## CHAPTER 4: RANDY DRUKEN

### 1. Introduction:

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

> ...to inquire into the conduct of the investigation into the death of Brenda Young and the circumstances surrounding the resulting criminal proceedings commenced against Randy Druken for the murder of Brenda Young.

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 ...Randy Druken...

As done in the previous chapters, some systemic issues will also be addressed in this chapter as they arise.

Term 1(c) also authorizes me to advise on whether Randy Druken should receive financial compensation from the Government and, if so, the appropriate amount. I have discussed the journey of this provision together with a similar one in relation to Mr. Dalton, *supra*, at p. 7. There, reference is also made to the issue of determining factual innocence. I need not repeat that discussion here.

My mandate in Term 1(b), in relation to Randy Druken is identical to my mandate in relation to Gregory Parsons. However, Mr. Parsons has been acknowledged by the Government to be factually innocent. Mr. Druken has not. This distinction does not preclude me from reviewing the conduct of the investigation into the murder of Brenda Young and the subsequent prosecution of Randy Druken.

On March 18, 1995, Randy Druken was convicted of murdering Brenda Young and sentenced to life imprisonment, with no eligibility of parole for fourteen years. The only direct evidence tying him to the murder was the testimony of a "jailhouse informant". On August 10, 1998, this individual sent a statement to the Minister of Justice alleging that he had been coerced to give false testimony by members of the Royal Newfoundland Constabulary (RNC) and by Crown prosecutors. The Director of Public Prosecutions (DPP) asked the Ontario Provincial Police (OPP) to conduct an independent investigation into these allegations. The report of the OPP investigation outlined a prolonged pattern of deceit on the part of the informant, including his false testimony at Mr. Druken's trial. The informant

was charged, convicted and sentenced to a five-year term of imprisonment for his attempt to obstruct justice.

In light of this OPP report, the RNC arranged for forensic testing, which revealed the presence of a male other than Randy Druken at the scene of the murder. That person was identified as his brother, Paul Druken. Ironically, Paul Druken died of a drug overdose on the day that the report of the forensic testing was received by the RNC.

On June 17, 1999, the Court of Appeal allowed an application to introduce fresh evidence and ordered a new trial for Randy Druken. On July 8th, he was released from prison on an undertaking with strict conditions.

In light of the OPP report in relation to the informant and the DNA evidence revealed by the forensic testing, the RNC launched a second investigation into the murder of Brenda Young. The report of this re-investigation concluded that:

- Paul Druken was actually present at the time of the murder;
- Quite apart from the jailhouse informant, the testimony of other key witnesses was tainted and unreliable;
- There was no evidence of the Crown theory of two perpetrators because of a clean-up of the scene following the murder;
- No new evidence was discovered to implicate Randy Druken and grounds did not exist to charge him with Brenda Young's murder.

Faced with the question of whether to proceed with a new trial the DPP's Office obtained three internal opinions and one from the Crown Law Office in Ontario. This external opinion was critical of the second investigation and recommended that a stay of proceedings be entered on the basis there was a reasonable likelihood that some additional evidence implicating Randy Druken would come to light. As a result, a stay of proceedings was entered on August 20, 2000 and a third investigation was initiated by the RNC. The stay expired one year later. The third investigation reached the same ultimate conclusion as the second.

My mandate is not to re-try Randy Druken. On the contrary, I am explicitly precluded from doing so. Nor am I authorized to determine whether he is factually innocent. I am required to assess the manner in which the Brenda Young murder investigation was conducted, just as I did in relation to the Catherine Carroll murder investigation. I am also required to assess the circumstances surrounding the resulting criminal proceedings against Randy Druken. Although his factual innocence has not been acknowledged, I have concluded that there was no reliable evidence on which to base his prosecution.

## 2. Chronology of Events:

### (a) Background:

Brenda Young was born on August 19, 1966. From the time she was a few days old, she was raised by her grandparents, Edmund and Josephine Dyke. Mr. Dyke was a caretaker at the Salvation Army cemetery. Brenda Young was murdered on June 12, 1993.

Randy Druken was born on May 21, 1965. His mother, Shirley Druken, was a friend of Josephine Dyke for decades. The two families lived in the same neighbourhood when Brenda and Randy were children. Although they knew each other, they did not socialize as children. He was charged with her murder on August 20, 1993,

Randy Druken had two sisters and five brothers. Some of his brothers had a reputation in the St. John's area for engaging in criminal activity, primarily related to drugs and violence. Two of them, Gerald and Paul died of drug-related causes in 1991 and 1999, respectively. Derek was shot to death in 1996. A fourth brother, Jody was charged with his murder and ultimately convicted of manslaughter.

Randy's lifestyle involved heavy drinking and drug use. His first criminal convictions occurred while he was a teenager and his extensive criminal record culminated in a four-year prison sentence for armed robbery in 1986 and a 3½-year prison sentence for aggravated assault (a stabbing) in 1989. He was due for mandatory release from prison on May 31, 1991.

By that time Brenda Young had been married and divorced. She had two young children, Cindy born on August 4, 1983, and Tyrone, born on August 28, 1988. Since her marriage ended, she had relationships with a number of men. Her lifestyle did not involve the degree of criminality of Randy Druken. Her drug use appeared to be oriented to prescription drugs, such as painkillers, which she would use, pass on to friends or sell. In her submissions to me, Cindy Young described Brenda Young as:

> ...a loving, considerate mother to herself and to her younger brother. Brenda Young tried very hard, while living with her own personal troubles, to provide a decent life for her children.

No one took issue with this description during the Inquiry before me.

Brenda Young spoke to Randy Druken by telephone about a month prior to his release under mandatory supervision. It is not clear how things developed but it is known that her grandmother and acting mother, Josephine Dyke, was very fond of Randy Druken.

During a subsequent telephone conversation, a date was arranged upon his release from prison and on May 31, 1991, Randy Druken was Brenda Young's guest at her home on Walton's Mountain. The next month, he helped her to move into her last address, 194 Empire Avenue. He divided his nights between there and the home where his mother and stepfather, John Ring, resided. In July, he moved into Brenda Young's apartment, in spite of escalating arguments between them because of his lifestyle. On August 17th, he was incarcerated for breach of parole conditions related to the use of alcohol and possession of drugs. Brenda Young visited him in jail and he was released on September 6th.

Their relationship continued right up to the time of her death, with Randy Druken moving in and out of her apartment a number of times. He was returned to jail for another parole violation on November 5th and released in late January 1992, when he completed a three-week addiction program at the Humberwood Institution in Corner Brook. He was returned to jail because of another parole violation on September 10, 1992.

During the times he was living with Brenda Young, there were frequent arguments between them, some of which became violent. He was attempting to quit drinking but would relapse and this, as well as his drug use, would lead to further arguments. Brenda Young told her friends and her grandmother about being beaten by Randy Druken. It appears that her grandmother, Josephine Dyke, had little sympathy for her and continued to believe that Randy Druken was a fine young man and that she must be the cause of the problems between them.

On January 17, 1993, he struck her in the face and also threw an ashtray through a window. This incident caused him to realize that he was out of control and he submitted to arrest so he could be incarcerated and participate in a counselling program. He was released on April 1st, and began working at the cemetery, with Brenda Young's grandfather, Edmund Dyke.

On May 23rd, following another violent incident, he moved back into the home of his mother and stepfather. He continued to visit Brenda Young and was scheduled to attend a counselling program on family violence on June 9th.

Cindy Young did not like the arguments between her mother and Randy Druken and she feared for her mother's safety when he was physically abusive towards her. She was relieved when her mother terminated their romantic relationship on May 22nd and told Cindy she would call the police if he abused her again. But she also said that she and Tyrone had a good relationship with Randy Druken. She said she liked him and described him as "sweet" and treating them "good".

In early June, Brenda Young and Josephine Dyke decided they would travel to Ontario to attend a family wedding. They were scheduled to leave on June 15th. On the weekend of June 4th, the plane tickets were picked up and Brenda Young did some clothes shopping in preparation for the trip. Randy Druken agreed to look after the children while they were away. He spent that weekend at her place and there was no violence. The following Wednesday, June 9th, he attended the first meeting in the family violence program.

However, the next day, on Thursday, June 10th, Edmund Dyke advised him they would not be working at the cemetery because of the adverse weather conditions. Randy Druken began drinking beer early that afternoon at the home of a friend. The drinking continued into the evening and night, in bars, with his brothers Derek and Paul and another acquaintance. By midnight he was very drunk and decided to take a taxi to visit Brenda Young.

When he arrived, she was on the telephone speaking with Josephine Dyke and he said he had consumed a few beers. Josephine Dyke advised her to let him stay there for the night. Brenda Young had intended to audiotape an argument between them to demonstrate to her grandmother that their arguments and his violence were not her fault. His visit provided that opportunity and she activated the recording early on the morning of Friday, June 11th, without his knowledge.

The tape was discovered after her death and was transcribed. Randy Druken appears to be accusing her of something but is generally incoherent. She repeatedly accuses him of being on cocaine that night and tells him he is making no sense. At one point he tells her how much he loves her but then accuses her of lying to him. She tells him how much she disliked their past arguments and his violence and how frightened she was of him at times. He replies that he was wrong and sorry and "didn't mean to do it". At this point he appears to be crying. The tape ends with him asking her not to be afraid of him since he would never hurt her. This tape provides some insight into the nature of their relationship.

Later that morning of Friday, June 11th, he was suffering from a major hangover and was unable to go to work, which was unusual, according to Edmund Dyke. He spent most of the day sleeping on the chesterfield in Brenda Young's living room. Shortly before 10:00 p.m., she drove him to the house of his mother and stepfather. Shirley Druken stated that she looked at the clock when he walked in and it was 10 minutes past 10 o'clock. He retired about 20 minutes later since he would be working the next day. At approximately 8:30 a.m. on Saturday, his stepfather, John Ring, drove him to the cemetery where he commenced work with Edmund Dyke.

After dropping off Randy Druken the previous evening, Brenda Young visited her friend, Joanne Youngberg from approximately 10:30 p.m. until 12:30 a.m. She then when to a Wendy's drive-thru and purchased a chicken salad.

At approximately 8:30 a.m. while Randy Druken was being driven to the cemetery, Cindy Young got out of bed and walked into the living room. She found her dead mother, Brenda Young, lying on the floor, with her body mutilated by 31 knife wounds. The lower half of her body was naked and she put a blanket over her so Tyrone would not see his mother exposed in that way. At the time, Cindy was still 9 and Tyrone 4 years of age. At 8:32 a.m., Cindy telephoned 911 and then called her great grandmother, Josephine Dyke.

**(b) The Police Investigation:**

**(i) Background:**

The Brenda Young murder investigation occurred some 2 ½ years after that of Catherine Carroll. The Royal Newfoundland Constabulary had not changed much over that time. It was still hindered by a shortage of personnel and other resources. Training was inadequate and irrational. There was some improvement in the Forensic Unit but significant errors still occurred.

Similar to the Carroll investigation, officers from various units were assigned to the Young murder investigation team. However, the general shortage of personnel led to pressure for them to return to their regular duties as soon as possible. This again resulted in the chief investigating officer being left to complete the investigation with little assistance and, particularly the absence of critical analysis. This provided a fertile environment for tunnel vision to take root and it flourished in relation to Randy Druken, just as it had with Gregory Parsons.

There were many valid reasons to focus on Randy Druken at the outset. He had an extensive criminal record and, at the time of the murder, was under mandatory supervision for a stabbing offence. He had an ongoing and sometimes violent relationship with the victim and had been convicted of assaulting her. Her daughter, Cindy Young, and neighbours recalled shouting incidents between them. He once stuck a knife in the coffee table in the presence of Brenda Young. He had spent Thursday night and all day Friday at her apartment, and claimed she drove him home around 10:00 that night, a few hours before she was murdered.

The problem was that once the tunnel vision "locked in", the investigation proceeded without any objectivity and with the sole purpose of convicting Randy Druken, just as it had in relation to Gregory Parsons.

Again, liberties were taken in interviewing key witnesses. Inconsistent and contradictory evidence was treated as reliable. Exculpatory evidence was ignored. The police theory was pursued relentlessly even after it should have been apparent it did not fit the facts.

Lieutenant Desmond Peddle (now retired at rank of Inspector) was the weekend supervisor of the Criminal Investigation Division of the RNC. when Brenda Young's body was discovered. He had previous experience as a homicide investigator and immediately assembled a team to conduct the investigation, as follows:

- Constable Barry Randell (now Sergeant) as Lead Investigator;
- Staff Sergeant Alban Singleton (now Inspector) as File Coordinator;
- Constable Zita Dalton (now retired at rank of Sergeant) as File Analyst;
- Constable Regina Baggs (of the Child Abuse Unit) with responsibility for Cindy Young;
- Constable Wayne Harnum (now Sergeant) as the Forensic Identification Specialist;
- Additional Officers were assigned specific tasks such as neighbourhood canvassing and scene security.

Lieutenant Peddle assumed the role of Case Manager but he basically took over the investigation. Constable Randell was not allowed to lead the investigation, let alone participate in decision-making. I believe the following submissions of Commission Counsel (Hearings) accurately describe Lieutenant Peddle's nature and style:

> [He] kept things to himself. He does not always take notes. Throughout this investigation he regularly acted alone. He would visit witnesses by himself.
>
> He is a big man. His presence alone could be intimidating. What evidence there is of his manner suggests he was aggressive and confrontational. He was not a team leader. His method of coordinating the investigation was telling people what to do when he wanted it done.

While other members of the investigative team soon drifted back to their other duties, Constable Randell continued to work on this investigation under the direction of Lieutenant Peddle. After the murder charge was laid against Randy Druken on August 20th, Constable Randell prepared the court brief and served as the liaison with the Crown Attorney, including follow-up on

any requested tasks. The only exception was that when the jailhouse informant emerged, Lieutenant Peddle acted as his "handler".

**(ii) The First Stage of the Investigation:**

**Cindy Young:**

After speaking with Josephine Dyke, Cindy Young went downstairs and spoke with some neighbours until the ambulance arrived, at 8:37 a.m., five minutes after her 911 call. She led the emergency team up the stairs and pointed in the direction of her mother's body. The medical doctor present confirmed she was dead, the RNC was called and the two children were escorted to the fire rescue unit outside.

One of the firefighters placed these children in his truck and Cindy spontaneously spoke to him. In his words:

> She said she thought she heard her mother calling her name sometime during the night. She sat up and never heard anything, thought she dreamed it and went back to bed.

There was no mention of hearing Randy Druken's voice and it was "Cindy" and not "Randy" that her mother called out.

Josephine Dyke arrived at the scene about 15 minutes later and put Cindy and Tyrone in her car. She spoke to some people and then she and Lieutenant Peddle went over to her car. His notes say:

> Tyrone said that Randy killed his mother. He stabbed her. Mrs. Dyke stopped him from saying anything further. I told her to be quiet. I asked Cindy what happened and she said, "Randy killed mom". I asked if she saw what happened and she said "no". Mrs. Dyke again started talking about the children not seeing or knowing what happened. She said that they only think that's what happened because Brenda told them about Randy being in jail for stabbing someone before.
>
> Cindy said that Randy stabbed her mother. During the next minute or so, I had difficulty getting the children to say what happened as Mrs. Dyke was interfering. I told her not to speak to the children again.

Mrs. Dyke was correct in concluding that the children did not really know what had happened but were assuming that Randy Druken was the killer

because of his past conduct. However, Lieutenant Peddle was justifiably concerned that the children might be able to provide important information that could be lost if they were influenced by Mrs. Dyke. In fact, she was fond of Randy Druken, did not believe he could have done this and expressed her views to the children.

Both Cindy and Mrs. Dyke were taken to the police station where they each gave statements shortly after noon. Constable Baggs asked that Constable Tim Hogan assist her in conducting the interview of Cindy because of his previous experience in interviewing child witnesses. He worked with Constable Baggs in the Child Abuse Unit. They were about to commence the interview when Lieutenant Peddle entered the office and began questioning Cindy. Constable Baggs reconstructed this event some six years later, for the second investigation. She provided the following account in her notes:

> I cannot recall all the details but Cindy did say her mother called out to her. Lt. Peddle responded by saying something similar to "you mean your mother called out to you to help her and you didn't go." Cindy said no. He also said something like what would you're [sic] mother say if she knew you knew who did this to her and you didn't tell. Cindy was holding a doll in her hands and was wrenching it during this brief interview. I do not recall any mention of Randy Druken's name at this time.
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> Cindy was obviously upset at the time. I too was upset by his approach to the child.
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> This interview was short and I never recorded any details at the time. I did, however, mention to Cst. T. Hogan and B. Randell that I was upset by Lt. Peddle's approach.

In his testimony before me, Lieutenant Peddle took issue with this description and felt that he had been sensitive and conciliatory towards Cindy.

I conclude that the account provided by Constable Baggs is more accurate. It was confirmed by Constable Hogan. A subsequent incident supports my conclusion. Cindy, feeling guilty for not having gone to her mother when she called out to her, told a young friend of hers in a telephone conversation that she was at the time locked up in her room. She was not locked in her room. This conclusion also is reinforced by the nature of Lieutenant Peddle's personality and by subsequent statements made by Cindy. I do not find that this was a deliberate attempt to intimidate a child witness but it may well have done so and influenced her subsequent

recollection. At the very least it was regrettably insensitive to the trauma that nine-year old Cindy had just experienced.

Constable Baggs deferred to Constable Hogan in the formal interview of Cindy because of his knowledge, based on extensive experience, in interviewing children. This interview was properly conducted. Cindy said that she heard a "big bang" and her mother calling out her name. She heard another soft, male voice but is was not a familiar voice. She had never heard it before. Nothing in her statement implicated Randy Druken in the murder. The same day, Constable Hogan was directed to conduct canvassing in the neighbourhood and played no further role in Cindy's subsequent interviews.

