis of flawed court decisions that were swept away by the acquittal directed by the Court of Appeal.

These comments are equally applicable to the Crown's failure to critically assess the evidence against Gregory Parsons. It is essential that the DPP have a failsafe system in place to ensure that the evidence in every major case be critically assessed at the latest, upon completion of the preliminary inquiry.

(iv) Potentially Unreliable Evidence:

Assuming the Crown has assessed the evidence and concluded that there is a reasonable probability of conviction, what is the responsibility of the Crown in relation to potentially unreliable evidence? Leaving aside the situation where it is probable the witness will commit perjury, may a Crown attorney call a witness she does not believe? What if the evidence is simply

perceived to be highly improbable or unreliable because of the mental condition of the witness? This issue was raised before me but also was addressed in the Report of the Guy Paul Morin Inquiry.

Commissioner Kaufman articulated the opposing views:

> ...Various parties suggested that Crown counsel be mandated not to call evidence which they subjectively regard to be unreliable...Other parties suggest that reliability is an assessment to be made by the trier of fact and is not to be usurped by Crown counsel.

He basically concluded that there should be no rigid rules governing the exercise of such discretion but that it should be encouraged in appropriate circumstances.

He made the following recommendation:

> ...The Ministry of the Attorney General should amend its policy guidelines to strongly reinforce that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely untrue. Similarly, it is an appropriate exercise of prosecutorial discretion to advise the trier of fact that evidence ought not to be relied upon by the trier of fact, in whole or in part, due to its inherent unreliability.

I agree. There is no virtue in cluttering up the Crown case with "everything but the kitchen sink". The exercise of such discretion falls within the *quasi-judicial* dimension of the Crown role and is not usurpation but is a service to the trier of fact. It also enhances the expectation that the Crown will scrutinize the intrinsic value of the evidence to be presented.

Indeed, the classic statement of the purpose of a criminal prosecution in the *Boucher* case states that the Crown is:

> ... to lay before the jury what the Crown considers to be **credible** evidence ... [Emphasis added.]

Moreover, the *Crown Policy Manual* includes "the credibility of the various witnesses" as a factor to consider in determining whether there is a probability of conviction.

In spite of this clear direction in the *Crown Policy Manual*, there also was a failure to assess reliability in the Druken prosecution, *infra*, at p. 277. In these circumstances, the *Crown Policy Manual* should clarify that it is an

appropriate exercise of Crown discretion not to call evidence that is inherently unreliable. Similarly, it is appropriate to invite the trier of fact not to rely upon such evidence when it has been called.

Of course, in exercising such a discretion, the Crown will take into account a variety of factors. For example, evidence which might at first appear to be unreliable, may have the potential to be enhanced by the context of the other evidence in the case. Also, a witness statement might be enhanced by the witness' elaboration or ability to withstand rigorous cross-examination at the trial.

(c) Crown Counsel at Trial:

(i) The Challenge Function:

According to the *Report on the Prevention of Miscarriages of Justice*, (2004), prepared by the Federal-Provincial-Territorial Heads of Prosecutions Committee Working Group:

> ...Crown counsel must always act as a challenge function to the police and must bring critical eyes to bear on the evidence presented to them. They must always be prepared to consider alternate theories and explanations...

It was apparent that the Assistant DPP, Bernard Coffey, did not fulfill this function. He not only "bought in" to the police theory, he also embellished it. The counsel in private practice, Mark Pike, who was retained specifically to conduct the preliminary inquiry, could not be expected to challenge the Crown's decision to proceed. In any event, many of the problems with the Crown case were articulated by Judge Kennedy in his reasons for committal, *supra*, at pp. 84-5.

The responsibility to assess the evidence presented by the police is ongoing, even after the trial commences. As Crown counsel for the trial, Catherine Knox inherited this challenge function. She was placed in a very difficult position. The trial commenced on September 23rd , and she was not able to begin preparation until some time between late July and mid-August. The decision that the trial would proceed was made by her immediate supervisor, Bernard Coffey. In his discussion with her about the case, he obviously would not provide much in the way of critical analysis of the police/Crown theory. The police officer assigned to assist her in preparation and throughout the trial was Sergeant Singleton, who had already shared his tunnel vision with Mr. Coffey.

Ms. Knox would have been pressed to prepare for trial and would not have had the time to allow for proper reflection on all the evidence prior to the trial starting. This was not a straightforward case. There was a substantial amount of material, there were 119 witnesses called at trial, and the admissibility of the hearsay statements was a unique and complex issue. This was a first-degree murder trial that lasted 76 days over five months. She had no junior counsel to assist her.

This was her first murder trial although she had conducted a number of jury trials for the Crown. She was called to the Bar in 1985 (Mr. Coffey in 1979). In spite of a bitterly contested trial, and his criticism of Ms. Knox's conduct of that trial, defence counsel, Robert Simmonds had strong praise for her skill as an advocate. It is necessary to assess how Ms. Knox conducted the trial to determine how that may have affected the wrongful conviction of Gregory Parsons. In doing so, I am conscious of the circumstances under which she was assigned the trial, the imprimatur of her immediate supervisor on the Crown theory, and the necessity for her to place heavy reliance on Sergeant Singleton.

(ii) The Hearsay Statements:

I have already expressed the view that all of the statements made by Catherine Carroll should have been excluded under the test in the *Smith* case. The problem facing Ms. Knox was that the police investigation did not have a comprehensive report analyzing the complex personality of the maker or the inherent inconsistencies and contradictions within and amongst those statements. They were argued by Mr. Simmonds on the *voir dire* but those arguments were overwhelmed by their strong (superficial) probative value. Even the Court of Appeal did not assert unequivocally that Catherine Carroll, herself, was totally unreliable in making those statements.

The evidence of Stephen Roy, in particular, was powerful. He testified that on one of her visits to his law office she said that their son held a knife to her and he said he would kill her and cut her up in small pieces. When she was found slashed to death by 53 knife wounds, this was striking corroboration of the reliability of the hearsay statement (setting aside her personal unreliability). The law in 1993, based on the *Khan* case did not clearly rule out such corroborating evidence in determining reliability. Then Justice McLachlin stated that the hearsay of the child should be admitted at trial because, "...her statement was corroborated by real evidence", among other factors. It should be noted that the corroboration in the *Khan* case was closely related to the making of the statement itself.

It was not until *R. v. Starr*, [2000] 2 S.C.R. 144, that the Supreme Court clarified and emphasized that the circumstantial guarantees of reliability must be found in "the circumstances surrounding the statement itself". Speaking for the majority of the Court, Justice Iacobucci offered these general remarks for the guidance of lower courts:

> At the stage of hearsay admissibility, the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in R. v. C.(B)...see also Idaho v. Wright, 497 U.S. 805 (1990).

This American case refers to the danger of permitting:

> ...the admission of presumptively unreliable statements...by bootstrapping on the trustworthiness of other evidence at trial...

Although I did not participate in formulating the judgment in the *Starr* case, I am in complete agreement with it.

The statement reported by Mr. Roy demonstrates how dangerous and unreliable such corroborating evidence can be. The circumstances of the actual crime were extraordinary yet the hearsay statement predicted them with "striking similarity". However, we know (with hindsight) that the statement was completely false. There is no explanation for this extraordinary coincidence. Mr. Roy was vague on details of when the statement was made and most lawyers would record such a statement, which he did not. Was his recollection of the statement coloured by the description of the crime he received from his police officer friend? If his recollection was accurate, did Brian Doyle somehow learn about the statement prior to committing the crime?