The next day, Sunday, June 13th, Cindy and Tyrone were assessed by the Children's Protection Agency of the Director of Child Welfare, apprehended and placed at Presentation House, an emergency-receiving centre for apprehended children. Counsel for Cindy Young submitted to me that it was "troubling" that the children would be removed from the familiar home of their great grandparents at the request of the police. He stated that it was contrary to the best interests of the children to remove them:

> ...from the care of a known and loved relative, while their mother lay unburied in a funeral home, and place them in the care of strangers. How could a child, particularly a child just subjected to such horrible trauma, possibly benefit from such an apprehension? How could it be in that child's best interest? It is, perhaps, in the interests of the police investigation but this would be irrelevant to the appropriate legal test for an apprehension.

Cindy was interviewed again on Tuesday, June 16th, and in response to leading questions, gave a different version of her recollection, in which she acknowledged that she was now "sure it was Randy's voice" that she heard.

**Randy Druken:**

Shortly after Brenda Young's dead body was discovered, John Ring learned of the murder through his police "scanner". At about the same time, Shirley Druken received a telephone call informing her as well. John Ring returned to the cemetery, where he had just dropped off Randy Druken to inform both him (and the victim's father) of her death. John Ring then drove his stepson to Brenda Young's address where Randy Druken spoke to police officers and agreed to accompany them to the police station. They arrived there at 9:35 a.m.

While at the station, Randy Druken co-operated fully with the police including:

- Permitting photographs to be taken of his face and hands and removing his shirt to permit photographs of his chest and back;
- Providing samples of his head and pubic hair and nail clippings;
- Permitting blood samples to be taken from his arm by a medical doctor;
- Providing a urine sample;
- Submitting to a full interview even though aware he was not under arrest and was free to leave at any time;
- Consenting to the search of his home and revealing where the clothes he wore the previous night would be found.

The next day he was contacted by telephone, agreed to submit to a polygraph examination and attended at the police station again for that purpose. The result was "Inconclusive".

Randy Druken had never co-operated with the police in the past. He was a "street-smart", experienced criminal who knew the dangers of submitting to police interrogation by one who is culpable. This should have been a strong indicator to the police that he did not commit the offence.

The first evidence to emerge that incriminated Randy Druken was a statement given to the police by Madeline Dooley on June 14th. The dubious circumstances of obtaining this statement are described *infra*, at pp. 188-9. Randy Druken was arrested on the basis of a parole violation that evening and was again incarcerated. The parole violation was his failure to report he had been questioned by the police in relation to a serious offence.

**Forensic Investigation:**

The crime scene forensic investigation was an improvement over what had occurred in the Catherine Carroll investigation. For the first time, exhibits were collected and processed by members of the Forensic Identification Unit. However, once more, a parade of people visited the scene. By Saturday afternoon, some 18 people had entered and the next day an officer, who went to retrieve an exhibit, left a footprint in the blood. Several officers telephoned the scene to contact officers there.

The forensic team failed to notice a carpet burn below a doily that was collected from the floor. In examining (or failing to examine) the exhibits, they did not notice a cigarette butt wrapped in the doily. When the doily was

subsequently removed from an exhibit bag at the trial, the butt fell out. Years later, it was tested and found to contain the DNA of Paul Druken. The significance of this evidence is discussed later.

Calculating the time of death from the physical condition of a body is not an exact science. The biological processes which accompany death depend on temperature, digestion, toxicity and other factors, which can only be estimated. The pathologist who conducted the autopsy at 10:00 a.m. expressed the opinion at trial that death most likely occurred some 6 to 8 hours previously, which would be between 2:00 a.m. and 4:00 a.m.

It appeared that Brenda Young bled from her wounds while lying on the chesterfield. Her body was discovered lying on the floor beside the chesterfield, on her right side. How she moved or was moved was never determined. As the police commenced their investigation, the forensic evidence provided little guidance as to the identity of the killer.

**Neighbours:**

There are four apartments in the building in which Brenda Young resided. Her apartment was on the upper floor. The Dooley family resided on the ground floor directly below her. Adjacent to her on the upper floor was the Evoy family and below them lived the Duke family. It was reasonable for the police to focus their attention on these three close neighbours in attempting to determine what happened in the early morning of June 12th.

**Julie Evoy:**

Julie Evoy was interviewed by Constable Randell a few hours after Brenda Young's body was found. She was divorced and lived with two sons aged 21 and 22. She stated that she was watching a movie with her younger son when they heard a knock on their back door "between 2:30-3:00 a.m.".

The statement continues:

> I opened the door and a young fellow said either "Brenda" or "Is Brenda there". I said no, next door, and I closed the door...I heard this person knock on Brenda's door but I did not hear it open.

The doors are immediately adjacent to each other. Mrs. Evoy then returned to watching the movie. Approximately 10-15 minutes later, they heard sounds like "someone moving furniture" but thought the noise was coming from downstairs.

Julie Evoy had never before seen the person at her door that evening. Her description fit that of Paul Druken but, if it were him, the police did not wish to contaminate his identification. Paul Druken refused to participate in an identification line-up, so the police did the next best thing. The following description is taken from a judicial ruling on the admissibility of the identification evidence.

> On June 22nd, 1993, a police officer, Constable Jeannie Baggs acting on instructions and by prior arrangements, took Mrs. Evoy from her home to the lobby of the Provincial Court in St. John's. She was asked to look around to see if she recognized anyone as being the blond young man. There were large numbers of people about, however after some minutes, eight men who were in custody, were brought into the lobby on their way to Courtroom No. 7. As soon as Mrs. Evoy saw one of the men she was startled and grabbed Constable Baggs' arm. Mrs. Evoy evidence is to the effect that he had the same hair, he was similar in height, the similarity extended to both his hair colour and hair style but his hair was a bit shorter on top (spiked). He had the same moustache and almost the same hair, but different on top. She said, "I wouldn't be able to swear it was the same person, they could have been brothers. Constable Baggs gave me no indication of who I might see. I grabbed her arm when I saw him, I asked her who he was, but she wouldn't tell me".
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> Constable Baggs confirms the events which occurred in the lobby of the Provincial Court and says that she had been told that Paul Druken, a brother of the accused, would be passing through the lobby around about that time. Her evidence is that she and Mrs. Evoy were at one point no more than four or five feet from Paul Druken. Mrs. Evoy grabbed her arm and said, "that guy looks almost exactly like the man, but I'm not 100 percent certain. The man's hair was fuller on top." Constable Baggs described Paul Druken's hair at the time as being "spiked and jelled, very neat".

The identification was ruled to be admissible and there can be no doubt that Paul Druken knocked on Brenda Young's door shortly before 3:00 a.m. of the morning on which she was murdered.

**The Dooleys:**

Madeline Dooley lived in the apartment directly beneath Brenda Young's, with her husband Peter Dooley. Her son, Patrick Dooley, and grandson, Patrick Dooley Jr. also lived with them. She was first interviewed on Sunday, June 13th, by Constable Randell. Her one-page statement contains only one item of relevant information.

> I would say it was about 1:15 a.m. or 1:30 a.m. when I heard more than one person going up the stairs to the apt. upstairs. I never heard a sound after this and I asked my husband if he heard anything and he said no.

In addition to the statement which was signed by Madeline Dooley, Constable Randell also made notes of her statement in his notebook.

His notes are listed in point form and contain much of the same information but without some details. There is one very significant detail, however, which was included in his notes but not in her statement. His notes state that she heard people go up the stairs at 1:00-1:30 a.m. and that her son went to bed at 9:30 p.m., but add "then changed her mind and said she got the nights confused". This became highly relevant when Madeline Dooley later began recalling statements made by Brenda Young, repeatedly asking "Randy" to stop. These are very similar to statements she made on the tape of their argument on Thursday night.

Her husband, Peter Dooley, had given a brief statement the previous day, indicating that Brenda Young had stopped by at 9:30 p.m. on Friday to speak to their son Patrick but only stayed 10 minutes. He said he went to bed at 12:30 a.m. and heard nothing over the night.

The next day, on Monday, June 14th, Constable Randell visited Patrick Dooley and at approximately noon, took him to the police station where he was interviewed. He said that Brenda Young was a good friend and he often "kept an eye on" her children when she went out. At 9:30 p.m. she came over to say that she was driving Randy home and asked him to be aware of the children. He agreed to provide blood and other samples, which were taken. Shortly after 3:00 p.m., he was advised that he failed the polygraph test and was a suspect in the murder. He called a lawyer and was advised to give no further statements.

Meanwhile, Patrick Dooley Jr., also attended at the police station, at approximately 3:30 p.m., at the request of Constable Walsh. The following passages are from his notes of the interview with Patrick Dooley Jr.:

> He said that his father (Paddy Sr.) came out of his bedroom around 1 a.m. (93-06-12) to get a glass of water but never spoke to him at this time. He also said that Brenda did not come to the door but she did call on the telephone about 1 a.m. and spoke with his father. This was on the hall phone. Sometime between 2:30 a.m.-3:00 a.m. 93-06-12, he heard a knock at the front door of Brenda's apt., but later states he thinks it was a kick because when you knock on the door, you can hear the glass rattle.

The notes also indicate that he did not hear anything else because he thinks he then fell asleep "but is not sure".

Patrick Dooley Jr. was then taken to another room where his father was present together with Lieutenant Peddle and three other officers. Constable Geoff Walsh's (now Sergeant) notes indicate that a conversation was started but ended abruptly "when Paddy Jr. became hyper". Further efforts were made to question him, including 30 minutes alone with Lieutenant Peddle but he repeated that he had told them everything he knew.

Shortly after Patrick Dooley was driven home from the police station, Staff Sergeant Singleton and Constable Randell returned to the Dooley residence to re-interview Madeline Dooley. Commencing at 4:45 p.m., Staff Sergeant Singleton's notes contain the following entries:

> Myself and Cst. Randell proceeded to proceed to conduct an interview with Madeline Dooley, 192 Empire Avenue about information received from her son, Patrick about Druken's involvement. During interview, Mrs. Dooley told that on Saturday morning at 1:30 a.m., she heard Brenda say "stop Randy, don't to it anymore".
>
> Proceeded to take a written statement from Madeline Dooley.
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> Statement concluded after being read back to Mrs. Dooley.
>
> Proceeded to interview Peter Dooley 29-07-24 about what his wife told him of what she heard.
>
> Mr. Dooley's statement concluded after being read back to him.
>
> Proceeded to take a written statement from James Kearsey 43-01-04 of 39A Goodridge Street about what Mrs. Dooley said to him.

I was not able to determine precisely the nature of the "information received" that warranted them proceeding in this manner, particularly when her son had been told less than two hours earlier that he failed the polygraph examination, and was a suspect.

Madeline Dooley's second statement was dramatically different from her first. It includes the following:

Q. Mrs. Dooley, could you tell me in detail what you forgot to tell Cst. Randell yesterday?

A. Between 1-1:30 a.m. I heard Brenda kick off her shoes because you can hear it on the hard wood floor. About ten to fifteen minutes later, cause I got in bed quarter after one. After getting a drink of water and taking a pill, I went back to bed, my grandson was up around. I heard Brenda say, "stop Randy, don't do it anymore, stop". She was screaming it out loud. I never heard anything after that.

Q. Where were you when you heard all this going on upstairs?

A. In my bed. I went back to bed 1:15 – 1:20 a.m. Between that and 1:30 a.m. I heard the noise.

Q. Mrs. Dooley, who else was in your house when you heard Brenda?

A. My husband, he was asleep; Pat was in bed at the time I heard Brenda, my grandson Patty was up.

Q. Mrs. Dooley, did you tell anyone else about what you heard?

A. I told my husband, my son-in-law Jim Kearney and my daughter Bernadette Kearney.

Q. When did you tell them about what you heard?

A. Yesterday after he (Randell) left and I told them again this morning.

Q. Are you sure it was Brenda Young's voice you heard?

A. Positive.

Her husband, Peter Dooley, and her son-in-law, James Kearney were then immediately interviewed and both stated that Madeline Dooley had told them the same thing the previous day.

There is no explanation given for this substantial change. The suggestion that she "forgot" this significant information is not plausible. The statements given by Peter Dooley and James Kearney the previous day made no reference to this self-serving statement allegedly made to them.

At 10:25 p.m. on the same day, Lieutenant Peddle and Constable Paul Davis went to the Dooley residence. Madeline Dooley was already in bed and Lieutenant Peddle went into her bedroom while Constable Davis remained in the living room. He sat on a chair and, again, she was asked what she heard. His notes state:

> She heard around 1:15 a.m. two people going up the stairs to Brenda's apartment. Around 1:30 a.m. she heard Brenda cry out, "No Randy no, don't do it no more, Randy, stop will ya, leave me alone, stop". Brenda was screaming this out and it went on for a while. She did not think she was being stabbed but thought it was just another fight between Randy and Brenda.
>
> She said at 1:18 a.m. she went to bed. After that – only a short time she heard two sets of footsteps going to Brenda's. Around 1:30 a.m. she heard Brenda screaming out. At around the time she went to bed, Pat was just going to bed. Pat Jr. was up and in the kitchen, Peter Dooley, her husband was in bed asleep.

It is difficult to appreciate why this further interview, only a few hours after the previous one, was necessary.

Two days later, on Wednesday, June 16th, Staff Sergeant Singleton and Constable Randell again attended at the Dooley residence, ostensibly to talk to them about assisting with the Newfoundland Housing Authority to obtain another apartment for them. Staff Sergeant Singleton's notes indicate:

> Arrived at 192 Empire Ave. with Cst. Randell, spoke to Peter Dooley, Madeline Dooley and Bernadette Kearney. Dooley's indicated a desire to relocate.
>
> While speaking to Dooley's about complete situation, Mrs. Dooley stated she heard Brenda Young make the following comment, Randy, that's enough, leave me alone.
>
> She stated she heard, "Randy stop that's enough, Randy stop". Mrs. Dooley has no objection to a videotape interview.

On the afternoon of June 22nd, Staff Sergeant Singleton and Constable Randell again attended the Dooley residence to "prepare" her for the video interview that was to occur that evening. Again his notes indicate:

> 2:56 p.m. Myself and Cst. Randell arrived at 192 Empire Avenue and spoke to Madeline Dooley in her bedroom.

> Discussed video interview with her and provisions of section 137, 139, 140 and 131-132. Copy provided.
>
> She states between approx. 1:15 for about 20 minutes she heard Brenda say, "stop Randy, don't do it anymore" and heard her repeat this.

They returned at 7:00 p.m. with two others and the video interview was completed.

The videotaped statement is fraught with danger signals about the unreliability of Madeline Dooley. These are analyzed in greater detail later, *infra*, at pp. 237 *et seq*.

It should be mentioned that on June 16th, Lieutenant Peddle also attended at the Dooley residence with Constable Randell, who had also been there earlier that day with Staff Sergeant Singleton. While the officers were speaking to Patrick Dooley his son, Patrick Jr. telephoned. Lieutenant Peddle spoke with him and, while he was "hostile" about having to speak to the police again, he did state the following:

> Between 2:45 and 3 a.m., he heard a kick on the front door of Brenda Young's apartment. He did not hear anyone go up. About 15 minutes prior to this, he heard a creaking on the floor upstairs, like someone creeping around. He also heard a noise like a table tip over.

In a subsequent statement, given when he voluntarily submitted to a polygraph examination on August 31st, he added: "I'm not sure but I thought I heard Brenda".

**Phyllis Duke:**

The third set of neighbours in the same building as Brenda Young was the Duke family, who lived directly below the Evoys and adjacent to the Dooleys, on the ground floor. Phyllis Duke, who lived with her husband Peter, gave her first statement at 10:15 a.m. on Sunday, June 13th, in which she is recorded as saying:

> The last time I saw Brenda was about 1:15 a.m. 93-06-12. I saw Brenda coming down over the front steps in front of our house. I said good night to her. I was fanning myself with my nightgown and Brenda said you must be warm and then she said it's awfully cold out. That was the last time I spoke with her.

She gave a second statement on June 23rd, in which she described a telephone call she received, also on June 13th, between noon and 1:00 p.m. Her daughter answered the telephone and then told her there was "a man on the phone". Her statement continues:

> ...I went to the phone and answered. The man said, "Mrs. Duke". I said "yes". He asked me "what time did you see Brenda". I said "yes, I seen around quarter after one in the morning". He said, "was she by herself"? I said, "yes". He asked, "did she seem mad"? I said "no". He asked, "what time was it was that I seen her"? It was at this point I asked, "who's this". He said, "Randy Druken". I got scared.
>
> He said, "cause I left her at 10:30 (half past ten)". After this, he asked me a few more questions but I am not sure what order he asked me them in. I was really nervous. I know he asked, "was she alone". I said, "yes she was alone". He said, "good, tell that the police". He said he was talking to Pat Dooley. He said, "he phoned Pat". I feel that he asked me a few more questions but I can't at this point what they are. I know that the last thing he said was "if I remember anything else to tell it to the police".

Randy Druken had also called Lisa LeGrow and Peter Dooley, essentially doing the same thing: asking for any information they might have and encouraging them to co-operate with the police.

There is nothing in these statements that incriminates Randy Druken in the murder of Brenda Young. The 10:30 time of last seeing her was off by about 20 minutes from the time he said she dropped him off at his home but that was insignificant. However, Phyllis Duke also planted the seed of her fear of Randy Druken which recurred in her subsequent statements, which grew "like Topsy".

**(iii) Jump-Starting the Investigation:**

**Modus Operandi: Wiretaps: Media: Obstruct Justice Charges:**

Although Lieutenant Peddle was convinced that Randy Druken was the murderer, there was insufficient evidence on which to charge him. Cindy Young, through questionable interviewing tactics, provided a weak acknowledgement that she was "sure" the male voice was Randy's. This was contrary to her first statement which was properly taken. Madeline Dooley changed her story from merely hearing people go up the stairs to hearing Brenda Young scream "stop Randy, don't do it anymore, stop". This

statement led to Randy Druken's arrest the next day, albeit on a parole violation.