We do not know the explanation. But we do know that the Supreme Court was right in forbidding "after-the-statement" corroboration to validate the hearsay. Recent decisions of provincial appellate courts have applied the principle emphasized in the *Starr* case. For example in *R. v. Czibulka*, (2004), 189 C.C.C. (3d) 199 (Ont. C.A.), Justice Rosenberg rejected a hearsay statement in the form of a letter from the deceased, even though:

> The circumstances described in the letter resemble the circumstances of the deceased's death...

The letter was rejected even though it was "powerful evidence of an *animus*" on the part of the accused and strongly supported the Crown's case on identity and intention.

In my view, when rejecting the use of general reputation evidence or prior statements, Justice Iacobucci was merely distinguishing between determining "reliability" and "credibility". In *Starr*, he also stated:

> Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.

In other words, "threshold reliability" is the test of reliability under the principled approach to the admissibility of hearsay evidence. The reference to "ultimate reliability" is really the assessment of credibility, which is for the trier of fact, only after the test for admissibility has been met.

The reference to "the declarant's general reputation for truthfulness" evokes a very narrow avenue for assessing credibility, which has fallen into some disfavour, but is still available. It permits an opinion to be given in the form of character evidence of the witness's reputation in the community for lack of credibility. In the Parsons case, evidence was not called of Mrs. Carroll's general reputation in the community for truthfulness. Rather, evidence of specific conduct, such as her hoarding of pills and other bizarre behaviour demonstrated her unreliability. Similarly, in *Khan*, Justice McLachlin referred to "the personality of the child" as being relevant on the issue of reliability. In *Czibulka*, the Court took into account that the declarant was a heavy drinker, yet there was no evidence of her sobriety at the time of writing the letter.

Similarly, there are specific rules governing the use of "prior or subsequent statements" in relation to the assessment of credibility. For example, a prior inconsistent statement may be used to contradict specific testimony given by a witness. This may cast doubt on the specific testimony as well as on the witness's general credibility. In the case of Mrs. Carroll, the cumulative effect of her contradictory, ridiculous and deceitful statements, again, demonstrated the general unreliability of the maker of all of the statements. The mental condition of the declarant surely falls within "the circumstances surrounding the statement itself".

But Ms. Knox did not have the guidance of the *Starr* case, only the reference to corroboration in *Khan*. More significantly, she was not, initially, familiar with the inherent unreliability of Catherine Carroll as the maker of all of the statements.

In addition, Catherine Knox also received from the police, evidence of bruises to the victim's arms, a black eye and bruising to her hip. In his testimony before me, Gregory Parsons provided a credible explanation for these alleged bruises. However, he did not testify at the *voir dire* in relation to the admissibility of these statements. Ms. Knox was also faced with other, apparently, corroborating evidence (damage to the door frame, a hole in the wall, no sign of forced entry).

In these circumstances, and particularly in the manner in which she inherited the case from her more experienced supervisor, Bernard Coffey, I do not consider her position in relation to the admissibility of the hearsay statements to be unreasonable. She was entitled to depend, to a considerable extent, on his judgment, experience and detailed knowledge of the case. It was probably not until the completion of the *voir dire* that she would have begun to realize the extent of Catherine Carroll's problems. Indeed, that was when she decided to consult a pharmacologist to obtain an objective assessment of Catherine Carroll's behaviour in relation to the pills.

(iii) General Advocacy:

It appears that, at some point, Catherine Knox also became convinced of the guilt of Gregory Parsons for the murder of his mother. This likely was a significant factor in her "over-reaching" in advocacy. The introduction of the "kill tape" is one discrete example that is straightforward. It is true that the trial judge (erroneously) admitted it into evidence. But it proved nothing and was extremely prejudicial. At trial, she examined a forensic psychiatrist, Dr. Ladha, repetitively, on the significance of this tape, in an attempt to establish some relevance. She did not succeed, but nevertheless said in her closing address:

> ... is not just trash music, it is as Dr. Ladha said "a threat to that woman."

He said no such thing.

Counsel for Gregory Parsons documented a number of additional examples of inaccurate and misleading advocacy on the part of the Crown related to the time of death, improper (and aggressive) cross-examination of her own witnesses, non-disclosure of relevant information about a Crown

expert witness, reliance on worthless evidence and others. Counsel for the DPP's Office stated before me that:

> The trial prosecutor acknowledges mistakes. She acknowledges misstatements and overstatements in her Jury Address. These mistakes, made in the course advocating the Crown's theory to the jury, were inadvertent in our submission and made after a long trial which she did on very short notice and entirely on her own.

While they may have been inadvertent they were fuelled by the sense of noble cause that permeated the police investigation. They crossed the line of acceptable Crown conduct. I propose to review four areas in support of that contention: the Crown Theory of Exclusivity; the Cross-Examination of a Defence Expert; Post-Offence Conduct; Other Aspects of the Crown Address.

(iv) Exclusivity:

In her oral argument seeking to tender the hearsay statements for their truth, Ms. Knox stated that:

> Some of it in part will go to the issue of motive to have caused the death of Catherine Carroll, and some of it, in part or in total, goes **to the elimination of any other person as a likely person to have cause the death of Mrs. Carroll in the circumstances in which she died.** [Emphasis added].

In his response, Mr. Simmonds did not object. Ms. Knox referred in her opening address to Gregory Parsons being the only one about whom the accused expressed "repeated concerns for her safety". At the trial, ten witnesses testified that the deceased had no complaint about fearing anyone other than her son. There was no apparent objection to this testimony by the defence. In her closing address to the jury, Ms. Knox repeatedly stated that only Gregory Parsons had a motive to kill his mother.

It is clear that the Crown may adduce evidence of threats and *animus* by an accused to the victim to establish motive and identify. However, such evidence cannot establish that **only** the accused had a motive to kill the complainant and, therefore, the accused was the killer.

This approach is not logical. Catherine Carroll may have feared other persons and not told anyone. In fact, she did express fear of others, *supra*, at p. 113. Another person may have had a motive to kill her and she did not know it. Or, her killer may have been a psychopath with no apparent motive

or a sexual psychopath. It is ironic that Ms. Knox stated in her closing address:

> There was no unknown persons...And no flaming psychopath who got to that house that night and killed her in [sic] disappeared into the blue.

This was exactly what happened and the entire approach, including testimony about the extensive investigation which allegedly left no avenue unexplored, was highly prejudicial and unfair. She also said to the jury:

> The police went through her life with a fine tooth comb, couldn't find anybody who would have or could have assaulted her at least not that anybody could identify.

This absence of any resistance from defence counsel made it easy for the Crown to push this theme to an extreme, although there may have been a tactical reason for the Defence not objecting in the context of the "footprint" defence.

The theory of exclusivity culminated in Crown counsel's closing address comment:

> ...if Greg Parsons didn't cause his mother's death, who did?

This comment formed one of three grounds on which the Court of Appeal ordered a new trial.

(v) Cross-Examination of Defence Expert:

A central feature of the defence presented on behalf of Gregory Parsons was to establish the presence of a footprint in the dried blood in the bathroom that did not belong to him. Expert witnesses were called on behalf of both the Crown and the defence. The defence expert was Robert Hallett, a long-time employee of the F.B.I. in Washington D.C. He was the last witness in the trial and testified on a Friday afternoon but was to resume the following Monday. Defence counsel had attempted to derive a tactical advantage by withholding this evidence until the very end of its case, in effect, to catch the Crown by surprise.

Late that Friday afternoon there was a casual conversation, outside of the courtroom, involving a Crown witness, Mr. Hallett and Ms. Knox. Ms. Knox understood Mr. Hallett to tell them that Mr. William Bodziac, also an employee of the F.B.I., had concurred with his opinion. Mr. Bodziac was the author of a leading text in the area of footwear examination. Although Mr.

Hallett had made no such reference to Mr. Bodziac in his testimony, Ms. Knox called Mr. Bodziac by telephone and then sent a fax to him, at 6:00 p.m. that evening, stating:

> Could you please confirm in writing or by affidavit whether you were consulted by Mr. Robert Hallett and asked to offer an opinion on footwear impression evidence being presented by him at a trial currently going on in this jurisdiction. In particular, could you advise whether you confirmed to him that his conclusions are correct?

Mr. Bodziac responded in a letter, also by fax that he had not done so. Ms. Knox, who obtained the letter from Mr. Bodziac by relating to him her own version of a casual conversation she had with Mr. Hallett, was determined to use this letter to destroy Mr. Hallett's credibility in the eyes of the jury. The letter was not disclosed to defence counsel.

Towards the end of her cross-examination of Mr. Hallett she asked him if he had verified his research with anyone else and he said he had not. However, she pressed him until he said he "just ran it by Mr. Bodziac". Then in spite of objections from defence counsel and admonitions from the judge she insisted on referring to their conversation the previous Friday and the letter from Mr. Bodziac.

This was totally improper. The issue was a collateral matter on which contradictory evidence is not permissible. The evidence was, in effect, "created" by Ms. Knox, herself. It was extremely prejudicial in encouraging the jury to believe that a key expert witness for the defence was lying. Ms. Knox was on a mission and refused to be deterred, even by the strong reaction of the trial judge. This was not merely "overreaching" but "overzealous overreaching".

The "crowning" insult was to direct a police investigation into Mr. Hallett for perjury. Of course, this was groundless.

(vi) Post-Offence Conduct:

Reference was made earlier to the manner in which the police interpreted Mr. Parsons' behaviour after finding his mother's mutilated body, *supra*, at p. 123. In fact, he displayed a variety of reactions which were meaningless in relation to establishing guilt. Such meaningless behaviour may take on a highly prejudicial and dangerous character when a sinister "spin" is placed on it by the Crown either when examining witnesses or addressing the jury.

It is important to distinguish evidence which may have some probative value as to guilt from that which is worthless. As Major J. stated in *R. v. White*,[1998] 2 S.C.R. 72:

> Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. For example, an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial. Such an inference may also arise from acts of concealment, for instance where the accused has lied, assumed a false name, changed his or her appearance, or attempted to hide or dispose of incriminating evidence.

These are circumstances which, based on human experience and logic, may be consistent with guilt and inconsistent with innocence. As with other circumstantial evidence, such acts may be subject to competing interpretations. He added:

> ...When evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error.

The danger is even worse where the conduct is completely innocuous, perhaps merely part of the narrative or context of what occurred, yet the jury is invited to treat it as demonstrating guilt.

Mr. Lockyer testified before me that the experience of AIDWYC has been that Crown attorneys have been increasingly relying on such "evidence" to bolster weak cases. He referred to the testimony before the Morin Inquiry of the Crown attorney who prosecuted the second trial. At the trial, he argued that the accused did not join in the search for the victim after she disappeared because he was a practical man. He knew the search would be fruitless because he had left the body far from the search areas after raping and murdering her. The Crown attorney conceded that if the accused had joined in the search, he would have argued he was attempting to cover up his knowledge of where the body was and to demonstrate his genuine concern about the disappearance of the girl. Of course, the more innocuous the conduct, the more difficult it is to "explain".

Counsel for Mr. Parsons highlighted examples of Ms. Knox placing a sinister "spin" on worthless evidence in her closing address to the jury, including the following:

- "...it's a very horrible death but the statement [to the police] is my mother used to nag me, she was a real nag. Ladies and gentlemen, that may not strike you as peculiar, but I suggest to you it's very peculiar."
- "He's very unemotional just like Father Davis said he was back at the scene. You remember Father Davis, he was a priest and has been a priest for a long time and he remembered that there was something about Mr. Parsons at the scene that wasn't quite consistent with what had gone on. And when my learned friend suggested to him well people react in different ways when they're in shock, he...no, it wasn't like being in shock like he was talking to the girl who was there and stuff like that, he was doing things, just didn't seem right."
- "...he's on the phone and on the phone he's giving the ambulance attendant an alibi, I've been looking for my mother for two days. Who cares? Why not say, 'get an ambulance here get an ambulance here, now my mother is hurt', or 'my mother is dead'. He's on the 911 line giving an alibi for himself. Like he's been setting it up I suggest to you for two days being very concerned about his mother in the presence of others...'
- "...there's another really funny thing about those two days when you assess objectively the action of Mr. Parsons. Or two things that are funny...All he does is talk about how he can't reach his mother. No effort to get in touch with his father."
- "The second really funny thing that happened was on January 1st...[he called the SPCA to take his dog after having previously asked her to take it]...Coincidentally he gives up on her just a few hours after she died."
- "Greg Parsons knew that Elizabeth Parrell was his mother's friend. He didn't tell the police that. You got to wonder why."

In her submission, counsel for the DPP's Office stated:

> Although Gregory Parsons' post offence demeanour was not, in our view, a significant component of the Crown's case, it may have influenced the jury to return a verdict of guilty. To that extent, it would be preferable had it not been admitted, or if admitted, qualified by judicial caution.

In my view, the problem of overreaching advocacy by the Crown was even more dangerous than the admissibility of this evidence or the absence of judicial comment to the jury. For example, the 911 call had to be admitted but the interpretation placed on it was greatly strained.

Commissioner Kaufman made the following recommendation with respect to "demeanour" evidence:

> Purported evidence of the accused's 'demeanour' as circumstantial evidence of guilt can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel should be educated as to the merits of this cautionary approach and the dangers in too readily accepting and tendering such evidence...

He made a similar recommendation with respect to evidence of "consciousness of guilt", more generally. The dangers of such evidence were addressed by the Supreme Court of Canada in *R. v. White, supra,* at p. 149.

However, the problem must also be understood in the context of the Crown attorney succumbing to a "culture" which encourages over-reaching advocacy to support a weak case. The broader context was discussed under heading (b) above. It is illustrated not only in relation to Post Offence Conduct but also in other aspects of the Crown's address to the jury in this case.

(vii) Other Aspects of Crown Address:

A closing address can have a powerful and persuasive effect on a jury. At the end of a lengthy jury trial, counsel's addresses and the Trial Judge's charge take on a heightened significance because the facts are not fresh in the jury's mind. In this case, the Crown had the advantage of addressing the jury last.

Errors of fact by counsel are tempered by three things: the opportunity of opposing counsel to object, the trial judge's charge on this issue which emphasizes that the jury alone determines the facts, and the trial judge's duty to correct any significant errors made. Similarly, if there is unfair comment, counsel can object and the trial judge can attempt to rectify the situation.

It is not always possible to rectify every error or unfair comment, and our law reflects this. Counsel prepared their addresses from trial notes taken while they were examining a witness or during opposing counsel's questioning. This is not an easy task. They do not have the benefit of a transcript. The addresses are usually prepared at the end of a lengthy trial such as this one. Errors by opposing counsel can be missed. These are

practical considerations to be taken into account when considering errors of fact and misstatements of the evidence, and failure to object.

Certainly, Ms. Knox faced a difficult task in preparing her closing address to the jury. She had no junior counsel to take notes over the lengthy trial. Indeed, she acknowledges misstatements and overstatements in her address. In *Criminal Pleading and Practice in Canada,* Justice Ewaschuk comments specifically on the latitude to which Crown counsel are entitled in making a closing address to the jury:

> It must be kept in mind that a closing address is an exercise in advocacy culminating a hard fought adversarial proceeding. Crown counsel, like defence counsel, is entitled to advance his or her position forcefully and effectively with a degree of rhetorical passion in the presentation of the address.