Madeline Dooley was consistent in both versions of her statements in placing the time at 1:15 a.m. This reinforced the police view that Patrick Dooley Jr. must have been holding back in denying he heard anything at that time. However, he did say that he heard a kick on Brenda Young's front door at approximately 2:45 a.m. as well as a noise like a table tipping over. This matched the evidence of Julie Evoy, who also placed Paul Druken at the scene at that later time.

Lieutenant Peddle never appeared to consider the possibility that Paul Druken was acting entirely on his own. He also had a violent past and a closer relationship with Brenda Young than was revealed at the time. In fairness, the history of Randy Druken assaulting Brenda Young in the past was a significant consideration. There also was the superficial motive that he might have been enraged by the possibility she would not return from her visit to Ontario which was to occur on the Tuesday following the Saturday morning murder. I say superficial since the arrangement had been made that her children would remain in Newfoundland under the care of Randy Druken.

To accommodate the presence of Paul Druken, the theory was adopted that Randy Druken committed the murder around 1:15 a.m. and Paul Druken arrived around 2:45 a.m. to "clean-up" the scene. This theory was adopted even though there was no evidence of any such clean-up.

Lieutenant Peddle's personality and style ensured that there was a complete absence of critical or "contrarian" thinking. The analysts assigned to the file played no meaningful role in comparing the inconsistencies within the statements of individuals, let alone in comparison to each other. The analyst assigned to the file on June 12th, went on annual leave at the end of July, then on special assignment and, finally, on sick leave. A more senior analyst was also assigned to assist her but was re-assigned after little more than a week. Just as the problems and inconsistencies in the evidence were multiplying, there was no one assigned the specific responsibility of analyzing that evidence.

A pattern had already been established early in the investigation of re-interviewing key witnesses. A dramatic turnaround was accomplished when the police "stirred the pot" by re-interviewing Madeline Dooley after her son was told he was a suspect. There was an underlying assumption that some witnesses were holding back because of fear of retaliation or intimidation.

However, Constable Randell testified before me that there was never any evidence that any of the main witnesses were threatened or intimidated.

Cindy Young was interviewed numerous times in addition to the ones referred above. The police visited the Dooley residence on at least 34 occasions. Phyllis Duke was interviewed 11 times and gave 6 written statements to the police, most of which were inconsistent or revealed new details never mentioned by her previously. Combined with this "shotgun" approach was selectivity in the manner and extent these statements and conversations were recorded. There also was considerable selectivity in choosing which versions to accept and which to ignore.

With the investigation going nowhere after the first few days, on June 19th Lieutenant Peddle requested funding and human resources to conduct electronic surveillance. This was granted and on July 7th, he completed preparation of his affidavit in support of an application for authorization under the *Criminal Code*. This was also granted. The goal was to obtain additional information from key witnesses in relation to the murder.

The entire operation was flawed. Unfortunately, restrictions were placed on the authorization, precluding interception of communications between midnight and 8:00 a.m. This failed to take into account that some of the targets were socially nocturnal and often active well beyond midnight.

The more serious problem was the inability to determine what relevant information was being collected and to transmit it to the investigators. The following is taken directly from the submission of James Walsh, counsel for officers Singleton and Randell, which I adopt:

> Lieutenant Peddle arranged for Sgt. Geoff Walsh, a member of the RNC who had some knowledge of wiretaps from his days on the Joint Forces drugs Section run jointly with the RCMP, to assist as the Backroom Supervisor. The training of the monitors would be handled by Sgt. Harry French of the RNC technical investigation unit. Sgt. Walsh would serve as the liaison between the monitors and the investigative team.
>
> The inquiry has discovered problems related to information flow from the monitors to the investigative team. Some of the difficulty relates to funding problems. For example, there were as many as seven live intercepts operating at any one time. However, while in an ideal world there would be a monitor dedicated to each line, in

> this operation a maximum of two monitors, at any one time, would be expected to cover all live intercepts.
>
> The inquiry has also discovered that the monitors may not have had sufficient information about the investigation in order to determine whether intercepted information was relevant or not to the investigative team or, if so, the degree of relevance. The methodology of flagging important information to the Backroom Supervisor and, then, to the investigators was inconsistent and inadequate.
>
> Further, some of the monitors had separate notebooks in addition to the monitor's logs that they were supposed to be keeping. These notebooks sometimes contained crucial information that never found its way to the investigators.
> ...
>
> The monitors and the Backroom Supervisor really had an impossible task under these circumstances. If one person were to listen to every minute on every tape of the intercepted telephone lines as well as the tapes of the live intercepts it was estimated by Commission Counsel, Mr. Avis, that it could take up to six months to listen to everything (listening for six hours per day).
>
> At the time of the investigation it was determined that little, if any, valuable information was gathered from the wires. With the benefit of hindsight, and the time to review the monitors' logs and listen to some of the tapes that were clearly germane to the investigation, one now knows that information was available that may have affected the decision-making process of this investigation.

Commission Counsel (Hearings) also pointed out that his review of the monitors' logs indicated a focus on incriminating evidence. This suggests that the officers involved in passing on information transmitted their tunnel vision to the monitors as well.

The wiretap evidence did disclose one significant and troubling insight into the evolution of the testimony of Cindy Young. In her first recorded interview, properly conducted by Constable Hogan, she said that the male voice she heard, "...wasn't a familiar voice. I never heard it before". In her taped interview, she acknowledged, rather reluctantly, that she was "sure" the voice was Randy Druken.

Cindy's great grandmother Josephine Dyke, first believed that Randy Druken was innocent of the murder of Brenda Young. Intercepted

conversations between her and the Dooleys show that she changed her mind. On August 17th, after hearing Madeline Dooley's version of events, she says: "I knows he done it" and, later, "he had me fooled". Mrs. Dyke was told that Brenda Young "definitely called his name". Mrs. Dyke then says:

> And Brenda said "No, no leave me alone" but this all going to come back to Cindy.

Madeline Dooley adds, for good measure:

> Everybody that gave evidence into this or gave information, all of this got to go together...

Two weeks later, on August 31st, Josephine Dyke contacted Constable Randell. Cindy had added to her evidence that she heard her mother call out the name "Randy". The evidence of Madeline Dooley which, itself, was highly suspect, was engaged further to influence Cindy's evidence through Josephine Dyke.

It is difficult to know how much other "inter-witness" contamination was occurring but the Dooleys and the Dukes were next door neighbours and they socialized together. The evidence of Madeline Dooley and Phyllis Duke was constantly changing and the repeated police visits and methods of questioning would not contribute to their reliability.

It is clear that media reports also contributed to witness contamination.

On July 29th, Constable Randell applied for a warrant to search a car belonging to Paul Druken. The application referred to many of the details of the murder which had not been made public. Unfortunately, he neglected to request a "sealing" order to prevent the information from being made public at that time. The information eventually came to the attention of journalists and on August 5th, CBC News in St. John's reported the following:

> Brenda Marie Young was brutally murdered, 31 knife wounds to her chest, she was found face down on her living room floor partially covered by a blanket, a pair of underwear twisted around her neck. Police believe at least one of the woman's children saw her being killed. The police also have their suspects. Police first arrived on the scene later that morning after a frantic call to 911 from a child. In fact, they believe two people may have been involved in the young woman's murder. One person that killed Brenda Young, the other helped wipe the place clean. Police are also looking for a search warrant to comb the second man's car, this car, for evidence.

The news report showed a car believed to be the one involved in the murder. It was a 1978 brown-coloured Chevrolet Impala.

The next day, Peter Duke told Constable Davis that the car he saw on CBC News the previous evening was the same one he saw outside his house on June 11th, when the driver spoke to Brenda Young. This was quite extraordinary since on June 12th, he had told the police it was a small, grey import car. In a statement on June 19th, he elaborated by describing the car as:

> ...Dark grey, it's not like a Chev or Dodge, it's an expensive car. It had high headrests. The center of the headrests were like a wire mesh type in appearance.

On August 12th, Peter Duke attended at the police impound lot and identified the brown Chevrolet Impala as the car he had seen.

The police did not deliberately release all of this information. The evidence suggested that obtaining sealing orders was a relatively new process and the failure to request one was simply an oversight. However, the police at least should have been cognizant of the potential impact of such public information on malleable witnesses such as the Dukes and Madeline Dooley. It was also a significant feature in relating to the "jailhouse informant", who later emerged.

An even more dramatic, and indeed shocking report was carried on CBC News on August 10th. A similar report was carried in The Evening Telegram the next day, which included the following:

> Two people were charged Tuesday with attempting to obstruct justice in connection with the investigation into the murder of Brenda Marie Young on June 12 in St. John's.
>
> Shirley Druken, 71, and her common-law husband John Joseph Ring, 57, both of 82 Nash Cres., Mount Pearl, are alleged to have provided a false alibi to police as to the whereabouts of Randy Druken - Shirley's son - on that day.
>
> Insp. Robert Shannahan, public information officer with the Royal Newfoundland Constabulary, said Randy Druken is "the subject of an interview having to do with the homicide investigation."

> A search warrant issued July 29 at provincial court indicated the RNC wished to search a motor vehicle belonging to Paul Druken, Randy's brother.

It is highly unusual to lay such charges in such circumstances. It is of interest that when Peter Duke told Constable Davis about the vehicle he had seen on television, Constable Davis also noted that: "Peter Duke is now sure that the Dooleys clearly know what happened to Brenda Young".

The wiretap recordings contain a great deal of information about the police tactics that does not appear in the officers' notes. They reveal that the witnesses are following the media and discussing the details of the offence with each other. They show the police regularly returning to the Dooley residence, trying to stimulate conversation and even attempting to intimidate them.

On August 11th, the day after the obstruction charges, and again on the next day, Lieutenant Peddle and Staff Sergeant Singleton again visited the Dooley residence. Lieutenant Peddle asked whether they heard the news of the obstruction charges. After Patrick Dooley refers to the frequency of police visits, Staff Sergeant Singleton says:

> Well you won't see too many in uniform around here now. Like you say. If you heard anything or if you think of anything boy you know.

He adds:

> We know two people came and went in there that night and there's cars used. Now if you know anything about it, who came and went. Or remembers something, give us a call you know.

Mrs. Evoy had already identified Paul Druken as being at the scene so the obvious entreaty to the Dooleys is for them to identify Randy Druken.

That is even more apparent in the questions put by Lieutenant Peddle to Patrick Dooley:

> I suppose if ah if Randy was arrested ah things might get a little more relaxed too, wouldn't it?

And also to Patrick Dooley Jr.:

> Pat would you feel more comfortable if you knew he was already charged with it or what?

> Would that help your memory a little bit or anything or what?

Later, when Staff Sergeant Singleton says: "That would be obstruction", Patrick Dooley replies "that's all I need". It seems clear that the obstruction charges were being used to attempt to intimidate the witnesses and, more specifically, to persuade them to identify Randy Druken as a second person present early on the morning when Brenda Young was murdered.

After leaving the Dooley residence on August 11th, the officers went next door to the Duke residence. The following summary was prepared by Lieutenant Peddle:

> Went to the Duke residence at 190 Empire Avenue. Was talking to Mrs. Phyllis Duke in the kitchen. Peter Duke came in and joined the conversation. He told Mrs. Duke to tell us what she told him about seeing someone there that night. Mrs. Duke got mad at him and said she had nothing further to add. He kept at her and she then conceded. She told us at around 1030 - 11 p.m., Friday night 1993-06-11, she saw Randy Druken at the rear of 194 Empire Avenue. He got into a car with someone else driving and left the area. She was afraid of Druken and that is why she never told us before. Took statement.

This was viewed by the police as an important development. The implication appeared to be that even if Brenda Young did drive him home at 9:50 p.m., in accordance with his alibi, he somehow returned and was driving away a second time and then returned around 1:15 a.m. to commit the murder.

Another explanation might be that she was mistaken about the time she saw Randy Druken being driven away. In other words, the time really was shortly before 10:00 p.m. and she actually saw him being driven home by Brenda Young. In retrospect, it is most likely that she did not see him at all. A more detailed analysis of the evidence of the key witnesses is discussed later in this chapter but there can be little doubt that her various statements were influenced by media reports and that they were unreliable.

The evidence before me was that the police received advice from the Crown that if Phyllis Duke repeated her sighting of Randy Druken during the time in question, in a sworn "KGB" statement, there would be sufficient grounds to charge him. A KGB statement is one that is given under oath, following a warning and is videotaped. All of the Crown attorneys associated with the case denied giving such advice and no police officer could recall which of them received this advice or who gave it. On August 19th,

Phyllis Duke gave the videotaped statement, and on August 20th, Randy Druken was charged with the murder of Brenda Young.

No satisfactory explanation was ever given for the laying of charges against Shirley Druken and John Ring because of the alleged false alibi. Their lawyer never received any disclosure from the Crown in spite of repeated requests. There is no record of consultation between the police and the Crown on this charge either. The Crown sought to have these charges postponed until after Randy Druken's trial for murder but the request was denied. The Crown then entered a stay of proceedings and the charges expired one year later.

**(iv) Jailhouse Informant:**

Jailhouse informants are notorious for fabricating confessions alleged to be made by an accused awaiting trial, while the two of them were in prison together. Often the informant seeks some reward such as leniency in return for testifying against the accused. The courts have long recognized the dubious reliability of their testimony. However, it was only with the more recent Morin and Sophonow inquiries that their role in contributing to wrongful convictions was fully exposed. In the Sophonow Report, Commissioner Cory commented:

> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars.

With reference to the Sophonow trial he noted the ease with which they are capable of deceiving even experienced police officers and Crown attorneys.

At the hearings before me, I ordered that the jailhouse informant be identified as Mr. X. I use the same designation in this report.

Mr. X was arrested in the RCMP jurisdiction of Ferryland on October 23, 1993, for breach of a parole warrant. Randy Druken's preliminary inquiry was scheduled to commence the next month. Mr X had been incarcerated for 15 months on 45 fraud-related charges. At the time of his arrest he had been out of jail for almost six weeks and, again, was charged with fraud-related offences, namely:

- Volunteering to canvass for the CNIB, collecting money and keeping it;

- Stealing a purse from one of the houses where he canvassed;
- Forging money orders and cashing them at various convenience stores.

During the RCMP interview following his arrest, Mr. X provided information about an armed robbery in the Witless Bay area, also within RCMP jurisdiction. The officers involved determined that the information was false. Moreover, the person alleged by Mr. X to have confessed to him passed a polygraph test. They disregarded his evidence with respect to the armed robbery. However, he also claimed that Randy Druken had confessed to the murder of Brenda Young so this information was conveyed to the RNC.

Mr. X was given a polygraph test by Lieutenant Patrick Ledwell (now retired at the rank of Inspector) of the RNC on October 26th, which he failed. Constable Randell concluded that this failure would preclude Mr. X from being used as a witness. However, the Crown attorney, Wayne Gorman, requested that he be given a KGB interview, which occurred on November 5th. Mr. Gorman observed this interview and considered Mr. X to be credible.

There were numerous inconsistencies in the various statements of Mr. X. Lieutenant Peddle acknowledged these and personally challenged him on some of them in another interview on November 9th, when he concluded he was truthful and would be a good witness. The failed polygraph was rationalized as being due to Mr. X attempting to hide his alleged homosexual relationship with Randy Druken. Neither Mr. Gorman nor Lieutenant Peddle could explain why they did not simply raise this with him and arrange for another polygraph test.

A separate team of investigators was set up to check out a variety of "facts" asserted in his statements. One after another, they proved to be false. For example, Mr. X told police that Randy Druken killed Brenda Young in the kitchen and that Paul Druken moved the body from the kitchen to the living room. There was no forensic evidence to support this but an RCMP forensic specialist was asked to re-examine the scene. He came to the same conclusion that all the bloodletting occurred on or near the chesterfield. All of these clearly wrong facts were rationalized as being an accurate portrayal by Mr. X of false facts conveyed to him by Randy Druken.

Mr. Gorman was challenged at this Inquiry as to what facts were related by Mr. X that were not already made public. He responded that Mr. X had the unique knowledge that the body had been moved. It did not matter that the movement was from the chesterfield to the floor rather than from the kitchen as Mr. X alleged. It was the mere fact of movement of the body that made Mr. X credible, and he was called as a witness.

(v) **Conclusion:**

The investigation into Brenda Young's murder was plagued with many of the same problems as the Catherine Carroll murder investigation. Major case management had not yet been established and the investigation was essentially a "one-man show". The limited resources prevented even the team that was assembled to remain on the investigation for very long.

At the same time, the wiretap operation was wasteful and even counterproductive. The *modus operandi* of returning to key witnesses to try to persuade them to bolster or change their statements was a clear reflection of tunnel vision.

(c) **Judicial and Related Proceeding:**

(i) **Disclosure:**

Prior to the laying of the murder charges against Randy Druken, the Crown attorney, providing advice to the police, was Bernard Coffey. He would have been involved, to varying degrees with:

- Advising on the apprehension of Cindy and Tyrone;
- Advising in relation to search warrants;
- Preparing the applications for electronic surveillance;
- Advising on the procedures for conducting KGB interviews;
- Advising on the charges of attempting to obstruct justice;
- Advising on laying the murder charge against Randy Druken.

After the murder charges were laid on August 20th, Wayne Gorman became the Crown attorney assigned to the file.