The following are simply some further examples of over-reaching advocacy.

Within a few minutes of commencing her closing address, Ms. Knox stated [emphasis added]:

> He doesn't look like a **monster**, there's nothing about him to suggest that he is a **monster** but...

She referred to the Justice of the Peace who received the peace bond information:

> ...as she described it to Mr. McDougal, when he was good he was really good but sometimes he could turn and be a real **animal**...when he was bad he was **evil**.

And a little later:

> when she was telling Mr. McDougal what he was like she said he was like an **animal** effectively.

Towards the end of her address she stated:

> He was seventeen or eighteen years old. Riding his motorcycle with his leather jacket, and the neighbours were afraid to say anything to him about what he was doing because they didn't want any trouble...He was out of control.

In my view, this "demonizing" of Mr. Parsons was improper. It was not only inflammatory but also an impermissible attack on the character of the accused.

In his closing address defence counsel commented that no one heard screaming or cries for help at 5:00 a.m. That suggestion has some logic since such noises would be less likely heard at the height of the revelry, shortly after midnight. (We do now know from Brian Doyle that the murder did occur much closer to midnight). Her response to this suggestion was highly speculative and inflammatory:

> Maybe nobody heard her because she was saying Greg no don't, please don't. She was a mother begging her son not to hurt her. She wasn't screaming out terrified of a stranger. She was a mother begging her son please don't, oh my God no. Maybe that's what happened.

She stated that the logic of expecting screams at the time the murder was committed leads to the conclusion that there was no murder.

With respect to the police not finding evidence of a footprint in the bathroom:

> ...are they all **lying** to you when they say there was no apparent evidence of footwear impression visible...Ladies and gentlemen the possibilities that all these police officers are **lying** to you are pretty remote.

In effect she was telling the jury that if the police were mistaken, they must have committed perjury.

Rather than recognizing the lack of relevance and highly prejudicial nature of the "kill tape", she emphasized that it was a direct threat to the victim and, as mentioned previously, misstated the evidence of Dr. Ladha in support of that proposition.

She placed great emphasis on the peace bond application and, particularly, on his letter in response. She expressed her personal opinion that he had lied:

> This letter confirms an act of violence between Greg Parsons and his mother...this letter contains lots of lies.

His letter expressed concern that a record in relation to the peace bond would shatter his dream of becoming a police officer. Ms. Knox mocked that suggestion:

> This kid wouldn't get up and go to school. Despite his mother's nagging. He wouldn't go to school, look at his school records, looks at his attendance. **Some dream to be a police officer.** (Emphasis added.)

She continued:

> Earlier in the letter he talked about how he was an honor student in school, his marks are in, he was no honor student. He wasn't attending. He had no dreams to be a police officer. He was doing a con job on Mr. McDougal...**This is riddled with lies, but it is also riddled with hatred. It's riddled with the kind of hatred, the kind of feeling that Dr. Ladha testified that you'd find in relationships where children kill their mother.** A very strong, very intense turbulent relationship. A feeling that she's powerful, that she's in control. That's what he said here. [Emphasis added.]

The language is not only inflammatory but is also an attempt to contradict a collateral matter, which was irrelevant to whether he murdered his mother.

(viii) Summary:

Ms. Knox did not set out to convict an innocent person. She testified that she has suffered anguish over this case since learning of Mr. Parsons' innocence and has thought of it frequently. However, she was caught in the same vortex as the police investigation and her Crown colleagues, under very difficult circumstances. In some respects, it is unfortunate she is no longer a Crown attorney since she was very competent in that role. In the words of Mr. Simmonds, when testifying:

> Ms. Knox was the best prosecutor the Crown had up there. There was no doubt about that. She was well prepared, she was tenacious...

Her personal experience in this case would be valuable in guiding her conduct in future cases and, more importantly, would be a valuable resource to share with younger Crown counsel to assist them in avoiding similar pitfalls.

In the Morin Inquiry Report, Commissioner Kaufman made the following recommendation:

> Educational programming for Crown counsel should contain, as an essential component, clear guidance as to the limits of Crown advocacy, consistent with the role of

> Crown counsel. These issues may also be the subject of specific guidelines in the Crown policy manual or a Code of Conduct.

I agree with this recommendation but I am also of the view that mentoring by experienced colleagues is even more important. The example set by more senior Crown counsel and the opportunity to receive advice on such issues could help to avoid some of these problems. What must be encouraged is a Crown culture that is sensitive to the opportunities to avoid injustice as well as to obtain convictions.

It is important that Crown counsel not be placed in the position that Ms. Knox was in this case. Crown counsel must be given adequate time for preparation and in lengthy and complex trials, junior counsel should be assigned. I recommend that the DPP develop a policy to address this problem and that the Government allocate sufficient resources to support such a policy.

(d) Crown Pattern of Conduct:

Four members of the DPP's Office were involved in the prosecution of Mr. Parsons. Bernard Coffey worked with the police during the investigation, subscribed completely to the police theory and did not conduct any significant analysis of the hearsay statements. Catherine Knox relied upon Mr. Coffey's decision to proceed with the prosecution and conducted the trial when he became unavailable. Wayne Gorman conducted the appeal and an application for leave to appeal further to the Supreme Court of Canada. He also acted on many of the bail hearings and the appeal of the conflict of interest application. Colin Flynn, as DPP, had a more general and supervisory role but did become directly involved, for example, in the January 9, 1991 meeting with the police which culminated in the police laying the charge against Mr. Parsons the next day.

An overview of the judicial proceedings in relation to Mr. Parsons was provided in the Chronology and the specific stages need not be analyzed in detail. What is disturbing is the picture that emerges from their cumulative effect. It reflects a Crown "culture" that is not objective but over-reaches to pursue every possible legal avenue that will make life difficult for the accused. In reaching this conclusion, I have considered the following:

- The extraordinary conditions initially imposed on the disclosure of documents to defence counsel, *supra,* at p. 82;
- The attempts to remove defence counsel through conflict of interest applications including *certiorari* proceedings and an appeal to the Court of Appeal, *supra,* at p. 83;

- The position taken on the appeal of the conviction in the face of obvious fatal errors, *supra*, at p. 88-90;
- The application for leave to appeal the Court of Appeal decision to the Supreme Court of Canada, *supra*, at p. 90;
- The decision to initiate a perjury investigation against a defence expert witness, *supra*, at p. 148.

In addition, the Crown was relentless every step of the way, in attempting to have Mr. Parsons incarcerated or to have stricter bail conditions imposed pending trial. When bail was granted pending the appeal, the "lengthy and well-reasoned decision" of Marshall J.A. was challenged under S. 680 of the *Criminal Code, supra,* at p. 88. Green, J.A. was critical of the Crown advocacy in seeking incarceration following the drug charges, *supra,* at p. 93.

I also have concerns about the Crown's use of the stay of proceedings procedure in this case. Reference was made earlier to the Corey Evans assault charge which proved to be totally without merit. Rather than withdraw the charge or present no evidence, the Crown entered a stay of proceedings. This denied Mr. Parsons an opportunity to be exonerated publicly, *supra,* at pp. 91-2. I have further comment on Crown use of the stay of proceedings. However, it also was a significant issue in relation to Randy Druken, so these further comments are found in the next chapter, *infra,* at p. 317.

As mentioned previously, there were observations made in the decision of Judge Kennedy, following the preliminary inquiry, which should have given pause to the Crown, *supra,* at pp. 84-5. He offered the correct interpretation that should have been given to Mr. Parsons' peace bond letter. He pointed out the correct and significant interpretation for Dr. Ladha's evidence. He also commented on the weakness of parts of the Crown case. This did not cause the Crown to reassess its case prior to the first trial. Nor did it do so following the Court of Appeal decision as the Crown had every intention of proceeding with a new trial.

(e) Defence Counsel:

(i) General:

The defence counsel, Mr. Simmonds, was frank in his testimony before me in stating he was not happy when he learned Justice Lang had been assigned to the case. He felt that this judge tended to favour the Crown. He felt his submissions and objections were not treated fairly and there was mutual acrimony between them. It is difficult to know how such an atmosphere might affect a jury but I doubt it was a significant factor in Mr. Parsons' conviction.

Counsel are reluctant to raise objections frequently before a jury because they do not want to be perceived as being difficult or trying to hide something. Mr. Simmonds testified that he decided at one point that further objections, particularly since they would be consistently unsuccessful, would be futile. This was a reasonable position, especially in light of the judge's reaction to the Crown's "who did?" statement. However, there were other objections that could and should have been made in the absence of the jury, particularly in relation to the Crown's closing address. Even if unsuccessful, objections may be relevant on a subsequent appeal.

(ii) The Hearsay Statements:

Counsel for Ms. Knox submitted that Mr. Simmonds put too much emphasis on the expert evidence of a foreign footprint in the bathroom. He also suggested much more effort should have been made to call evidence to demonstrate the unreliability of the deceased:

> ...what about the failure to call other witnesses from her family i.e. her other son to assert she was the crazy lying woman the [Crown] wanted the jury to believe.

Indeed, he could have called Gregory Parsons on the *voir dire*. In addition to providing direct evidence of the unreliability of the declarant, he could have provided direct evidence of the untruth- fullness of the statements and an explanation of the alleged corroborating evidence. Mr. Simmonds testified that in retrospect, he would have called an expert witness such as Dr. Kimberley, who was called at this Inquiry.

(iii) Messrs. X and Y:

Two individuals were referred to as Mr. X and Mr. Y at the Inquiry in order to protect their identities. Mr. Y had been interviewed in the police investigation and a statement taken containing an alibi. During the trial, Mr. Simmonds expressed suspicions to Ms. Knox about the validity of that alibi. She arranged for the police to re-interview him and two independent witnesses, establishing to Mr. Simmonds' satisfaction that his suspicions were unfounded.

Mr. X was a viable suspect who lived three doors away from Catherine Carroll's home. The police were aware of his propensity for violence towards Ms. B, with whom he lived. Mr. Simmonds learned about Mr. X during the course of the trial but did not have sufficient information to raise him at the trial as the possible perpetrator. However, he did not draw his name to the police for further investigation. In my view, in the circumstances at that time, he should have done so.

He testified that his reason for not doing so was that he had no confidence the police would treat the information seriously as an avenue to explore. Nor would he have had confidence in bringing it to the attention of Ms. Knox or any of the other Crown attorneys. I agree with the following submissions from counsel for Ms. Knox on this issue:

> How and why he chose to treat his suspicions about Mr. X differently than he treated information he received about another suspect, Mr. Y is inexplicable. He does not dispute that he asked Ms. Knox to have the police investigate his other suspect, Mr. Y, and that she did so promptly and to his satisfaction.

Of course, this begs the question of the failure of the police to pursue Mr. X in the first place. However, the failure of Mr. Simmonds to raise Mr. X with the Crown for police investigation was an error on his part, even though it would have had no practical consequences.

(iv) Footprint Tactic:

Once all of the hearsay evidence had been ruled admissible, Mr. Simmonds had a difficult hurdle to overcome. The statement alleged by Stephen Roy was particularly damning in view of the actual manner in which the victim was killed. He sought to establish that the police investigation was completely bungled at the scene and that they failed to discover a footprint, not belonging to Gregory Parsons, in the dried blood on the bathroom floor.

The investigative team and the forensic experts saw no footprints and testified that there were none. No elimination was done. The two young medical attendants claim to have seen a footprint, one drew a diagram, and this had been overlooked by the Crown and the police. The jury saw what they believed to be a footprint. The forensic experts then agreed that a footprint was there. On this basis alone it would appear that the defence was at least reasonable.

Mr. Simmonds' strategy not to cross-examine on this issue during the Crown's case and to recall the Crown witnesses was unusual and he took the risk of being caught by rebuttal evidence. Counsel for Ms. Knox was highly critical of this approach and also criticized Mr. Simmonds for what was alleged to be an inadequate foundation for presenting the expert opinion:

- An experiment conducted on the wrong side of a tile.
- Not providing the original negatives for analysis.
- Not providing a firefighter's boot for elimination, since a firefighter had stepped into the bathroom.

Ms. Knox claimed that her cross-examination on these matters greatly weakened the defence expert testimony and, therefore, also diminished any adverse consequences of her improper cross-examination, *supra,* at p. 148.

My Terms of Reference, as well as constitutional imperatives, preclude me from re-trying the case. I find nothing improper in the footprint evidence strategy of defence counsel.

(v) Failure of the Accused to Testify:

Counsel for Ms. Knox examined Mr. Simmonds at great length on the decision not to call Gregory Parsons as a witness in his defence. There is little question in my mind that this was a significant factor in the minds of the jurors. The allegation of such a vicious murder against one's own mother together with an alleged relationship of hostility cried out for a denial from her son. It is possible that if he had taken the stand to testify, Gregory Parsons' true character would have emerged. The jury might have seen for themselves that he was not a "monster" or an "animal" but a caring son. But he also might have created the opposite impression.

The decision whether or not an accused should testify can be one of the most difficult for defence counsel to address. Occasionally, an accused will insist on doing so and, unless he is likely to commit perjury, defence counsel normally will not attempt to stand in his way. In this case, there was no criminal record that could unfairly prejudice the jury if it came out in his testimony. Mr. Simmonds consulted with other senior counsel, with the father and with the accused and it was agreed that he should not testify.

Some of the evidence he would have given was available through his statements. He was vulnerable to cross-examination on the letter he wrote with respect to the peace bond application but most of all, in the words of Mr. Simmonds:

> ...he wouldn't have been a match for the Crown...

Her ability to attack, and probably destroy, the unfavourable evidence of her own witness was demonstrated in relation to Rose Marshall. Her cross-examination of Anne Marie Johnson, was also aggressive and effective. This happened even though both were telling the truth.

Moreover, I understand that Mr. Parsons was not the same man at the time of the trial that he is today. When testifying before me recently, he said he was still working to cope with his anger, even though he was mature, articulate and convincing. Mr. Simmonds testified that, at the time of the trial:

> ...Greg was a very young man, a very angry man, as a result of the treatment, he had absolutely no trust in the system starting from his arrest, the conflict, right up to the events in the trial.

I can understand that defence counsel would not want to risk him being provoked in cross-examination to burst out with a hostile or even threatening reaction towards Ms. Knox. Indeed, even at the outset of this Inquiry, he expressed such anger toward her.

Mr. Simmonds also testified that one of the reasons he did not call Mr. Parsons was that he felt he had no "case to meet". I may observe, in passing that it was my decision in *Dubois v. the Queen* [1985] 2 S.C.R. 350, that elevated this concept from Professor Ratushny's book on Self-Incrimination, to a constitutional principle! The difficulty is that in a jury trial, the point at which that standard has been met, can be very difficult to gauge.

In such circumstances, there is always the danger that if an accused testifies and is convicted, it is open to the appeal court to find that there was no miscarriage of justice based on the view that the jury simply did not believe the accused. By putting the accused on the stand, the defence can lose its grounds for appeal. The decision not to call the accused as a witness may be safer to make when it is apparent that error has already occurred requiring a new trial.