In November of 1993, as required by the *Criminal Code*, Mr. Gorman sent notices of interception to the persons who had been subjected to electronic surveillance. As a result, he was aware that the notes of the monitors contained relevant information that, together with the related tapes, could be helpful to Randy Druken's defence. They were not disclosed to defence counsel. The preliminary inquiry was being conducted at that time and defence counsel had been deprived of the opportunity to analyse the notes, listen to the relevant tapes and cross-examine the witnesses, on their conversations with each other, in particular.

This information was not disclosed until almost a year later, after the commencement of the trial. Defence counsel frantically attempted to determine which portions might be relevant and his secretary worked well into the mornings to transcribe certain portions. However, the mass of material and the pressure of day-to-day trial preparation and participation precluded effective use of this evidence. Indeed, some of the most relevant information for the defence only emerged at this Inquiry as the result of many weeks of preparation and analysis by my staff.

**(ii) Crown Preparation for Trial:**

Constable Randell worked closely with Wayne Gorman in preparing the Crown case for the preliminary inquiry and trial. He described Mr. Gorman as being very "hands on" and added that he had a very good grasp:

> ...of this file of the evidence that was there, the people we were dealing with...he knew the file inside out.

They met on November 4th, 1993 for approximately 3 to 4 hours and discussed almost every aspect of the case. The preliminary inquiry was scheduled to commence on November 22, 1993. Constable Randell left the meeting with a list of well over 100 tasks or issues requiring follow-up. They had an excellent relationship and Constable Randell found Mr. Gorman an excellent person to work with.

Constable Randell accepted that the file was now in the control of Mr. Gorman and that he knew best what needed to be done in preparation for the impending judicial proceedings. Constable Randell would report back to him with respect to progress on the various tasks assigned. Mr. Gorman would also telephone him and say he would like to interview a certain witness at a specified time. The officer would then make the arrangements, drive the witness to the meeting and then drive the witness back. On some occasions, Mr. Gorman would ask Constable Randell to be present during the interviews. On other occasions, the witness would be interviewed by Mr. Gorman alone.

On occasions when Constable Randell was present, he would make some notes of the meeting. Some of the persons interviewed were subsequently called as witnesses. Others were not. Cindy Young was interviewed by Mr. Gorman on six separate occasions from just prior to the preliminary inquiry to just prior to the trial, a period of about one year.

One of the issues of particular interest to Mr. Gorman was whether the murder could have occurred in the kitchen. Constable Harnum of the RNC forensic team returned to the crime scene again on November 10, 1993, and

confirmed that there was no physical evidence that the murder or any "clean-up" occurred in the kitchen. This was important since Mr. X stated that Randy Druken told him that was how the murder occurred. Mr. Gorman wanted further investigation of this issue.

As a result, Constable Randell arranged for the head of the RNC Identification Section to request the RCMP in Halifax to conduct a further examination. On November 23rd, Constable Harnum again attended at the scene, but this time with RCMP Staff Sergeant Victor Gorman. This visit resulted in the same conclusion. There was no evidence to suggest a bloodletting assault or any clean-up had occurred in the kitchen.

Wayne Gorman met with Staff Sergeant Victor Gorman again on July 13, 1994, the summer following the preliminary inquiry and prior to the trial, which commenced in October. He asked five specific questions including, once more, whether the victim was killed in the kitchen and moved to the living room. In a written report dated September 28, 1994, Staff Sergeant Gorman gave exactly the same response to this question. There was no bloodletting or clean-up in the kitchen. He also concluded that the bloodstains were consistent with the victim lying on the chesterfield for some time and then moving or being moved to the floor. There was also an area of soaking blood on the mat where she was found. She could not have rolled off the chesterfield into her final position but moved herself or was moved by someone else.

There were many problems with the Crown's case. In addition to the inaccuracy of Mr. X's version of where the murder took place, there were many other difficulties with his evidence. Counsel on behalf of the DPP's Office was frank in submitting to me that:

> My client can only say that Mr. X's evidence ought not to have been tendered. There were just too many red flags, not enough corroboration of his story.

The three other main prosecution witnesses were Cindy Young, Madeline Dooley and Phyllis Duke. Cindy Young was credible and consistent to a remarkable extent but there is evidence that her ultimate testimony of hearing Randy Druken's voice and hearing her mother call his name, were the products of undue influence upon her. The evidence of Madeline Dooley had reversed after one day in the context of suspect circumstances. The evidence of both her and Phyllis Duke was fraught with inconsistencies and improbabilities.

Mr. Gorman appears never to have cast a critical eye upon what he had been handed by the police. He simply took the ball they handed him and ran with it. A more detailed analysis of the evidence available to the police is presented under the next heading, *The Police Investigation.*

**(iii) Trial:**

The trial was preceded by a number of pre-trial motions and commenced on October 27, 1994. Some aspects of the trial will be analyzed in greater detail later. But, generally, defence counsel for Randy Druken argued before me that Crown counsel had conducted the prosecution in an unfair and unprofessional manner.

In a Crown opinion provided many years later, Bernard Coffey observed that:

> At the trial the Crown explicitly relied on what it characterized as a thorough police investigation having uncovered no motive for anyone to murder Brenda, other than Randy's jealousy.

In his closing address, Crown attorney Wayne Gorman said to the jury:

> When you're asking yourself the question in terms of who killed Brenda Young, perhaps one way to put it, and one way to think about it is who else other than the accused. Who else had a reason or a motive to kill Brenda Young? The evidence indicates that there is no such person, that person doesn't exist.

This approach is strikingly similar to that of the Crown attorney in the Parsons case, who said to the jury:

> ...if Greg Parsons didn't cause his mother's death, who did?

This comment formed one of the three grounds on which the Court of Appeal ordered a new trial in the Parsons case.

The Crown also relied heavily on the movement of the victim's body as enhancing the testimony of Mr. X that Randy Druken had confessed to the murder:

> There was no way that Brenda Young got there by herself [moved from the couch to the floor] and there's no way, not possible, that [Mr. X] knew that unless – I suppose there's one way – and that is the accused told him...

> If you look at the scene, I think you'll come to the conclusion that the body was moved, and that perhaps more than anything in this entire case illustrates the truth and that was what [Mr. X] said.

Of course, Mr. X did not tell the police that the body was moved from the couch to the floor. He told them it was moved from the kitchen to the living room. Crown counsel also stated in the same closing address that Paul Druken was present, since it would require two persons to move the body.

In addition, Crown counsel told the jury there was no evidence of a sexual attack or sexual motive. While this is merely conjecture, the presence of the panties around the victim's neck does have a possible sexual connotation. A sexual motive would be more consistent with Paul Druken being the sole perpetrator, for example following a refusal to have consensual sex.

The approach taken by defence counsel was that Cindy's testimony had become distorted, Madeline Dooley was unreliable and Phyllis Duke lied. The defence also characterized Mr. X as a liar, which certainly was justifiable.

It is not readily apparent why the defence found it necessary to deny the presence of Paul Druken at the scene. An alternative defence strategy to the one adopted, might have been to encourage the jury to accept that when Paul Druken knocked on Brenda Young's door at 2:45 a.m., his visit resulted in her murder.

The family relationship and the perception on the part of some police officers of a "Druken Gang" being mobilized was reflected in the following CBC News Report, on November 15, 1994, during the third week of the trial:

> These plain clothes police officers are carrying concealed weapons in Supreme Court in St. John's. They have been doing that since early October. They're protecting Sgt. Robert Escott, a fellow police officer, who is facing charges of dangerous driving. Each day the armed officers are seated right outside the door leading into the courtroom but protecting him from whom? Nobody in connection with the Escott trial. This is what it's all about – the theft of two handguns and a riffle from the trunk of a police car in the RNC parking lot in early October. At the time, police officers speculated the guns might be used to free Randy Druken. Druken is on trial in Supreme Court for murder. So what's that got to do with Sgt. Robert Escott? Well, Escott just happened to be in Court at the same time.

> Police speculated that Sgt. Escott might be used as a hostage to free Randy Druken.

This entire scenario is almost farcical but illustrates the paranoia surrounding the Druken family at the time.

Constable Randell wrote to a superior officer on November 23rd to report:

> ...there was no indication that the theft was in any way connected to Randy Druken. I personally heard the news broadcast on CBC and I can say that there is absolutely no evidence to connect the theft of firearms, in any way, to the ongoing Supreme Court Trial of Randy Druken. Also, the same is true regarding a conspiracy by the Druken family to take Sgt. Escott hostage in an attempt to free Randy Druken.

Counsel for Randy Druken initially indicated he would be seeking a mistrial but agreed to the trial judge simply explaining to the jury in open court that there was no basis for the news broadcast.

On March 18, 1995, Randy Druken was convicted of second-degree murder and sentenced to life imprisonment without eligibility for parole for fourteen years. The events following his conviction, which formed the basis for this phase of the Terms of Reference, were described in the Introduction to this chapter, *supra,* at pp. 174-5.

## 3. The Police Investigation: Analysis:

### (a) Manner of Investigation:

#### (i) General:

In the Chronology of Events, some of the features of this investigation were described:

- The absence of a "team" approach and dominance by Lieutenant Peddle;
- The absence of a dedicated Analyst to evaluate and cross-reference the evidence and convey the results to the investigators;
- The early conclusion that Randy Druken was the murderer, leading to his arrest for a parole violation two days after the murder;

- The theory that, while Randy Druken committed the murder, Paul Druken appeared at the scene, not long afterwards, to conduct or assist in a "clean-up";
- The assumption that witnesses were afraid to give inculpatory evidence against a member of the Druken family and were withholding information.

The tunnel vision that led to the conclusion of Randy Druken's guilt also led to the adoption of some questionable police practices.

**(ii) Interviewing Witnesses:**

In her first statement, the day after the murder, Madeline Dooley said only that she heard persons going up the stairs the previous morning at approximately 1:15 or 1:30 a.m. The next day, after her son was told he was a suspect in the murder, the police returned to interview her again. This time she added that she had also heard Brenda Young screaming out: "stop Randy, don't do it anymore, stop".

In my view, it was more than coincidental that Mrs. Dooley was re-interviewed the day after her first statement, at a time when her son had just been told he was a suspect. No doubt this deliberate tactic was driven by a noble intention, namely, to encourage her to tell what she knew but previously refused to disclose. But this objective was driven by the assumption that Randy Druken committed the crime. Therefore, since she failed to implicate Randy Druken, she must know more. The officers were blind to the potential for this tactic to generate false information from a mother seeking to protect her son.

The tactic of constantly returning to the Dooleys and urging them to provide more information, was also inappropriate and dangerous. Lieutenant Peddle was frank in acknowledging that they were putting pressure on these witnesses, relating facts to them, telling them they knew more than they were admitting and even saying they didn't believe them. However, he did not think people would give false information in such circumstances. This may be true with respect to many people but others may be highly vulnerable to suggestion and prone to exaggeration or even fantasy. It is clear that much of the information given to the police by Madeline Dooley was highly unreliable.

Phyllis Duke also was highly unreliable and was highly vulnerable to suggestion. In her case, it was not necessary for the police to apply direct pressure. Her personal tendencies to exaggerate and dramatize her

recollections allowed them simply to let the influence of media reports take its course.

The wiretap evidence referred to in the previous section clearly demonstrates that the obstruction charges were invoked in an attempt to intimidate witnesses. In another example of apparently attempting to intimidate a witness, Lieutenant Peddle told Cathy Denief that if she were lying, she would be charged and, if that happened, questions would arise as to what would happen to her children.

These efforts to influence key witnesses have some parallel to the manner of interviewing key witnesses in the Parsons investigation, *supra*, at pp. 119-23. However, there were also general deficiencies in the manner of taking statements that had not changed from the time of the Parsons investigation, *supra*, at pp. 108-9:

- There was no "canvass" questionnaire;
- Officers routinely spoke to everyone in the home at the same time rather than separately;
- Signed statements were not always taken or accurately recorded;
- Narrative rather than "true version" statements were the general practice;
- There were lengthy unrecorded discussions with key witnesses, sometimes followed by a brief written statement.

Some examples of deficient taking and recording of statements have already been given:

- When Pat Dooley Jr. declined to answer further questions at the police station, Lieutenant Peddle met with him alone for over 30 minutes but the details of their conversation were not recorded.
- Constable Randell's notes of Madeline Dooley's first statement contain important information not contained in the statement itself.
- Constable Baggs did not record Lieutenant Peddle's admonition to Cindy Young prior to the interview by Constable Hogan. She did not commit her recollection to writing until some six years later, in the course of the second investigation.

In addition:

- When Pat Dooley and Pat Dooley Jr. were interviewed together, Pat Dooley Jr. referred to a telephone conversation his father had with Brenda Young around 1:00 a.m. on the morning of the murder. His father interrupted to say he was mistaken and Patrick Dooley refused to continue the interview.
- When Cindy Young declared that the voice was either "Randy Druken's or Gordon Youngberg's", she was told Gordon Youngberg was no longer a suspect.
- Shirley Druken and John Ring testified that the officer who took their statements was in a hurry and did not record everything they said. Yet their credibility was challenged at the trial for failing to provide all of the details.

The taking of the statements of Shirley Druken and John Ring provides an illustration of the casual manner in which statements were taken, even from key witnesses. Indeed, these statements subsequently formed the basis for the charges of attempting to obstruct justice by providing a false alibi.

The officers arrived at the Druken home at approximately 11:15 on the morning of the murder. Nothing is recorded until 11:45, when Shirley Druken's statement commences. Mr. Ring's statement then commences at 12:20 p.m. and ends 20 minutes later. It appears that each of them were present when the statement of the other was taken. Each statement is about a page long and in narrative form, which is inadequate when details can be extremely important.

For example, Mrs. Druken states that she was "up twice to use the bathroom" but there is no follow-up with respect to the times. The time that she heard snoring is ambiguous and was not clarified. These details became the subject of extensive cross-examination at the trial and should have been properly explored and recorded during the interview.

The deliberate tactics of continually re-interviewing witnesses, telling them what the police wanted to hear and attempting to intimidate them, were particularly egregious. Further contamination of witness reliability through their encouraged interaction with each other and through media reports established a highly dubious and dangerous foundation for the prosecution of Randy Druken.

In the Parsons' chapter, I recommended that the recommendations of Commissioner Kaufman in relation to interviewing, note-taking and statement-taking be reviewed for incorporation into RNC policies. Of particular relevance to the events of the Brenda Young investigation are his recommendations 103 and 104.

> Police officers should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness, where such information may colour that witness' account of events.
>
> Police officers should be specifically instructed on the dangers of communicating their assessment of the strength of the case against a suspect or accused, their opinion of the accused's character, or analogous comments to a witness, which may colour that witness' account of events.

Here, the contamination of witnesses through information conveyed and commentary on the case, or on the accused, in a number of interviews, was extensive and deliberate.

This issue of interviewing is another that already has been addressed by the Royal Newfoundland Constabulary. Its submissions on the Systemic Phase, state:

> Proper interviewing techniques are the bedrock of any criminal investigation.

Since January of 2005, all RNC recruit cadets were required to take a forensic interviewing course as well as receiving additional lectures from a psychology professor and other experts on related topics.

The almost reckless manner of conducting this aspect of the Brenda Young murder investigation certainly reinforces the importance of proper training in interviewing approaches and techniques. Good judgment and discipline on the part of individual officers are also required. I address the interviewing of children under the next main heading of the Reliability of Key Witnesses, in the specific context of Cindy Young's treatment.

A more basic issue was raised in the submissions related to statement-taking by the police namely, what is the underlying purpose of such statement-taking. One view was expressed by counsel representing the DPP's Office, when she submitted:

> Further, it is normal and natural that witnesses greatly expand on their initial statements to police when they

> testify at trial. The purpose of a police officer taking a statement is not to capture every detail the witness knows, but rather to record sufficient information to enable him or her to ground a charge if the decision is made to charge. Most police statements are recorded within a few minutes and read in less time. However, the actual statement taking has usually been preceded by a much longer discussion.

Senior Commission Counsel (Hearings) took issue with this approach in his own written submissions. He responded:

> The purpose of taking a statement is to determine and record any and all relevant information as fully as possible that the person might have that could assist in the investigation. As well, anything else said by the person interviewed should be recorded since at the time of being interviewed the officer may not be aware if it is relevant. It is essential to get as much detail as possible as soon as possible because memories fade and stories change.
>
> The purpose suggested by the DPP is exactly what is wrong with the way the police took statements in both Parsons and Druken. If the purpose is to record sufficient information to ground a charge, this means that the officer's purpose is to obtain evidence in support of the charge and does not need to be too concerned about anything else that is said.

In his oral submissions, counsel representing Staff Sergeant Singleton and Constable Randell, strongly aligned himself with the latter view. He stated:

> The Crown's position causes my clients some concern because they take the position that the purpose for taking a statement is to gather enough grounds to lay a charge and if that's truly the position that they are sitting on, then we have some problems because if that is the purpose, then the police from that statement would be left to be seen as only seeking charges and not seeking the truth. The statements, we believe, are as outlined by Commission Counsel Hearings that they are to get as much information from any potential witness as they possibly can so that they can assess it in light of the complaint to determine whether or not there is any truth or substance to what's been alleged, not simply to ground a charge.

I also strongly agree with this position. Statements should be as detailed and comprehensive as the circumstances of their taking permit. Nor should statements be taken "within a few minutes" following " a much longer discussion". Statement-taking is an extremely important policing responsibility which must be conducted in a knowledgeable and focused manner and recorded in detail and accurately. That is why I have already recommended, in the previous chapter, that all interviews be electronically recorded in major crime cases, *supra*, at p. 109.

**(iii) Polygraph Evidence:**

Lieutenant Peddle received training as a polygraphist at the Canadian Police College. This consisted of eight weeks in the classroom followed by two weeks of practical training and then conducting testing which is assessed as the basis for certification. He testified that the accuracy of testing greatly depends on the skill and experience of the polygraphist. He considers the polygraph to be an important investigative tool which he considers to be accurate 80-90% of the time. The two other officers with the most significant roles in the Druken investigation, Constable Randell and Staff Sergeant Singleton, testified that they had a great deal of confidence in the polygraph at that time, but no longer have any faith in polygraph results. Most officers consider the polygraph to be a useful investigative tool but mostly for the opportunities it presents in conducting the post-polygraph interview with a suspect or reluctant witness.