In my view, the decision not to call Mr. Parsons as a witness is certainly understandable.

(vi) The Basement Window:

At trial five Crown witnesses testified with great confidence that the basement window had been properly examined and was not a point of entry. At the Inquiry we learned a completely different story. Also the confessed murderer, Brian Doyle, confirmed that he entered through this window.

Mr. Simmonds testified that he accepted and believed that the basement window was not the point of entry because the officers' evidence was so conclusive and persuasive at the time. He did question the officers at trial and viewed the scene. His view was that whoever got in that night was either let in, had a key, or found some other way to get in.

What I find surprising, on reflection, is that Mr. Simmonds does not have appeared to discuss the basement window with his client, Gregory Parsons. Counsel for the DPP's questioned Mr. Simmonds specifically on this issue and he responded:

> ...obviously, that how the person that entered the house was an issue. Myself and Mr. Parsons discussed all of those things, but a specific conversation related to just that, no...

Counsel referred to Mr. Parsons' statement to the police which said the window was always covered by a curtain, contrary to the state in which it was found and Mr. Simmonds added:

> Certainly the fact that was this a break in, how the person got in was canvassed with Mr. Parsons.

Counsel persisted in pursuing this discrepancy and Mr. Simmonds responded:

> ...At the time I spoke to Mr. Parsons that obviously would have been discussed in a general sense. I don't have a specific recollection...

This probing on the part of Ms. Hoegg was helpful since I have already alluded to the central significance of the police investigation ruling out the basement window as the point of entrance for the murderer, *supra*, at p. 94.

It would be unfair to place on Mr. Simmonds' shoulders the burden of conducting his own investigation to challenge the resolute findings of the police that the basement window was not the point of entry. But Mr. Simmonds had one crucial resource that the police did not. Their tunnel vision deprived the police of the benefit of Gregory Parsons' assistance in determining the significance of the basement window, *supra*, at p. 95. Mr. Simmonds was in a position to discuss all aspects of the case with Mr. Parsons.

It appears that Mr. Parsons did not tell his counsel that he and his friends including Brian Doyle, had frequently used the window as a point of entry and exit, *supra*, at p. 95. Demonstrative evidence of an adult being able to enter through the window would have been a strong challenge to the Crown's case.

(vii) Summary:

Mr. Simmonds faced the same challenges as Ms. Knox in acting without junior counsel. He testified:

> ...I'm never doing a trial again longer than four weeks by myself...you start to get fatigued, you start to lose

> objectivity, you start to lose focus and you just will miss things...

In order to cope, it was necessary for both of them to work long hours:

> ...once we got into the trial, it was seven days a week, five nights a week. I took off Friday and Saturday night...And to be fair, I expect it was the same on the other side.

I have already recommended that the Crown adopt a policy of providing junior counsel for long and complex trials. I recommend the Legal Aid Commission adopt a similar policy for defence counsel and that adequate resources be allocated by the Government to support such a policy.

The observations with respect to the basement window are not a criticism of defence counsel. They are more in the realm of *ex post facto* speculation. In fact most of my observations with respect to defence counsel fall within this rubric. Counsel for Mr. Parsons at this Inquiry filed a complete and unequivocal waiver of solicitor client privilege in relation to Mr. Simmonds. This exposed Mr. Simmonds to a searching exploration of every aspect of his conduct of the defence.

Mr. Simmonds testified that it was incorrect to suggest he **believed** in Mr. Parsons' innocence. Rather, he **knew** he was innocent. This knowledge imposed an even greater personal burden than defence counsel experience in many cases. There were things that possibly should have been done differently, in retrospect, but Mr. Simmonds did everything he could to assist his client, and Mr. Parsons was fortunate to have him as his lawyer.

(viii) Trial Judge:

It is obvious from reading the judgment of the Court of Appeal ordering a new trial, that the errors made by the trial judge contributed to the conviction of Gregory Parsons, *supra*, at pp. 88-90. The Court of Appeal did not express its opinion on the admissibility of any or all of the hearsay statements. I have already said that, in my view, since the maker of all of them was demonstrably unreliable, all of them should have been excluded, *supra*, at pp. 86-7.

In this respect, I wish to emphasize that the test in *Smith* requires rigor in its application to the requirement of "reliability". The starting point must be that hearsay is inherently unreliable, dangerous and inadmissible. Such a statement is only admissible where it:

> ...is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken...

The gist of the trial judge's ruling was as follows:

> So that was basically all I can say to you on my analysis which I spent hours going over it, I'm satisfied that looking at the cases that you've given me and the Smith and the Khan that there is the circumstantial of reliability there when you look at all the evidence and I'm ruling that the hearsay evidence is admissible.

Nowhere does the ruling address the inherent unreliability of the declarant.

The trial, in general, was not conducted with the rigor warranted for such a serious charge. The Crown was permitted to cross-examine her own unfavourable witnesses without the proper procedure being followed. Contradictory evidence was permitted on a collateral issue. Post-offence conduct of no probative value was permitted. The trial judge was unable to control Crown counsel in her improper cross-examination of the defence expert. The judge said he would give a direction to the jury in relation to this matter but failed to do so.

He also failed to give a proper direction on the use of post-offence conduct as required by the recent Supreme Court of Canada decision in *R. v. White, supra,* at p. 149. Although the White case was decided a few years after the Parsons trial, the requirement that the jury be properly instructed was also established 75 years ago in *Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C.). Quite apart from specific precedent, the basic principle of relevance and common sense warrant at least some comment to the jury when it is faced with such ambiguous evidence magnified by the Crown advocacy alone.

It is true that defence counsel did not object on many of these occasions but he testified that his objections were not taken seriously. He was concerned that further objections would anger the judge. Counsel for Mr. Parsons at this Inquiry submitted a series of comments made by the judge over the trial that support that conclusion. The judge referred to defence counsel's arguments as "poppycock", "bull", "hogwash" and "foolishness". In addition, he stated:

- "...an awful lot of objections about nothing it seems to me. You make mountains out of mole hills."

- "I would tell you that you're objections a lot of them are of no substance."
- "I said on your objections throughout the trial they were not substantial."
- "And I've watched and watched the way you have been acting in this case. And I tell you I'm surprised at some of the objections you have made..."
- "So the more confusion now I can add to this the better right?"
- "It would be more to your benefit to have them confused."
- "There must be something awful bad in that letter that you don't want to come out."
- "...I don't really see why you always have to repeat things to me all the time, you know. You always repeat things. I've heard you once, I don't need to hear them two or three times..."

Mr. Simmonds was frank in testifying that there was acrimony between him and the trial judge and accepted his share of responsibility for that. He accepted that on occasion he deserved to be rebuked.

The judge's conduct towards defence counsel, in contrast to the Crown, was petulant and unfortunate. But I do not agree that it prevented Mr. Simmonds from continuing to object. Every erroneous ruling on an objection enhances the prospect of a successful appeal. But the judge's conduct did contribute to Mr. Parsons' perception that he did not receive a fair trial. His perception is understandable. Judges are human but must exercise restraint.

I have not inquired into the experience and expertise of the judges of the superior courts of Newfoundland and Labrador. However, as a general proposition, I would encourage the Chief Justices and the Minister of Justice to be vigilant in identifying the need for criminal law experience and expertise when vacancies occur. When such need exists, it should be drawn to the attention of the Federal Minister of Justice.

There is a rich source which has largely gone untapped, in my experience, in the provincially appointed courts of this country which do exclusively criminal work. Judicial training for superior court judges has improved greatly with the creation of the National Judicial Institute. However, when that is combined with years of practical judicial experience and expertise, our superior courts will have the best of both worlds. At the same time chief justices must be cautious in assigning judges to complex criminal trials.

(f) Juries:

(i) Jury Secrecy:

Section 649 of the *Criminal Code* provides that:

> Every member of a jury...who...discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence...

This protection of juror secrecy was established under Common Law to encourage uninhibited jury deliberation as well as to protect jurors. Unfortunately, it imposes a formidable hurdle for an Inquiry such as this one. My task is to determine what went wrong, why it did and how such an injustice can be avoided in future.

It is possible to isolate a number of specific factors and to draw some general conclusions. However, the picture will always be incomplete without at least some insight into what happened in the jury room.

Commissioner Kaufman made the following recommendation, without any elaboration:

> The Criminal Code should be amended to permit research into the jury's deliberative process, with a view to improving the administration of justice.

The report documents how the Commissioner there declined to summon the jurors in the Morin case to appear as witnesses at the Inquiry. Judicial review was sought but his decision was upheld.

There have been some studies done in the United States on jury behaviour as well as some Canadian studies on "simulated" juries. But much of our knowledge of juries is based on assumptions. My role as Chairperson of the Law Reform Commission of Canada as well as my experience as a criminal lawyer, as a trial judge and as an appellate judge have taught me that the legal system makes many assumptions which prove to be precarious when scrutinized. However, I also recognize the frequent need for "balancing" when recommending legislative changes or making judicial changes to the law. Here, the challenge is to maintain the benefits that section 649 affords while obtaining the benefits of better insights into jury deliberations. That would be especially valuable where a serious injustice has occurred.

I recommend that a specific exception be added to section 649 which would take into account the unique problem and recently identified frequency of wrongful convictions. This "wrongful conviction" exception would allow a juror to be interviewed where a Commission such as this one has been established. Conditions could be established such as the following:

- The juror must consent to be interviewed alone or with other jurors who also consent.
- The interview is conducted by the Commissioner in private but in the presence of others on the recommendation of the Commissioner, with the consent of the juror(s).
- The interview may be recorded for accuracy but the recording is subsequently archived with the Federal Minister of Justice.
- Any use of the information is to be without attribution to a specific juror but is treated like an "off-the-record" journalistic interview for background.

Further development of this concept is required. However, the Burns and Refay decision of the Supreme Court of Canada has specifically taken into account the danger of wrongful convictions in rendering an important judicial decision. In recent years "wrongful conviction" commissions have been established in Nova Scotia, Ontario, Manitoba and Saskatchewan as well as by Newfoundland and Labrador.

It would be ideal if the experience of these commissions could lead to the elimination of wrongful convictions immediately. The reality that there have been five commissions into wrongful convictions and their systemic nature suggest that is not likely to occur. The next such commission should have access to the missing link of jury deliberations.

I recommend that the Minister of Justice of Newfoundland and Labrador pursue such an amendment with his federal and provincial counterparts.

(ii) Directed Verdicts:

In response to a question from me. Mr. Simmonds stated he did not move for a directed verdict because he thought there was no point. He elaborated:

> I don't mean to sound flippant, Mr. Commissioner, but I think if you were there at the end of the crown's case, you would have understood why it was no point. It would have been, I think, a move that would have clearly agitated Judge Lang more, not something I wanted to do directly

> before I started my case. I think he would have phrased it as poppycock or nonsense, and you know it is, and just using it to look for some delay or something like that, as he accused me of at one point.

In my view, and on the basis of the hearsay statements being admitted, such an application would not have been successful. On the basis of the current test, also applicable at that time, there was some evidence on which, if believed, a reasonable jury, properly instructed, could convict. The test had been firmly established by the Supreme Court of Canada and confirmed in recent cases such as *R. v. Charemski,* [1998] 1 S.C.R. 679 and *R. v. Arcuri,* [2001] 2 S.C.R. 828.

In applying the test, a trial judge is not allowed to weigh the evidence, for example, by assessing the credibility of witnesses. Where the case depends on circumstantial evidence, the trial judge must weigh those circumstances in the sense of determining whether, when taken together, they are capable of an inference of guilt beyond a reasonable doubt. It is still the function of the jury whether or not to draw that inference.

All of the cases of wrongful conviction referred to by the Supreme Court of Canada in the *Burns and Rafay* case, involved reliance upon circumstantial evidence for the identification of the accused: Marshall, Milgaard, Morin, Sophonow and Parsons. Evidence merely of motive and opportunity will often be a weak foundation on which to base a criminal conviction. It was only with the Report of the Mashall Royal Commission in 1989, that the potential ineptitude of our criminal justice system was laid bare. **This was the first time in Canadian legal history, that a wrongful criminal conviction was ever formally acknowledged by a public institution.** The weaknesses of our system were amply demonstrated in subsequent public inquiries such as this one.

Prior to the matter being resolved in *Mezzo v. The Queen,* [1986] 1 S.C.R. 802, there was some support for the proposition that a trial judge could engage in a limited weighing of the evidence on a Directed Verdict application. I hasten to declare my perceived conflict of interest since I dissented in that case, on this issue. I will indulge further in anecdotal experience of my practicing criminal law in Montreal almost 50 years ago. At that time and place, at least, experienced criminal law trial judges would not hesitate to withdraw a case from the jury when it rested upon flimsy evidence supported mainly by suspicion.

In my view, the recent spate of demonstrated convictions of innocent persons is proof that juries are not always reliable. It is no longer acceptable

for the criminal justice system to place blind faith in the perceived, innate good sense of juries. Increasingly complicated jury instructions are not the answer. Some of the "model" charges have already become counter-productive in their complexity. An important response to this problem would be to raise the threshold for permitting cases to be considered by the jury. The test for a Directed Verdict should be modified to allow trial judges to throw out cases where the evidence can colloquially be characterized as "garbage".

The earlier cases refer to criteria such as "manifestly unreliable" and "of such a dubious nature" when assessing evidence in relation to a Directed Verdict. In my view, the test for the "sufficiency" of evidence to be met before a case goes to a jury should be articulated in the *Criminal Code* to require a judge to enter a verdict of acquittal where there is:

> ...no evidence or the evidence is so **manifestly unreliable** on any essential element of the offence, that it would be dangerous to convict ...

Moreover, in such circumstances, where defence counsel does not make an application, the trial judge should be required to act *ex proprio motu* (i.e. on the initiative of the judge).

A common situation for the consideration of such a motion would be where the identity of the accused is sought to be established solely on the basis of circumstantial evidence of motive and opportunity. It is often dangerous to conclude that identity has been established beyond a reasonable doubt merely on such circumstances, as some of the wrongful conviction cases demonstrate.

There is another reason why such a provision is now justified. Counsel for the Royal Newfoundland Constabulary Association, in his Submissions, include the following observation:

> ...In the early days of forensic science, the direct evidence left at a crime scene was difficult to interpret. If too much was required for a conviction in a circumstantial evidence case, many guilty would go free. In the days when science was rudimentary, the bar for circumstantial evidence had to be low. The change in science means much more useful direct evidence is found at a crime scene. The old justification for convicting on circumstantial evidence alone has much less force. The change in science means a much higher threshold for conviction should be used now, not a lower one.

This is an astute observation and it places the emphasis where it should be. Convictions must be based on thorough and skilful investigation and presentation of evidence rather than on suspicious circumstances and over-reaching Crown advocacy.

I recommend that the Minister of Justice of Newfoundland and Labrador invite his federal and provincial counterparts to work with him in developing and achieving an amendment to the *Criminal Code*, along these lines. I recognize that "law and order" themes are often more attractive to voters. However, the agony and cost of convicting innocent persons warrant a legislative response. By "cost" I refer not only to compensation of the victims and the cost of the inevitable Royal Commissions that follow, but also to the far greater cost to the reputation and integrity of our criminal justice system.