Lieutenant Peddle conducted all of the polygraph testing in the Druken investigation except that in relation to Mr. X, which was conducted by Lieutenant Ledwell. Lieutenant Peddle agreed that the officer who is conducting the investigation should not administer a polygraph test, particularly where the investigator believes in the guilt of the subject being tested. He explained that when a person is prepared to be tested, the opportunity has to be seized but did not explain why another operator could not be assigned to any of the eight persons tested, all by him. He also agreed that the testing of Randy Druken may have been too close to the event, considering his emotional involvement.

For whatever reason, Lieutenant Peddle sealed a number of polygraph statements and did not disclose them to other officers or to the Crown. That was a serious breach of the disclosure obligation. In particular, a number of statements by Shirley Druken (which confirm what she advised the police in the first days after the murder) were not disclosed to Crown or defence counsel. This omission was mitigated by the availability of a transcript of the polygraph interview itself.

The polygraph tests were reviewed by the second investigation which also requested an external review by an RCMP polygraphist. A retired OPP officer was also engaged by the Commission to review the polygraph tests. He concluded that the lead investigator should never administer the tests because he would not be able to maintain the necessary objectivity. He was also very critical of some of the tests, including that of Randy Druken, not being recorded. He stated this should never occur.

Some interesting observations in relation to the tests are that:

- Randy Druken's result for the Peddle test was "inconclusive" while the other three examiners would have interpreted his results as "deceptive", "truthful" and "inconclusive".
- Mr. X was found to be "deceptive" by all four examiners.
- Paul Druken was found to be "deceptive" by Lieutenant Peddle and either "deceptive" or predominantly "deceptive" by the other three.
- Shirley Druken was found to be "deceptive" by Lieutenant Peddle but "truthful" by the two other examiners (the third could not be ascertained).

It is of particular interest that Mr. X was relied upon as a key Crown witness even though his result was deceptive. At the same time, Shirley Druken was charged with attempting to obstruct justice because of the same result. Finally, steps were taken to return Randy Druken to custody even though his result was inconclusive, and in spite of his exceptional co-operation.

I have concluded that the manner of conducting the polygraph testing and the manner in which the results were used (or ignored) can only be explained as a further reflection of the tunnel vision which drove this investigation. It is encouraging to see that some officers have radically altered their perception of the reliability of polygraph results. The subjectivity they invite, in the cloak of science, indicates the need for strict vigilance in not deploying them to bolster a weak case which has no foundation in reliable evidence.

The submissions of the Royal Newfoundland Constabulary on the Systemic Phase reflect a clear understanding of the uses and limitations of polygraph testing in criminal investigation. In particular, I endorse the following observations:

> A polygraph test must never be conducted if videotaping is unavailable.

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

These submissions also refer to the following recommendations from the Kaufman Report:

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

These submissions are attached as Annex 10 to this Report. It is not apparent that they have been formally adopted by the RNC.

I recommend that the position expressed by the RNC in the Systemic Phase of this Inquiry in relation to the use of polygraph be adopted in its policies, procedures and training programs.

**(iv) Forensic Evidence:**

In the Conclusion to my analysis of the police investigation in the Parsons chapter, *supra*, at p. 132, reference was made to the need to commit greater financial resources to the RNC. I am satisfied that the Forensic practices within the RNC are vastly improved from the situation at the time of the Parsons and Druken investigations. The only factor preventing further improvements being made is the limited resources available for equipment and training, which I also addressed there.

The Druken investigation did demonstrate some improvement in relation to forensic practices. For the first time, the exhibits were collected and processed by the Forensic Identification Unit as opposed to the junior officer from the Major Crimes Unit on the investigation team. Although, as mentioned in the Chronology of Events, *supra*, at pp. 184-5, there were some errors, the collection of exhibits certainly had improved. However, a major omission occurred in relation to the examination, or failure to examine, one exhibit in particular. This was the cigarette butt that ultimately was found to contain the DNA of Paul Druken.

This cigarette butt was not recorded, and apparently not noticed, by the exhibit officers. It first came to light during the actual trial, when the

head of the forensic investigation team was testifying. He was asked by defence counsel to open an exhibit bag which was marked as containing a doily collected from the scene. When he removed the doily from the exhibit bag and unfolded it, the cigarette butt fell out. Since the butt had a red substance on it, it was logical to assume that the substance was lipstick and that the lipstick was that of Brenda Young.

However, in criminal investigations such assumptions must always be tentative, pending actual scientific verification. A difficulty that arises is that the pressure on testing facilities may require a discretion to be exercised as to which exhibits should be given priority for testing. In this case, it was possible that the substance was, indeed, lipstick but that it came from another woman, who might have been involved in the murder. Another possibility was that the substance was not lipstick at all. In fact, subsequent testing determined that the red mark was not lipstick, but melted carpet from below where the doily had once rested on the coffee table that had been overturned. This ultimately led to the conclusion of the second investigative team that the cigarette butt containing Paul Druken's DNA, was burning at the time the coffee table was tipped over. As a result, it burned briefly into the carpet on which it rested as well as into the doily on top of it and to which it became stuck.

During the investigation and preparation for trial in 1994, the DNA analysis necessary to detect Paul Druken's DNA may not have been available in Canada. It may well have been available in the United States, where some of the Brenda Young exhibits were tested at that time. While Paul Druken's presence at the scene was already part of the Crown's case, the circumstantial evidence of him being present at the time of the coffee table being tipped over, would have suggested he was present at the time of the murder. That would also suggest the murder occurred at 3:00 a.m. rather than 1:30 a.m. casting even further discredit on the testimony of Madeline Dooley as well as the clean-up theory.

The RNC forensic investigative team also determined that the evidence did not support the theory that the murder occurred in the kitchen or that the body was moved from the kitchen to the living room. Nor did it find any evidence to support the theory of a clean-up of the kitchen or the living room following the murder. This aspect of the team's investigation and analysis was confirmed by a subsequent forensic investigation conducted by the RCMP.

This scientific evidence is particularly significant because of the ease with which it was discounted or ignored by both the police and the Crown

attorney conducting the trial. The initial police theory of a clean-up was never abandoned in spite of clear and convincing evidence to the contrary.

**(v) Electronic Surveillance:**

The circumstances of the electronic surveillance, which was conducted, were described under the Chronology of Events, *supra*, at pp. 194 *et seq.* Amongst the flaws in this operation were the following:

- Interception of communications was precluded between midnight and 8:00 a.m., when many of the targets were active;
- The monitors received insufficient information about the investigation to permit them to identify all relevant information;
- Their notes suggest they were merely focused on identifying obviously inculpatory comments, rather than gathering all relevant information;
- There were insufficient monitors for the seven active intercepts in operation since a maximum of two monitors, at any one time, were expected to monitor all seven;
- There was inadequate communication between the monitors and the investigators;
- It was concluded that the intercepts provided very little, if any, valuable information but subsequent analysis by my staff demonstrated that important information was missed.

Amongst the important information not considered during the investigation was the inter-witness and media contamination of the evidence of potential witnesses.

However, these flaws are merely a reflection of a broader underlying concern. There was no apparent attempt to gather, cross-reference and analyse the information recovered. The lack of availability of monitors should have been taken into account in establishing priorities with respect to the targets rather than simply taking a "shotgun" approach in the hope something significant might happen. This was a wasteful allocation of scarce resources.

The submissions of the RNC at the Systemic Phase indicate that many of the concerns arising out of the electronic surveillance in the Brenda Young investigation have been addressed:

> Many changes have been made since the early 1990's with respect to the involvement of the technical investigators in major cases. In addition, monitors are now part of the

> briefing process before intercepts begin. The RNC currently has a pool of experienced monitors whom we contract as needed. Issues identified during the previous phases of the Inquiry have served to reinforce some of the more recent changes for investigators and technicians alike.

Unfortunately, such improvements do not extend to the upgrading of equipment, which has not occurred since the Technical Investigation Unit was created some fifteen years ago. In a period that witnessed rapidly changing and improving technology, that is a significant gap.

According to the RNC submissions, for example:

> ...**the RNC is probably the last agency in Canada to use analog intercept equipment (wiretap).** The RNC continues to carry out intercepts using equipment purchased as far back as 1981 and borrowed from other agencies. As a consequence, we lack the capacity to undertake a number of types of intercepts. Other police agencies intercept telephone and other audio using digital intercept systems which not only intercept, but store, manage and disclose audio in a very efficient, low error fashion. Currently the RNC purchases thousands of audio cassettes at considerable cost, duplicate them at an additional cost and store them for the long term.

In my view, it is "penny-wise" but "pound-foolish" to continue to commit inordinate maintenance costs to an out-dated and inefficient system driven by out-moded equipment. This is an area that cannot be improved "piecemeal". What is required is the adoption of integrated modern systems, which are complementary, to replace the analog systems. In doing so, related needs should be addressed such as high-resolution digital camera equipment, adequate computer workstations and laptops as well as the portable audio recording equipment that I have already recommended for taking statements, in the field, in major crime investigations.

I recommend that a task force be established to assess the current technological needs of the RNC, with reference to other Canadian police forces, and to recommend both what is required and an implementation plan. In addition to the RNC, the task force should have representation from government, the private sector, the academic community and the Canadian Police Service, of people who are knowledgeable in relation to technology and able to apply that knowledge to policing needs.

In the short term, the implementation of such changes will require a significant capital expenditure but that is inevitable. The sooner it is done, the better.

Before leaving the subject of electronic surveillance in this investigation, I wish to refer to a specific incident that occurred during the hearings before me. Lieutenant Peddle was knowledgeable and experienced in drafting applications for authorization to conduct electronic surveillance under the *Criminal Code*. He drafted the affidavits in this case with the assistance of Crown attorney, Bernard Coffey. The affidavits refer to information provided by an informant and, during his testimony, Lieutenant Peddle identified the informant as Derek Druken. The information in question was that, after the murder, Paul Druken went to the scene "to clean the scene of any possible incriminating evidence", and then returned to the residence of Cathy Denief, where he was residing, to wash his clothes.

Staff Sergeant Melvin Cake (now retired) learned of this testimony through the media and was surprised since he had been the "handler" of Derek Druken, as an informant. He contacted Senior Commission Counsel (Hearings) and then testified before me that Derek Druken had advised that Cathy Denief had told him:

- Paul Druken was not home during the three nights prior to the murder;
- He showed up and used the washing machine and dryer in the early morning of the murder;
- He also obtained a bottle of rum by way of a taxi driver that morning.

The informant also told Staff Sergeant Cake it would be beneficial for him to speak to Cathy Denief. There was no doubt in his mind that Derek Druken did not give him the information alleged in Lieutenant Peddle's affidavit.

After hearing this testimony, Lieutenant Peddle testified that, in the circumstances, he could not challenge Staff Sergeant Cake's recollection. His own recollection was that the informant who provided this information was Derek Druken but he could not think of anyone else from whom his information might have come.

My staff was unable to locate any documentation or notes made by Lieutenant Peddle or Staff Sergeant Cake. In the circumstances, the only reasonable conclusion is that Lieutenant Peddle simply was mistaken.

## (b) Reliability of Key Witnesses:

### (i) A Study of Evolution:

When the investigation commenced, there was no direct evidence linking Randy Druken to the murder of Brenda Young. He had a history of violent behaviour, including a stabbing. He had also assaulted Brenda Young over the course of their stormy relationship. It was generally accepted that she drove him home shortly before 10:00 p.m. on Friday, only a few hours before the murder. But there was no direct or even circumstantial evidence placing him at the scene of the crime when the murder was committed.

Shortly after the discovery of the body, police statements were taken from occupants of each of the four apartments in the building where Brenda Young resided:

- Cindy Young, who was in the apartment where the murder occured said she was awakened by a big bang she described as the coffee table being knocked over. She heard a soft, male voice but it was not familiar and she had never heard it before.
- Madeline Dooley, in the ground floor apartment directly below, heard only "more than one person going up the stairs" to Brenda Young's apartment at about 1:15-1:30 a.m.
- Phyllis Duke, in the ground floor apartment adjacent to the Dooley's, said she last saw Brenda Young at approximately 1:15 a.m. at the bottom of her stairs and spoke briefly with her.
- Julie Evoy, in the upper floor apartment adjacent to Brenda Young's answered her door around 2:30-3:00 a.m. to a man who was asking for Brenda. She directed him to the door right beside hers and later identified the man as Paul Druken.

The evidence of Julie Evoy was consistent throughout.

However, the other three witnesses all "changed their stories" in subsequent interviews:

- Cindy Young later identified the voice she heard as being Randy Druken and, later still, recalled her mother saying: "stop, Randy, stop".
- Madeline Dooley subsequently recalled that she heard Brenda Young kick off her shoes and then heard her "screaming" the words "stop Randy, don't do it anymore, stop".

- A month after her first statement, Phyllis Duke stated that she saw Randy Druken at the rear of the building at around 10:30 - 11:00 p.m.

This recollection by Phyllis Duke was considered to be particularly significant since it placed Randy Druken back in the neighbourhood at a time after he had been driven home shortly before 10:00 p.m.

The evolution of the stories being told by each of these three witnesses was not a matter of concern for the police. Rather, it was their objective. The *modus operandi* described above was based on the premise that many potential witnesses were withholding information. The rationale for this premise was that these people were afraid that if they provided inculpatory evidence against a member of the Druken family, they could be subject to retaliation from other family members. Some had expressed such a fear, but there was no evidence of any actual attempts to intimidate witnesses.

This approach gave the police complete freedom to follow their tunnel vision wherever it might lead. Discrepancies between earlier statements and the statements of others could be rationalized as flowing from that fear. The presence of an analyst might have been of some assistance but the operating paradigm lent great scope for selectivity. It was never apparent just why witnesses such as Madeline Dooley or Phyllis Duke eventually overcame their fears and told "more". Nor was there any questioning of whether "more" really meant "different" and, particularly, whether it was in response to what the investigators wanted to hear.

It is significant that all three of the witnesses who changed their initial statements from being innocuous to being inculpatory of Randy Druken, were vulnerable to suggestion and influence. Cindy Young was only nine years of age at the time of the murder, which she experienced in highly traumatic circumstances. She was suddenly without her mother, had conflicting feeling about Randy Druken and was facing competing pressures from other adults, namely, her great grandmother and the police. Madeline Dooley had health problems and by the time of the trial, her mental condition had deteriorated to the point of complete insanity. Phyllis Dukes' daughter described her as being an attention-seeker who didn't lie intentionally but had no credibility.

**(ii) Cindy Young:**

The Chronology of Events, *supra*, at pp. 181-3, refers to Cindy Young's statements on the day of the murder:

- She spontaneously told a firefighter that she woke up and thought she heard her mother call her name, but then thought she dreamed it and went back to sleep.
- While in Josephine Dyke's car, she told Lieutenant Peddle that Randy Druken killed her mother but that she did not see what happened.
- After Cindy was taken to the police station and while she was awaiting her formal interview, Lieutenant Peddle came into the room and admonished her along the lines of Constable Baggs' notes, *supra*, at p. 182.

Constable Baggs was a member of the RNC Child Abuse Unit and had been assigned responsibility for dealing with Cindy Young from the start of the investigation. She was tasked to conduct the interview of Cindy but was new to the Unit and not experienced in interviewing children. She went to see Constable Tim Hogan some two or three hours prior to the statement being taken (shortly after noon) to ask for his assistance. They worked together in the same Unit and were friends.

**The Hogan Interview:**

Constable Hogan served with the RCMP in Alberta prior to joining the RNC. In his combined experience, he had conducted hundreds of interviews with children. Many of these involved the sudden death of parents through suicide or murder. He had not taken courses in child interviewing techniques but obviously learned a great deal from his practical experience. He testified before me that it is an excellent learning experience to be "grilled by defence counsel" about the manner in which a statement was taken and then to hear the statement criticized in a judge's charge to the jury. His NCO in Alberta also stressed proper interviews with children, stimulating his special interest in this aspect of investigation.

His interview with Cindy was properly conducted and is the best record of what she actually recalled of the events surrounding the murder. The interview commences with "small talk" about Cindy's brother, her school, her friends and what she did the entire previous day. These were simple questions to make her feel comfortable and increase her confidence. Also, the details about the previous day would provide a basis for testing her recollection. Constable Hogan testified that Cindy was mature "well beyond her years" and that she did "extremely well" in the interview, especially considering the traumatic circumstances she had recently experienced.

The interview is fully recorded in question and answer format. The questions are "open-ended" and not leading in relation to any substantive

matters. Cindy is never challenged on her responses or provided information by the interviewer. It is not prolonged or repetitive. When the interview was completed, it was read back to Cindy by Constable Baggs for confirmation. This entire interview is attached as Annex 11.

In her statement, Cindy mentioned that when she returned from school the previous day, she asked Randy if he would be sleeping over that evening and he replied that he would not. Shortly before 10:00 p.m. she could hear Randy and her mother leaving for her to drive him home and she fell asleep shortly after that. The most important part of the interview is the following:

Q. Did you see or hear your Mom come back?
A. No.
Q. What do you remember next?
A. I heard a big bang and I thought it was the coffee table knocked over because I thought it might be Mom sleepwalking or something. She was saying, "no, no, Cindy, leave me alone, leave me alone" and I could hear another voice say once or twice, "be quiet Brenda".
Q. Did you know who the other voice was?
A. No. It wasn't a familiar voice. I never heard it before.
Q. Was it a woman's voice or a man's voice?
A. It sounded like a man's voice. It sounded like a soft voice.
Q. Are you certain you never heard your Mom return home?
A. I'm sure.
Q. After you heard your Mom talking and the other voice, what did you do?
A. I went back to sleep.