(g) **Conclusion:**

In his oral submissions, Silas Halyk, counsel for Ms. Knox, observed:

> In an overview, my suggestion is that there is no evidence of any intentional misconduct on the part of anyone with respect to the Parsons issue. On the other side of the coin, the bad news is that almost everyone made some mistakes in the course of the process and I have in my Brief made the point of these things that as in aviation, incidents tend to have sequences, - it's not any one factor that by itself causes the unfortunate and tragic result. It is a combination of factors and usually sequential factors that, that lead to this.

I am in general agreement with this characterization except that we have seen limited examples of intentional conduct, albeit driven by a perceived "noble cause", that contributed significantly to the tragic result.

The Crown failed in its responsibility to exercise a "challenge" function to the police theory. Mr. Coffey "bought in" to this theory very early and contributed to it. Ms. Knox was thrown into the trial in difficult circumstances and followed the Crown path that had been established while adding personal and aggressive advocacy in support. Aggressive legal advocacy was also contributed by Mr. Gorman whose positions often demonstrated lack of objectivity. Mr. Flynn showed no leadership in altering the path, or the vehicles selected along the way. In sum, the DPP's Office demonstrated a Crown culture that accepted and supported the police tunnel vision.

All of these people have now left that Office but there was no evidence before me that this culture has changed since the prosecution of Gregory Parsons. Over the

course of the second investigation and throughout this Inquiry, the RNC actively pursued reforms in response to identified problems. There was little indication of improved training, mentoring, review of decisions or encouragement of contrarian thinking amongst the law officers of the Crown.

In fairness, the current DPP testified that he simply did not have sufficient resources to dedicate personnel to monitor this Inquiry. The DPP's Office appears to be engaged in an ongoing struggle to meet daily demands let alone engage in policy review. Mr. Mills is certainly aware of the dangers of "tunnel vision" in relation to the Crown as well as to the police. However, any initiatives to provide education for Crown attorneys in this sphere have been sporadic because of budgetary limitations.

At the time he testified, in June of 2005, the DPP's Office had been living with a government-wide 5% decrease in all budget headings for over three years. The program for articling students had to be abandoned and this deprived senior Crown attorneys of research assistance, as well as requiring them to prosecute summary conviction offences. This leaves less time to concentrate on more serious matters. There is little replenishing of senior staff from the junior level and work pressures will increase significantly with the recent expansion in police hiring.

It is still necessary to assign only one Crown attorney to complex cases such as the Parsons prosecution and support personnel are also over-extended. Basic requirements such as legal textbooks and electronic access to case law through lap top computers are inadequate. There are no dedicated resources for ongoing education and sharing of experience amongst Crown attorneys. Opportunities have to be cobbled together by constantly re-priorizing resource allocation.

My earlier observations with respect to the funding of the RNC, *supra*, at pp. 132-3, are equally applicable to the DPP's Office. The first step should be an objective assessment of budgetary requirements and practices in comparison to selected prosecution services in other provinces. Then the Government should allocate adequate resources to ensure that the people of Newfoundland and Labrador are equally well served.

The Minister of Justice of Newfoundland and Labrador should establish an independent review of the DPP's Office. This review should ensure that steps have been taken and identify further steps that should be taken to eliminate the Crown culture that contributed to the wrongful conviction of Gregory Parsons and was evident in the prosecution of Randy Druken. This review should also conduct the assessment referred to in the previous paragraph so that the Government may allocate adequate resources to modernize the DPP's Office. This also requires a comprehensive review and revision of the *Crown Policy Manual*.

I believe it would be helpful to have a forum where representatives of the Crown and of defence counsel could meet to discuss matters of common concern on an ongoing basis. Indeed, I would suggest that other components of the criminal justice system should also participate. I recommend that a Criminal Justice Committee be established consisting of the following members:

1. A judge or retired judge appointed by the Chief Justice of Newfoundland and Labrador.
2. A representative of the Minister of Justice.
3. A representative of the Defence Bar.
4. A representative of the DPP.
5. A representative of the Legal Aid Commission.
6. A representative of the RNC.
7. A representative of the RCMP.

While the details could be worked out "on the ground", the Committee might be chaired by the judge or retired judge and provided the services of an Assistant in the Justice Department on a part-time basis. The latter could canvass the members for agenda items and arrange meetings, perhaps three times a year. The "constituents" of the members could refer issues or problems to their representatives for discussion and, hopefully, resolution.

We have seen the dangers that can arise where components of a "system" go their separate ways. The sharing of information, dialogue and understanding other points of view are always valuable pursuits.

5. Conclusion:

The investigation and prosecution of Gregory Parsons became a "runaway train", fuelled by tunnel vision and picking up many passengers along the way. It had many of the recurring features of wrongful conviction cases that were described at the outset of this chapter, *supra*, at p. 71. As counsel for Ms. Knox said, "almost everyone made some mistakes".

In the Reference to the Nova Scotia Court of Appeal which resulted in the acquittal of Donald Marshall, Jr., the Crown urged the Court not to cast blame on the criminal justice system for his wrongful conviction. Otherwise, it was argued, the public would lose confidence in the administration of justice. The Court accepted this argument resulting in the unfortunate words that any miscarriage of justice was "more apparent than real" and the conclusion that Mr. Marshall was the author of his own misfortune. The subsequent Royal Commission and an Inquiry Committee of the Canadian Judicial Council eventually set the record straight. But the attitude that the criminal justice system had to be "protected" from criticism was fairly widespread at the time. It was reflected in the contempt power for "scandalizing the

court" and rather smug assumptions about the protection of accused persons in our system that went unchallenged.

The Marshall Royal Commission, and others that followed, have taken the approach that it is far better for the system, itself, to identify its mistakes and weaknesses and to try to correct them. Admitting mistakes and trying to improve, does more good for public confidence than denial. Otherwise, the public, ultimately, is faced not only with the mistakes, but also the exposed false denial.

In his testimony before me, Mr. Lockyer expanded on the inevitability of mistakes in the criminal justice system:

> It's really never ceased to surprise me and, indeed to amaze me over the years how surprised people are that there are wrongful convictions in our systems and, indeed, in other systems as well because the criminal justice process is as human a system... as there is in the modern day. If you think about and think about a serious criminal case, a homicide for example, the number of people you're depending on to get it right can run into hundreds in some cases and they all come from different parts of the case. You start with the witnesses themselves...all the inherent problems in witnesses as to whether or not their evidence should be accepted or not. You then have, of course, the police involvement and police come in naturally with their bias, their determination to solve cases as best they can, accompanying problems that come with that...and then after the police you then have the Crown, who's job it's always seemed to me above all, especially at the outset, should be one of a supervisory role and crowns don't always get it right. Then you have a defence counsel and defence counsel come in with degrees of competence and, indeed, in some cases, let's face it, incompetence. You have a trial judge. The trial judge who may come in, will come in with his own bias, who may get it wrong in the process and then, of course, 12 jurors who come from anywhere who we rely on to apply their common sense but they can only apply it in the context of what they hear in the course of the trial and even then they can get it wrong. So it's, it's an extraordinary human system our criminal justice system...

Any system that depends on human beings is, by virtue of that very feature, fallible. This helps to explain why tunnel vision is seldom the result of personal malice, *supra*, at p. 71, and why wrongful convictions are not aberrations but are rooted in systemic problems, *supra*, at p. 72.

I have already given my opinion that Gregory Parsons is and was a good person to whom bad things happened. I do not find that those who contributed to

those bad things happening were evil or malicious. They were caught up in systemic forces and only saw "their own workshop", *supra*, at p. 68.