Towards the end of the interview, Constable Hogan also explored who, other than Randy Druken, might have been involved:

Q. Does your Mom have any other friends that might sleep over?
A. No, just Randy and Lisa and her husband. Lisa LeGrow and his name if [sic] "Faouk Owens".
Q. Does your Mom have a boyfriend right now?
A. No. She said that she didn't want to go out with anyone else.
Q. Why?

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

He also provided an opportunity for her to speculate on what might have "happened" to her mother:

Q. What do you think happened to your mom?
A. I think maybe she killed herself. I don't know.
Q. How do you think she killed herself?
A. I think a knife.
Q. Why do you think she killed herself?
A. Cause she was under a lot of stress. She never had no luck with boyfriends and that and she always had a lot to do.

There is nothing in this statement of Cindy Young that incriminates Randy Druken.

While the exact circumstances are not clear, Constable Hogan played no further role in relation to Cindy Young. He was assigned to do "canvass" interviews in the neighbourhood that same day. In view of his expertise and experience in dealing with children and the inexperience of Constable Baggs, this was unfortunate. His interview did not support the premise on which the investigation was proceeding and the next interview proceeded in a very different manner and achieved a different result. It is tempting to infer that he was re-assigned because Lieutenant Peddle did not want a proper and objective interview. However, there is no evidence to support that conclusion and the RNC did engage another expert to assist in a further interview.

**Cindy Young's Apprehension:**

As a result of the incident at Josephine Dyke's car, outside Brenda Young's apartment on the morning of the murder, Lieutenant Peddle was justifiably concerned that Mrs. Dyke would attempt to influence Cindy's recollection of events. When he asked her what happened, she said "Randy killed mom" but in response to a further question said she had not seen what happened. Mrs. Dyke immediately intervened to say the children did not know what happened but were assuming Randy Druken was the killer because of his past conduct. Lieutenant Peddle was concerned that Cindy would be staying with the Dykes and susceptible to pressures not to implicate Randy Druken.

Following Cindy's formal interview by Constable Hogan at the police station, the children were picked up by Mrs. Dyke and her daughter, Linda

Clarke, and taken to the Dyke residence where they spent the night. Meanwhile, Sergeant Robert Shannahan (now retired at rank of Superintendent) sought advice from Crown attorney, Bernard Coffey and then contacted the Department of Social Services. On the following day, the children were interviewed and assessed by a social worker at the Dyke home. The social worker also spoke to Linda Clarke, who expressed concern about the environment in the Dyke home. She related that Mrs. Dyke repeatedly asked Cindy questions and talked about the relationship of Randy and Brenda. Mrs. Dyke also had spoken with Randy on the telephone and related these discussions to Cindy. Mrs. Clarke related statements allegedly made by Cindy to her which incriminated Randy Druken. The children were apprehended at 8:30 p.m. that evening and taken to Presentation House, an emergency-receiving centre for children removed from their homes.

The next morning, on Monday, Cindy was visited by Constable Baggs at Presentation House. When she arrived, Cindy was being interviewed by a social worker there. Cindy asked Constable Baggs when she could go back to her "nanny's home". When told a couple of days or, possibly, at the latest, the end of the week, she responded that her aunts had told her the previous day that it would only be one or two nights. Cindy repeated this inquiry on a number of occasions but was not returned for approximately two weeks. Constable Baggs told her she would like her to speak with a psychologist and Cindy asked if she would have to talk about her mom again. By this time she had not only been formally interviewed by the police but also spoken frequently with Mrs. Dyke and other relatives as well as at Presentation House to social workers.

Lorna Piercey had a master's degree in clinical and development psychology and considerable experience in working with children. She was retained by the RNC to provide therapy or support for Cindy Young in reducing the emotional strain she would be experiencing. This appears to have been restricted to the context of another interview to which she would be subjected. She tried to establish an environment that would assist her in recalling details from the morning of the murder. Constable Baggs had arranged for her to meet with Cindy Young that same Monday evening, when she returned to Presentation House with Lorna Piercey at approximately 6:00 p.m.

Ms. Piercey began by drawing pictures with Cindy and then Cindy began to talk about the events on the morning of the murder. The interview was unstructured and only recorded in a few brief paragraphs in Constable Baggs' notes. Her notes state:

> Cindy talked about being afraid of noises and the dark at Presentation.
>
> Cindy also talked about her feelings and concerns about what would happen to her and Tyrone.

The interview concluded at 7:15 p.m.

In my view, the police initiative to have the children removed to Presentation House was unwarranted and unfortunate. While Tyrone may not have been adversely affected, there is no question that Cindy was anxious to return to the comfortable environment of her great grandmother. Constable Randell testified that:

> ...in my experience this is the first time and the only time where we've gone to this somewhat dramatic measure of actually removing the child from a place where she feels safe and bring her in alternate accommodations.

The proper procedure was followed on the morning of the murder. Cindy Young was taken to the police station and a competent interview of her was conducted and recorded. Unfortunately, it was not videotaped, but that did not justify what followed.

A nine-year old child, who had experienced an extremely traumatic event, was removed from the secure and familiar home of close relatives to an institutional setting and kept there for two weeks. She made it clear she was not happy there and wanted to be with her "nanny" whom she missed "a lot". This was all in the hope the police would obtain something more incriminating of Randy Druken than she gave in her formal statement.

I make no comment on the actual process that resulted in the apprehension and detention of Cindy and Tyrone. My concern is its initiation by the police.

**The Baggs Interview:**

The interview conducted by Lorna Piercey at Presentation House was not intended to be a formal interview but an opportunity to meet Cindy Young and establish a rapport. The notes of Constable Baggs, on the key issue state:

> She said that she felt the voice she heard was Randy Druken. She said it also could have been Gordon Youngberg's. She said that they both sounded alike.

Ms. Piercey reviewed her notes made at the time and reported her interpretation as follows:

> She thought the male voice might have been Randy Druken's voice, but was quite uncertain about this. My impression was that she thought that Mr. Druken was the man most likely to have been in her home at night but that the man's voice did not really sound like Mr. Druken's voice.

The notes of one of the social workers indicate that, the next day, Constable Baggs had a conversation with Cindy Young when she, again, said it could have been Randy's voice or Gord Youngberg's. Constable Baggs "explained to her that Gord is no longer a suspect".

The videotaped interview of Cindy Young took place on Wednesday morning, four days after the murder, three days after the children were removed to Presentation House, two days after Lorna Piercey interviewed her and the day after Constable Baggs told Cindy that Gordon Youngberg was no longer a suspect, implying that the voice she heard must have been Randy's. Up to the time of the videotaped interview, Cindy had communicated with numerous people on numerous occasions about what she heard on the morning of the murder. She had never positively identified Randy Druken's voice. Indeed, in her most objective and uncontaminated statement, she said she did not know who the other voice was:

> It wasn't a familiar voice. I never heard it before.

Since she was intimately familiar with Randy Druken's voice, she was effectively saying it was not his voice. However, Lieutenant Peddle needed Cindy Young to identify Randy Druken's voice in order to place him at the scene, thereby confirming the police theory.

Lorna Piercey's precise role was never clearly established. There was no written retainer. However, it appears that she was expected to conduct the videotaped interview in view of her professional training and experience with children. This conclusion is supported by her preliminary meeting with Cindy at Presentation House, where Constable Baggs was present but remained in the background. Also, the transcript of the videotaped interview, indicates that, following a brief introduction, Constable Baggs told Cindy:

> I'm just going to sit here and listen, okay so you talk to Lorna.

Lorna Piercey then commenced the interview.

Cindy Young was consistent throughout her various statements in recalling that she was awakened by the loud noise of the coffee table tipping over, she heard voices and then she went back to sleep. When asked by Lorna Piercey what kind of voices she heard, she responded:

> My Mom, said let go, no Cindy and I think she was saying leaving me alone and I heard a voice say be quiet Brenda, be quiet.

Lorna Piercey prompted her that the voice belonged to someone who knew her mother's name and asked about how she sounded. Cindy responded that it was "like she was in her dreams" and repeated:

> I think she said leave me alone and she was calling out my name.

Cindy was then asked: "what did you think to yourself?" and she replied that either her mother was having a dream or Randy was present "ransacking the house". This was logical speculation on Cindy's part since she had observed previous arguments as well as violence by Randy Druken including him knocking over the coffee table on one occasion.

Lorna Piercey then suggested this did not sound like "a usual fight" between Randy Druken and her mother since the male voice was attempting to calm her down. Constable Baggs then interjected for the first time and the following exchange occurred:

| | |
|---|---|
| Cst. R. Baggs: | Cindy, you heard two voices, one was your Mom's you're saying, who owned the other voice? |
| Cindy Young: | I thought Randy, I thought Randy was up in the house so probably it was Randy's. |
| Cst. R. Baggs: | Did it sound like Randy's to you. (Cindy nodded yes). |

It is clear that Cindy only thought the voice was Randy's because she assumed it was him in the apartment. It is only after the leading question that she agreed the voice sounded like Randy's. Her nodding instead of answering may also suggest her reluctance to agree.

Lorna Piercey then resumed the questioning when Constable Baggs again intervened to ascertain exactly what Cindy could see from her bedroom when she awoke. Cindy then speculated that her mother might have stabbed herself because she was unhappy with her life and herself. Constable Baggs

then took the dominant role for the remainder of the interview with Lorna Piercey also joining in to pursue other lines of questioning. At one point, she told Cindy it was understandable she could not remember some things because the event was shocking and upsetting. But she added Cindy was doing "really well" and remembering "quite a lot".

Constable Baggs then initiated the following exchange:

| | |
|---|---|
| Cst. R Baggs: | So Cindy, when you heard, say you heard your Mommy call out to you and you heard someone say shh Brenda, that voice, was a male or female? |
| Cindy Young: | Male. |
| Cst. R. Baggs: | Male, and whose voice did you think it was? |
| Cindy Young: | Randy's. |
| Cst. R. Baggs: | Randy's, any reason why you thought it was Randy's? |
| Cindy Young: | Yes because his voice sounded like that. |
| Cst. R. Baggs: | His voice sounded like that and you knew the other voice was your Mom's did you? |
| Cindy Young: | Hmm...Hmm... |

Although Cindy only "thought" it was Randy's voice, for the first time, she volunteered that the voice sounded like him. When Constable Baggs attempted to confirm this, she again seemed to show some reluctance. The interview appears to be coming to an end, with the following exchange:

| | |
|---|---|
| Cst. R. Baggs: | Is there anything else that you think we should know Cindy that... |
| Cindy Young: | I can't think of anything else. |
| Cst. R. Baggs: | You can't think of anything else. You never heard or saw anything else that night? (Cindy indicates no by nodding) No, just the voice that you thought was Randy's and your Mom's, (Cindy indicates yes) okay. |

However, the interview did continue for some time, until Constable Baggs stated:

> ...Okay Cindy, I don't think I'm going to ask you anymore questions unless there's something you like to ask me or

Lorna. Okay, it's now 11:44 June 16th and our interview is concluded.

Constable Baggs then left the interview room and spoke with Lieutenant Peddle who had been monitoring the interview, out of view.

Constable Baggs returned to the interview room and the following questioning occurred:

| | |
|---|---|
| Cst. R. Baggs: | Okay Cindy it's 11:51 and I just got a couple more questions that I have to ask you okay. So June 16th, did you hear your Mommy call anybody's name when you heard her say Cindy, did you hear her say anybody's name? |
| Cindy Young: | No. |
| Cst. R. Baggs: | Just your name. |
| Cindy Young: | Yes. |
| Cst. R. Baggs: | Nobody else's, you're sure? |
| Cindy Young: | Sure. |
| Cst. R. Baggs: | Okay. |
| Lorna Piercey: | She said let go and leave me alone, but she didn't say a name with that. (Cindy nods no). |

It appears from this that Lieutenant Peddle asked Constable Baggs to pursue whether Cindy might have heard her mother name someone. The questioning continues:

| | |
|---|---|
| Cst. R. Baggs: | Okay. The voice you heard, you said you heard a male voice and you thought it was Randy's, are you sure it was Randy's voice you heard. |
| Cindy Young: | **I thought it could have been someone else's, cause lots of people sounds the same.** |
| Cst. R. Baggs: | **Why would you think that? Why did you think it was Randy's?** |
| Cindy Young: | Well I thought he might be up in the house again you know. |
| Cst. R. Baggs: | Did you think it sounded like Randy's voice? (Cindy nods yes). At the time, were you sure it was Randy's voice, that you heard. (Cindy nods yes). You were. So the |

voice you heard that night you thought was Randy's voice answer.

Cindy Young: Yes.
[Emphasis added]

One can only infer that Lieutenant Peddle instructed Constable Baggs to be more aggressive in attempting to have Cindy confirm that the voice she heard was Randy Druken's.

The first question was understandable. Cindy had given a variety of answers to the identification of the male voice. She speculated it was Randy's since he was the most likely male visitor and had been violent on previous occasions and had tipped over the coffee table. Her responses to the "sound of the voice as being Randy's" was sometimes reluctant and in response to a leading question. She had also given a contradictory response on this issue when interviewed by Constable Hogan. However, what followed was unacceptable, when interviewing a child witness, in particular.

When asked if she was "sure it was Randy's voice", Cindy responded to the effect that she was **not** sure, since it "could have been someone else's". This answer was completely ignored by Constable Baggs, who immediately asked why Cindy thought the voice was Randy's. She responded that she again assumed it was Randy since he was most likely to have been present. Again, Cindy's final acknowledgments that the voice sounded like Randy and she was sure it was his voice appear to have been reluctant nods. It is only when Constable Baggs says "answer" that Cindy says "Yes".

A careful reading of the entire interview makes it clear that Cindy did not know who was in the apartment and was not permitted to give her independent recollection. She was under pressure to identify the voice as that of Randy Druken. I agree with the following observation from the submissions of the RNC Association:

> The police treated the answer to the final question reproduced above ("Were you sure it was Randy's voice that you heard?") as an ah-ha moment that could be separated from all of the other qualifications in the remainder of the statement.

It was also completely contradictory to the statement taken by Constable Hogan on the day of the murder.

Lorna Piercey was engaged to provide a report to the Commission in relation to her role in interviewing Cindy Young. She reported that she had told Constable Baggs at the end of the interview that Cindy had revealed

everything she was capable of recalling. She felt that any further questioning could result in her thinking she remembered more, in an unconscious effort to satisfy interviewers. Her interpretation of the two interviews in which she was involved was that Cindy was unable firmly to identify the male voice in question.

It was submitted to me that a formal written opinion should have been obtained from Ms. Piercey in relation to the reliability of Cindy Young's identification of Randy Druken's voice. I agree with the submissions of the DPP's Office that it would not have been admissible at the trial. Moreover, her retainer appeared to be limited to assisting in the interview process rather than assessing the witness's reliability. With respect to the videotaped interview, her role was significantly usurped by Constable Baggs at the encouragement, if not the direction, of Lieutenant Peddle. In any event, the view she expressed was not what Lieutenant Peddle wanted to hear and the "ah-ha moment" was treated as the voice identification needed to place Randy Druken at the scene of the murder. In the circumstances, it is doubtful her opinion would have influenced the course of the investigation.

However, Lorna Piercey should have been engaged in writing rather than orally. In fact, a written report from Lorna Piercey might have provided the police with valuable insights into Cindy Young's reliability, even if such information was not desired by them.

A psychologist, retained by the Commission, identified the following problems with the videotaped interview:

1) No attempt was made to establish rapport with Cindy.
2) The issue of truth telling was poorly addressed and not linked to the interview.
3) The witness was told to 'imagine' an aspect of the event.
4) There was no structure to the interview.
5) The adults seemed to have no understanding of human memory.
6) Neither the police officer nor the psychologist had basic knowledge in forensic interviewing.

**The "Randy" Statement:**

The Chronology of Events, *supra*, at pp. 195-6, described how Madeline Dooley discussed her version of the events with Josephine Dyke, the "Nanny" with whom Cindy Young was staying, after she was released from Presentation House. Josephine Dyke had been fond of Randy Druken and

was satisfied that he could not have committed the murder. However, the electronic surveillance captured a telephone conversation on August 16th in which Madeline Dooley persuaded her that Randy Druken was the murderer. She emphasized that Brenda Young "definitely called his name". Mrs. Dyke said that she had been fooled but that this was "all going to come back to Cindy".

On August 31st, Josephine Dyke called Constable Randell and his notes of the conversation state:

> ...she advised me that Cindy is speaking about the murder and that she heard Randy & Brenda arguing & she heard Brenda call Randy's name and said "No Randy No".

Arrangements were made to interview Cindy the next morning and Constables Randell and Baggs arrived at the Dyke residence shortly before 10:00 a.m.

Again, the notes of Constable Randell state:

> I stayed in the kitchen with Mr. and Mrs. Dyke while Constable Baggs interviewed Cindy in the living room...
>
> In speaking with Cindy, she advised me that she heard her mommy [Brenda] say "No Randy, that's enough"... She was certain that it was her Mommy and Randy that she heard.

The Continuation Report completed by Constable Baggs contains the following:

> Cindy advised me that there was something else she remembered about the night her Mommy died. I asked her what it was and she said she heard her mother say "stop Randy, leave me alone". She said that she heard her mother say Randy's name...
>
> She only heard voices. These voices were those of her mother and Randy Druken. Cindy reiterated this same information to Constable B. Randell.

The recollection of Cindy Young had now evolved to where she not only heard Randy Druken's voice but she also heard her mother call out his name.

**Cindy Young's Reliability:**

Cindy Young was a truthful individual but her recollection of events was manipulated by the police and by her Nanny, Josephine Dyke. She may also have been unduly influenced by the Crown attorney in preparation for the trial. At the end of her trial testimony, she stated that the voice could have belonged to Derek Druken or Paul Druken as well as Gordon Youngberg or Randy Druken. In spite of all of the assaults on her memory over many months, she strived to be truthful.

However, the history of her treatment raised serious problems about her reliability. The Commission retained Dr. John Yuille, a psychology professor, with special expertise in memory and children's evidence. His opinion included commentary on child-interviewing techniques, including the following:

> The Step-Wise Interview has been developed to avoid the following problems frequently found in interviews with children:
>
> 1) Interviewers too often use leading questions, to which children are particularly susceptible;
> 2) Interviewers do not allow children to take their time and to describe events in their own words;
> 3) Interviewers are usually not trained investigators, and, as a consequence, they do not obtain enough information to validate the child's account;
> 4) Interviewers often have only one hypothesis in the interview setting and this hypothesis "blinds" the interviewers to obtaining all the relevant information from the child;
> 5) Interviewers may use language, which is inappropriate for children (particularly with preschool age children).

Items (1) and (4) were particularly significant in relation to the questioning of Cindy Young. He referred to the extensive literature on the susceptibility of children to suggestion and identified three conditions which enhance the likelihood of a child adopting a suggestion, namely where:

1. The suggestion is plausible to the child.
2. The source of the suggestion is credible to the child.
3. The suggestion is repeated.

These conditions were frequently present when Cindy was questioned.

His analysis of her pre-trial statements revealed that she was an unreliable witness because of variations in her accounts, such as the following:

1) She varied concerning her identification of a male voice she heard during the night. She said that the voice was unfamiliar, that it was someone she knew and that it was Randy's voice.
2) Cindy varied in her account of what she heard her mother say during the night: from no name other than 'Cindy' to using Randy's name.
3) Her statements varied concerning what she saw from her bed reflected in the mirror: from nothing to an arm raised.
4) She varied about what else she heard during the night from nothing other than her mother's voice and a male to hearing Randy talking to a neighbour (Pat) downstairs.

He added that she was not reluctant to co-operate:

> Her answers were matter-of-fact and she did not appear unwilling to provide answers. Although it is possible that reluctance played some role in the variability of Cindy's pre-trial accounts, I do no believe that this is the basis for her unreliability.

He concluded that her variability did not represent an attempt to misrepresent her memory. Rather, the combination of suggestion and reinterpretation caused changes in the pattern of her recall. In these circumstances, her earliest recollection, on the memory of the murder, represented her "uncontaminated memory". This takes us full circle to the first statement, taken by Constable Hogan on the day of the murder, which did not incriminate Randy Druken in any way.

**Conclusion:**

The evolution of the recollection of Cindy Young provides an important lesson about the vulnerability of child witnesses. Her first and most reliable statement, on June 12th in effect, said the voice she heard was not Randy Druken's. By September 1st, she recalled hearing his voice as well as her mother saying his name and asking him to stop. The vulnerability of children is increased when tunnel vision is at play, or in the words of Dr. Yuille, where:

> Interviewers...have only one hypothesis and this hypothesis "blinds" the interviewer to obtaining all the relevant information from the child.

It is important that police officers be sensitive to the vulnerability of child witnesses not only because of potential damage to the investigation but also because of potential harm to the child.

Once again, the RNC has already taken steps in this direction. Their brief on the Systemic Phase states:

> In 1993, as a result of the Mount Cashel Inquiry, a comprehensive, one week, training course was developed in collaboration with MUN School of Social Work that included a protocol for not only the investigation of child abuse complaints but also the interviewing of children. This training is known as A Collaborative Approach to the Investigation of Child Abuse.
>
> It is important to note that to date the majority of RNC officers have received this training. A number of members in our Criminal Investigation Division are experienced interviewers of children and are trainers for this course. These are the members who may be called upon by other investigators when they need expertise in this area. We also recognize that we may need to engage the services of qualified experts in this field depending on the circumstances of the case.

It appears that the combination of the protocol, training and major case management would not result in the same treatment of Cindy Young today, as occurred in 1993. However, an expert should be available "on call" to assist in the interviewing of child witnesses.

**(iii) Madeline Dooley:**

In the Chronology of Events, *supra*, at pp. 187 *et seq.*, it was pointed out that Madeline Dooley lived in the apartment directly beneath Brenda Young's. She lived with her husband, Peter, son Patrick and grandson, Patrick Jr. In her first statement given on Sunday, June 13th, she said only that she heard more than one person going up the stairs to Brenda Young's apartment at about 1:15 a.m. or 1:30 a.m. She made no reference to hearing any voices.

The next day, her son was questioned at the police station and told he failed his polygraph test and was a suspect in the murder. Shortly after he

returned home, Staff Sergeant Singleton and Constable Randell returned to the Dooley residence to interview her again. In this second interview, Madeline Dooley stated that after she heard people going up the stairs, shortly after 1:00 a.m., she heard Brenda Young kick off her shoes. About 15 minutes later, she heard her screaming out loud, "stop Randy, don't do it anymore, stop". She was "positive" it was Brenda Young's voice she heard.

This complete reversal did not concern the police in any way. It was exactly what they hoped to achieve. Madeline Dooley's second statement changed, from only hearing someone go up the stairs, to hearing Brenda Young "screaming" at Randy to stop doing something to her. No doubt this "success" encouraged them to seek to achieve a similar evolution in the evidence of Patrick Dooley and Patrick Dooley Jr. As described earlier, their tactics included harassment (visiting the residence on at least 34 occasions) and intimidation (the threat of charges of obstruction of justice).

After learning that Madeline Dooley had changed her recollection, Staff Sergeant Singleton took a formal statement from her. He began by asking her to describe in detail what she "forgot" to include in her statement given just the previous day. It is not plausible that she would forget such significant circumstances in the context of the murder that had just occurred. Nor was any consideration given to the notes made by Constable Randell in conjunction with the first statement, which said: "Then changed her mind and said she got the nights confused".

Although Staff Sergeant Singleton and Constable Randell left the Dooleys shortly before 6:00 p.m. Lieutenant Peddle returned at 10:25 p.m. the same day. His notes indicate that she repeated what she had said in her second statement but added that the screaming "went on for a while". Two days later, close to 12:30 p.m. Staff Sergeant Singleton and Constable Randell again attended at her residence when she repeated what she had heard Brenda Young say. She also agreed to a videotaped interview. Six days later they visited her again, at about 3:00 p.m., to "prepare" her for the videotaped interview that was to occur that evening. She again repeated that she had heard Brenda Young say: "stop Randy, don't do it anymore" but heard this repeated for approximately 20 minutes. It appears that having Madeline Dooley repeat the gist of her second statement on three subsequent occasions may have been designed to reinforce the second version of her recollection in preparation for her videotaped interview.

The two officers returned to the Dooley residence at approximately 7:00 p.m. the same day together with a Commissioner for Oaths and a video camera operator, to take a sworn videotaped statement. This statement should have raised serious concerns about the reliability of Madeline

Dooley's second version. Although, she claimed to know Brenda Young very well and see her regularly, she could not remember her name, in spite of being prompted:

| | |
|---|---|
| Dooley: | It was Brenda, Brenda - |
| Randell: | Okay, do you know Brenda's last name? Can you tell me, please? |
| Dooley: | Brenda Marie – wait now - |
| Randell: | Just take your time. Okay, it's the lady we've been here – we've been speaking with you a couple of times this week – |
| Dooley: | I know and I got it off – Brenda – |
| Randell: | **Brenda Young** – no? [Emphasis added] |
| Dooley: | Flynn, no – |
| Randell: | That's okay. How long have you lived here Mrs. Dooley? |

Towards the end of the interview, Staff Sergeant Singleton provided her with another opportunity to recall Brenda Young's name:

| | |
|---|---|
| Singleton: | Do you recall her last name after – you might be after relaxing some? |
| Dooley: | Brenda Marie – I still can't get it. |
| Singleton: | Did you ever meet her grandmother? Or her mother? |
| Dooley: | She used to call her grandmother her mother, right? |
| Singleton: | Did you ever meet that lady? |
| Dooley: | Finn, is it? No, Pynn. Brenda Marie – it will come to me guaranteed. But – |
| Singleton: | Okay. |
| Dooley: | But maybe not right now. It will, Sure I said her name. |
| Randell: | Pardon me? |
| Dooley: | I said her name so often, you know. |
| Singleton: | That's okay. |

Madeline Dooley was also unable to remember Randy Druken's last name and suggested it might have been "Dyke" the name of Brenda Young's grandparents.

However, she was confident that the steps she heard going up the stairs included those of Brenda Young.

| | |
|---|---|
| Randell: | Okay. What makes you think you heard Brenda going up over the stairs? |

Dooley: Well, by her pumps. She got a fashion, when she get up over the stairs, well I knew it was Brenda. She kicked them off, but while she was doing that, she said Randy, don't do that anymore.

She stated that she heard Brenda go up and down the stairs many times in the past and knew her "walk" very well.

Dooley: Yes, I do, especially when she put on her high heels, it's different than the flat heels, right?
Randell: And her pumps –
Dooley: She do walk heavy.
Randell: That would be her high heels?
Dooley: Her high heel shoes, yeah.
Randell: Okay. Okay, so you heard two people go up over the stairs and you heard Brenda kick off her pumps –
Dooley: Right, I heard them click on the floor.

There is no dispute, whatsoever, that Brenda Young was wearing sneakers when she returned home shortly after 1:00 a.m.

She also gave the following three different version of what occurred:

> ...and she said it when she got to the top of the stairs and I mean whatever it was, it had to be done before she got to the top of the stairs -

When asked how much time passed between her kicking off her pumps and there being silence, she said:

> I'd say from quarter after one to two, about a half hour...until I heard Brenda saying Randy, don't do that no more.

Staff Sergeant Singleton attempted to sort out this confusion by asking how long after hearing two people going up the stairs, did she hear Brenda's voice. The response was:

> Just as Brenda kicked off her heels, I heard her say, Randy, don't do that no more. And that's why I said, it's like she never ever had time to get into her bedroom...something must have went wrong before she got up over the stairs.

So, within a very short period of time Madeline Dooley said she heard Brenda Young's protestations: (1) At the top of the stairs; (2) About one-half hour after kicking off her pumps; and (3) At the very time she was kicking off her pumps. Constable Randell testified before me that he simply was not aware of these contradictions at any time.

Even greater inconsistencies and confusion emerged in her testimony at the preliminary inquiry and it also became apparent that she was hard of hearing. Some six months after the preliminary inquiry, Madeline Dooley was assessed by a psychiatrist who concluded that she was suffering from a mental illness, namely frontal lobe dementia, which caused her to be psychotic, delusional and out of touch with reality. He found her to be clinically insane and testified on the *voir dire* at the trial that she was incapable of giving evidence. An application was made to have her testimony given at the preliminary inquiry read in as evidence at the trial, as is permitted by the *Criminal Code* in such circumstances.

The trial judge fully appreciated how unreliable her evidence was, when given at the preliminary inquiry. However, he concluded that such an application did not permit him to "weigh" her testimony. Since it had been given under oath and with full opportunities for cross-examination, he granted the application. The jury would be provided all of the information, including her medical history, and would be in a position to determine the "quality" or reliability of her evidence and what weight to assign to it, if any. In the course of reviewing this evidence, the trial judge did point out its many frailties. His judgment is attached as Annex 12.

Amongst the weaknesses in Madeline Dooley's evidence, reviewed in that judgment and highlighted in the hearings before me, were the following:

1. Her Intelligence Quotient was in the numerical range of 74 while the average is 100. Psychological testing showed that for some years she had functioned at a low level. Her perception of facts could well have been impaired on June 13, 1993.
2. She had a history of psychiatric problems and had received electric shock therapy. The dementia could have developed over years and been present prior to June 13, 1993.
3. She was on medication at the time and claimed to hear the events shortly after taking her second sleeping pill of the night, about one-half hour earlier. The medication she was on could cause disorientation and confusion.
4. The transcript from the preliminary inquiry demonstrates that she had hearing problems.

5. That transcript also demonstrates her confusion. For example, with respect to her statements to the police:
   - She was not sure when she told the police what she heard.
   - She might have first spoken with the police one week or two weeks after the murder. (It was the next day).
   - She did not remember speaking to the police on June 12th or 13th.
   - She said she told the police everything in her first interview.
6. Her bedroom was at the back of the building and not underneath the stairs and landing of Brenda Young.
7. None of the other residents of the building, including the next door neighbours, separated only by an interior wall, heard the voice of Brenda Young or any other person, let alone prolonged screaming.
8. A pedestrian saw a woman entering Brenda Young's front door at 1:05 a.m. or 1:10 a.m. At the same time, a neighbour, who was standing in her own doorway, saw and spoke briefly to Brenda Young as she entered her front door.
9. There is physical evidence that after entering her apartment she consumed the meal she had purchased at 1:00 a.m. at Wendy's, changed into her nightgown and probably lay down on the chesterfield where she planned to sleep that night.
10. The forensic evidence showed no sign of violence or bleeding anywhere but on the chesterfield and the rug on which she was found lying.
11. She initially told the police she heard only footsteps. She gave a second statement, 24 hours later, when she knew her son was a suspect, placing suspicion directly on Randy Druken.

With respect to the second item, the trial judge drew particular attention to the psychiatrist's conclusion that Madeline Dooley had a good memory for events but not for their time sequences. He believed she could have confused the events she said occurred at 1:30 a.m. on June 13th with other events, which occurred the previous night or in the previous weeks or months. In the words of the trial judge:

> Dr. Strong's opinion becomes especially significant in the light of the evidence already before the Court, but on the previous night the accused went to Brenda Young's apartment in the early hours of the morning and that they had an argument after she had let him in the front door and they had gone upstairs to the apartment.

This reinforces the significance of Constable Randell's notes in relation to the first statement. There, she is recorded as having "changed her mind" and saying that she "got the nights confused". In my view, the logical conclusion to draw from the tape recordings of the Thursday night argument, after Brenda Young let Randy Druken in late at night, from the events described by Madeline Dooley and from her mental condition, is that she confused the two days.

Madeline Dooley was a highly unreliable witness. The many deficiencies in her evidence suggested a very dubious basis for charging Randy Druken or for prosecuting him after the charges were laid. However, these were of little concern to the police. As long as they had Brenda Young saying: "Stop Randy, don't do it", in all of its variations, the rest could be ignored.

**(iv) Phyllis Duke:**

The Chronology of Events, *supra*, at pp. 191-2, refers to the first two statements given by Phyllis Duke, who lived in the ground-floor apartment, diagonally below Brenda Young's apartment. Her first statement, on June 13th, merely related that at about 1:15 a.m. the previous morning, she was outside her apartment, trying to cool off when Brenda Young returned home. They spoke briefly and Brenda Young commented on the weather. Her second statement, on June 23rd, refers to a telephone call she received from Randy Druken on June 13th, when he told her to tell the police whatever she knew. She said she "got scared" when she learned it was Randy Druken calling and was "really nervous".

On August 5th, the CBC televised an item showing a car the police suspected of being involved in the murder. The next day, Phyllis Duke's husband, Peter, told a police officer he had seen the same care outside his house the day before the murder, *supra*, at pp. 196-7. The story also indicated the police were looking for two people in relation to the murder: the killer, and a second person for cleaning the scene and disposing the evidence. On August 10th, the CBC reported that Shirley Druken and John Ring had been charged with giving Randy Druken a false alibi for the morning of the murder.

The next day, Lieutenant Peddle and Staff Sergeant Singleton visited both the Dooley and Duke residences, *supra*, at pp. 198-9. While at the Duke residence, Phyllis provided additional information, not contained in her first two statements:

> Friday night, I went to Bingo. I came home around 10:30 p.m. – give or take 15 minutes. I recall it was a cold night. I went out by the door to cool off. I walked around the building.
>
> Around 11:00 p.m., I was at the back of the building walking around it to cool off. As I got to the north west corner, I was going west, I saw a man coming around the south west corner going north to a car that was parked at the back of the building. The man was wearing: → leather jacket – dark (black); → jeans; → boots – you could tell by the click on the pavement.
>
> He walked toward the car. I heard the door close and the car drove off. I froze in my tracks when I saw him. The man was Randy Druken…
>
> When I saw the car it was heading west. When Randy Druken got into the car, it drove off too quickly for Druken to have been driving it. I think he got into the back, but I'm not sure of this. I can't say for a fact, but I think there was someone else in the car. I just kept on walking around the building and had not looked back. I'm not 100% sure of the time of night this was, but it was definitely after 10:30 p.m.

Phyllis Duke also put a completely different "spin" on her second statement, which described the telephone call she received from Randy Druken on June 13th. She said when she asked who was calling:

> He said: "Randy Druken." It was just like every bit of blood in my body drained. I froze. I told him if he wanted to know anything to call the cops. He said to me in a sarcastic threatening way that made me afraid or intimidated me – "you make sure that you tell the cops that I left Brenda at 10:30 p.m., if you know anything else to tell the cops". He said this in such a way as to make sure I didn't tell the cops anything. He made me afraid. My impression was that I shouldn't tell the police anything.

The police considered this to be a crucial development. If Randy Druken was in the neighbourhood at 11:00 p.m., his alibi was false. The police were under the impression that Crown advice had been given that if Phyllis Duke would confirm this information in a KGB statement, there would be reasonable and probable grounds to charge Randy Druken with murder.

The videotaped KGB interview was conducted at the police station on August 19th. Phyllis Duke stated that she returned from playing bingo with her companion Judy Janes at approximately 10:30 p.m. Her companion went to her home to check on her nine-year old son. When she entered her own home, she complained to her husband that it was very hot, so he suggested she go for a walk. She did and, as she was returning, she saw a young man:

> And for the minute, I can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on. And when I went to turn, I heard the car door close and I never stopped to look to see what car he got into, I just turned and came on in.

She said Judy Janes then arrived and they played cards until shortly after 1:00 a.m., when she left. That was when Phyllis Duke stood outside, trying to cool off again since she was "going through menopause", and spoke briefly with Brenda Young when she arrived home.

When asked what made her think the man was Randy Druken, she again was less emphatic in her identification of him than she had been a week earlier:

> 'Cause I met him before and like I wasn't paying no mind to him because he really passed me fast and he put his head down...

A few minutes later, when asked again, she said she "really thought it was" Randy Druken and explained:

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

She also returned to her telephone conversation with him on June 13th and how, when she heard his name: "my blood ran really cold"; "I frozed"; "I was petrified". She then spoke of trying "to keep him on the line" long enough to call a police officer who was just outside. After he hung up, she went to the police officer asked him to "get a hold of somebody". The officers did not question her on these rather bizarre comments but simply accepted her fear as the explanation for her revising her statement to place Randy Druken in the neighbourhood at 11:00 p.m.

Phyllis Duke's testimony at the preliminary inquiry had more variation. There she testified that while Judy Janes was checking on her son, she went to the store and bought her husband some beer. When she returned, Judy Janes had not arrived, so she walked to her house. But since Judy Janes was in her washroom, Phyllis Duke returned home. She passed a man she thought was Randy Druken, but was not paying much attention to him.

At the trial, she also testified that she walked to Judy Janes' house but said she did not go inside. Rather she simply turned around and went home. When she met Randy Druken this time, she said they passed so closely together that:

> ...you can almost bang into one another, you know, we were that close to one another.

In her first statement identifying Randy Druken at 11:00 p.m., they did not even pass each other.

Phyllis Duke was consistent in one respect. In her videotaped interview, in her testimony at the preliminary inquiry and, once more at the trial, she stated that after they returned from playing bingo at around 10:30 p.m., Judy Janes stopped in at her home while Phyllis Duke continued to her own home. It was while Phyllis Duke was waiting for Judy Janes to arrive to play cards that she took her walk and saw Randy Druken.

Judy Janes was first interviewed on June 23rd but was not asked about her time spent with Mrs. Duke on the eve and early morning of the murder. Mrs. Duke had not yet given her statement placing Randy Druken at the scene. On November 14th, she was re-interviewed, and this time asked about the evening of June 11th, when she briefly referred to playing bingo with Mrs. Duke and then returning to the Duke residence to play cards. This interview would have been a task assigned by Mr. Gorman in preparation for the preliminary inquiry.

Judy Janes was interviewed again, only four days later, on November 18th, when she stated:

> On June 11, 1993, Phyllis Duke and myself went to Bingo on Rickett's Road. It is called the Country Bingo. We usually leave about 7:30 p.m. I cannot be sure if we walked or took a taxi. We arrived home about 10:30 p.m. or there abouts. I went to Phyllis Duke's house where Phyllis, her husband Peter and myself played cards. I went home around 1:00 a.m. to 1:10 a.m.

This second interview suggests that Mr. Gorman may well have been aware of the potential significance of her evidence. There was no mention of her stopping at her own home before going to the Dukes to play cards. Judy Janes was not called by the Crown at the trial, so defence counsel called her as a witness. Her testimony was unequivocal. She accompanied Phyllis Duke directly from the bingo premises to the Duke residence and entered the house directly behind Phyllis Duke...They then had a cup of tea and played cards.

She stated that on that particular evening she did not go to her home after playing bingo and before playing cards. She would only have done so if she had won at bingo. She did not win that night. Unlike Phyllis Duke, she was a credible witness. The Crown attorney, Wayne Gorman, did not ask her any questions on cross-examination.

Phyllis Duke also gave statements and testimony about Randy Druken yelling and swearing at Brenda Young from outside the back of her apartment on Thursday. Her various descriptions of this alleged incident were contradictory but were important since they alleged threats to kill her so she would not be able to travel to Ontario. The police did not attempt to verify her allegations by interviewing other neighbours she claimed were present.

Phyllis Duke was frequently imprecise about times and acknowledged that she was weak in recollecting times. In her videotaped interview, she was asked when she visited Brenda Young on Friday afternoon and responded, "I'm no good on time limit". Later she was asked again and said it was around "4:30 or 5:00, maybe 5:30", adding "I can't be certain of the hours". She was asked if she had any idea what time she went to bed after Judy Janes left her place and she replied:

> No, I don't know. I can't swear to a time limit. I'm terrible for time limits.

She reiterated this difficulty on her part over forty times throughout her evidence at the preliminary inquiry and trial.

I agree with counsel for the RNC Association that there were "enormous" problems with Phyllis Duke's statements and testimony. Her denial of being influenced by the media reports was thoroughly discredited by the wiretaps that had been disclosed at the last minute. Unfortunately, effective cross-examination on this issue was precluded by a ruling of the trial judge, conceded by Mr. Gorman at this Inquiry to be erroneous. In my view, the inconsistencies and improbabilities in her various statements were

properly analyzed in the course of the second investigation and I have included the summary of this analysis as a separate Annex 13.

It is obvious that the evidence of Phyllis Duke was "all over the place", and this became apparent to the officers conducting the second investigation. As a result, they made special inquiries into her personal reliability. Counsel for the DPP's Office took exception to this scrutiny of Phyllis Duke's reliability:

> In particular, microscopic attention was paid to Phyllis Duke's several statements. Further, her personal credibility was undermined during the second investigation by the police asking her own children to opine on their mothers' ability to accurately perceive and report events!

Phyllis Duke was invited but declined to participate in this Inquiry.

In my view, it was not only appropriate and desirable for the second investigation team to make inquiries into her credibility but also highly revealing. One of the tasks assigned to the second investigation team was:

> Laying any additional charges if reasonable and probable grounds can be established.

She was a crucial witness at the first trial and the team had to determine whether she could be called as a witness at any new trial. They concluded:

> With the writer's review of all the statements and testimony of Mrs. Duke along with those of her children, it is my opinion that her credibility is suspect, and her account of events with such drastic inconsistencies and additions, that any future testimony would be negated by her unreliability. This is not to say that Mrs. Duke intentionally mislead [sic] the police or the courts, an answer to that only she knows, but the dramatic change of events can not stand up against scrutiny.

I agree with this conclusion. In part the interviews of Phyllis Duke's children provide a rational explanation for the erratic behaviour reflected in her statements and testimony. It was simply the nature of her character as described by those who knew her best in this respect.

Eleanour Duke, the daughter who answered the telephone call from Randy Druken on June 13th said her mother did not appear to be startled or

confused or to feel threatened. Responses from her various children about their mother's reliability included the following:

- If she thinks she remembers something, there is no way of convincing her she is wrong.
- She easily weaves stories together and confuses the picture.
- They did not believe her and could not understand why the police would rely on her as a witness.
- There usually is some truth to what she says but she exaggerates and makes things out to be worse than they are.
- She tells falsehoods but believes in them and is so strong-willed, she cannot be convinced she is wrong.
- She has a history of repeating things that are known to be false.
- She does not lie intentionally but is not credible at all.

One son provided a specific example of her exaggeration. When he was eight years of age, he received a shock from touching an electric cord. It "turned him white" but did not render him unconscious. His mother subsequently described the incident as blowing him against the wall and requiring men in special suits to remove him from the basement.

Of course, these insights into Phyllis Duke's personality would not be admissible in court. But they are valuable in providing guidance to the police about the reliability of her statements, particularly with all of her inconsistencies and "elaboration". But the bottom line for the police was that Phyllis Duke placed Randy Druken in the neighbourhood at a time when he was supposed to be home in bed, according to his alibi.

**(v) Conclusion:**

The statements of Cindy Young, Madeline Dooley and Phyllis Duke formed the basis for charging Randy Druken, in spite of all of their inconsistencies outright contradictions and improbabilities. All three of these witnesses were vulnerable to the pressure tactics which were employed as the *modus operandi* for this investigation. Cindy Young was a nine-year old child who was manipulated by adults. Madeline Dooley was on the verge of insanity and feared the implication of her son in the murder. Phyllis Duke was unstable and unreliable in her interpretation and recollection of events. The evolution of their accounting of what happened neatly fit the police theory that most witnesses knew more from the outset but were reticent to tell what they knew for fear of the Druken family.

(c) **Reasonable and Probable Grounds and the Police Theory:**

(i) **Focus on Randy Druken:**

It was pointed out in the Chronology of Events that there were many valid reasons to focus on Randy Druken as the prime suspect from the outset:

- He had a lengthy criminal record, which included crimes of violence. At the time of the murder he was under mandatory supervision for a serious stabbing offence.
- His relationship with Brenda Young was violent, including a conviction for assaulting her. He was in a program for male spousal abusers that counselled on anger management.
- Cindy Young spoke of him, not only assaulting her mother, but also "ransacking" the apartment by knocking over furniture, including the coffee table.
- After the police were told by a friend of Brenda Young that he had once stabbed a knife into the coffee table in her presence, forensic testing was done which confirmed the mark in the coffee table was from a knife stab.
- He was a known drug user, particularly cocaine, and the tape of their Thursday night argument suggested he was high on cocaine at the time.
- There were reports that he threatened to kill Brenda Young to prevent her from attending a family wedding in Ontario, fearing she would not return.

The day after the murder Madeline Dooley said she heard nothing significant. The following day, after her son was told he was a suspect, she told the police she heard Brenda Young "screaming", at 1:30 a.m., "stop Randy, don't do it anymore, stop". The day of the murder, Cindy Young said she heard a male voice that she did not recognize. In a videotaped statement four days later, under improper questioning, she identified the voice as Randy Druken.

Another item of evidence the police considered to be significant, related to telephone calls made by Gordon Youngberg to Brenda Young the day before the murder. Randy Druken spent much of that day nursing a hangover on Brenda Young's chesterfield. He told the police that Youngberg had called twice that day. The police did not interview Gordon Youngberg until two weeks later, when he said he called three times: At noon when he received no answer; At 8:00 p.m. when he spoke to Cindy; At 10:15 p.m. when he received a taped greeting. Since no message was left on the first call, the police assumed he left a message on the third and concluded that Randy

Druken was back in the apartment, some time after 10:15 p.m. when he listened to the taped message.

In fact, the evidence demonstrated that he left a message at noon, which Randy heard. On the 8:00 p.m. call, he actually spoke with Randy and not Cindy. Cindy verified that she had not spoken with Gordon Youngberg that evening but recalls Randy speaking with someone at that time. These calls were never properly investigated. Randy Druken was asked no follow-up questions. If he had been questioned further, he would have confirmed his knowledge of **two** telephone calls from Gordon Youngberg, at noon and at 8:00 p.m.

The emptiness of this perceived incriminating evidence was demonstrated at the preliminary inquiry. Gordon Youngberg testified that he had not left a message on the third call. This circumstantial evidence placing Randy Druken (or someone else who communicated with him) at the scene of the murder, some time after he alleged he had gone home, simply evaporated.

Phyllis Duke's first statement, the day after the murder, was as innocuous as the first statements of Cindy Young and Madeline Dooley. She merely said that she spoke briefly with Brenda Young outside the entrances to their homes, shortly after 1:00 a.m. A week after news reports about the police theory and the day after Shirley Druken and John Ring were charged with attempting to obstruct justice, she also changed her story. She stated that after returning from bingo, she went for a walk and saw Randy Druken beside her home at approximately 11:00 p.m. This contradicted his alibi, that said he was at home asleep at that time.

Lieutenant Peddle, Staff Sergeant Singleton and Constable Randell all testified before me that the Crown had given advice to the police about charging Randy Druken. The advice was that, if Phyllis Duke repeated her sighting of Randy Druken in a KGB statement, there would be reasonable and probable grounds for a charge of second-degree murder.

There is no record of such advice having been given. No Crown attorney could recollect giving it. No police officer could recollect which Crown attorney gave it or which police officer received it. The most likely scenario is that Crown attorney, Bernard Coffey, said something along those lines to Staff Sergeant Singleton in an informal conversation. Not a great deal turns on this "advice" since the decision as to whether there are reasonable and probable grounds to lay a charge and whether to lay a charge are ultimately a police responsibility, whatever advice may have been received. The role of the Crown attorney at the investigative stage and the

requirements of formal requests and written opinions were addressed in the Parsons chapter, *supra*, at pp. 129-31, and the recently adopted Police-Crown Relationship Policy in Annex 9.

In laying the charge when they did, there is a disturbing possibility that the police were motivated by wanting witnesses to be more forthcoming. This thought arises from the wiretap evidence where Lieutenant Peddle bluntly asked Patrick Dooley and then Patrick Dooley Jr. whether they would be more co-operative if Randy Druken were charged, *supra*, at pp. 198-9. To lay a charge for this purpose rather than on a belief in reasonable and probable grounds would be highly improper. Because of the manner in which witnesses were questioned, the circumstances of the second Madeline Dooley interview and the laying of the obstruction charges, this possibility could not be ignored.

However, I conclude that the police genuinely believed they had reasonable and probable grounds to charge Randy Druken with second-degree murder. I attribute any "slack" in their assessment of the evidence to tunnel vision rather than to any such oblique motive. They may have foreseen benefits to the investigation in laying the charge but that would be coincidental to the reasonable and probable grounds they believed to exist.

The following considerations were most prominent in deciding to lay the charge:

- Cindy Young heard his voice in the apartment;
- Madeline Dooley heard the murder being committed with the victim protesting to "Randy";
- Randy Druken knew of the Youngberg telephone call that was made after he left for home;
- Phyllis Duke saw him at 11:00 p.m.

Underlying these circumstances was the history of violence by Randy Druken to the victim as well as to others.

This assessment of the case against Randy Druken is superficial and highly selective. The Youngberg telephone calls were not investigated nor was Judy Janes interviewed at all about Phyllis Duke, prior to the charges being laid, even though she was with her through the entire evening and night in question. It ignores the unreliability of the incriminating statements of Cindy Young, Madeline Dooley and Phyllis Duke. It fails to take into account other possibilities. Finally, it lacks any reasonably coherent theory as to what happened.

**(ii) Another Possibility:**

Counsel for Lieutenant Peddle made the following submission:

> Unfortunately, due to lack of resources, necessary effort was not expended in the analysis of the internal and external inconsistencies in the witnesses' accounts of events. Nor were adequate measures established to ensure that the electronic interception of discussions between important witnesses regarding the critical events which were captured on tape were brought to the attention of the main investigators...

Lieutenant Peddle testified before me that it was not a question of the analysis being inadequate. Rather, no analysis was done at all. Counsel for the RNC Association added:

> Part of the errors of analysis in this case can be blamed on the failure to have a full-time analyst. The police were aware that there were contradictions between the evidence of different witnesses, but they did not attempt to resolve them. When assessing what a witness said, not much effort was made to track how the statement evolved over time, nor to compare it against what other witnesses were saying on the same point, nor to compare it with what the witness was saying on the wiretap. Had the investigation been able to retain its analyst, perhaps this task would have been done.

However, this does not relieve the police of realistically assessing the entire case before laying a charge of murder. Where there is a "team" approach, contrarian views are more likely to be expressed. Where an investigation is dominated by one person, that person takes on the added responsibility of ensuring there is a thorough assessment of the case.

One of the most significant features of this case, that was ignored by the investigators, was Randy Druken's complete willingness to co-operate with the police in every respect. He voluntarily attended at the police station and gave a statement, submitted to a variety of physical tests and consented to a search of his home. He even told the police where they would find the clothes he wore the previous night, *supra*, at pp. 183-4. Those clothes (confirmed by Cindy as the ones he wore), had no blood on them. Nor did he have any cuts or injuries consistent with being in a violent assault a few hours earlier.

As stated previously, Randy Druken had never co-operated with the police in the past. He was a "street smart", experienced criminal who knew there was nothing to be gained, and much to lose, by co-operating with the police if he were implicated. He also submitted to a polygraph test.

Counsel on behalf of Staff Sergeant Singleton and Constable Randell submitted that the polygraph result discounted Randy Druken's co-operation:

> The result – Mr. Druken was determined to be deceptive. Given the belief of the investigators at that time as to the reliability of a polygraph, the result had a serious impact on the assessment of Mr. Druken's level of cooperation.

Unfortunately, this was a rare occasion when this counsel departed from his usual standard of meticulous accuracy. In fact, the record shows that the test result for Randy Druken was "inconclusive" rather than "deceptive".

In these circumstances, I can determine no reason why Randy Druken's spontaneous and complete co-operation was not given the significant weight it deserved. Indeed, Lieutenant Peddle also testified that the "inconclusive" result may have been adversely influenced by the proximity of the event in which he was emotionally involved.

The police immediately dismissed Randy Druken's alibi as a fabrication with no reasonable basis for doing so. When Cindy Young asked if he would be staying over on Friday night, he responded that he was going home because he had to work the next day. She heard him leave with her mother shortly before 10:00 p.m. Patrick Dooley stated that Brenda Young came over at 9:30 p.m. and told him she was driving Randy Druken home. She asked him to "keep an eye on" her children.

The statements of Shirley Druken, John Ring and Randy Druken were perfectly consistent as to what transpired that night. Shirley Druken's statements were also internally consistent, remarkably so, in comparison to the main police witnesses. In addition to the statement she gave on the day of the murder, she gave two more statements to Lieutenant Peddle, three days later when submitting to a polygraph test. She also spoke out publicly on September 23rd, when a stay of proceedings was entered on the obstruction charges. This statement was also consistent with earlier ones. Rather than analysing and assessing the alibi evidence, the police immediately concluded it was false. They went further and charged John Ring and Shirley Druken with the criminal offence of attempting to obstruct justice.

Perhaps the most flagrant example of refusing to consider other possibilities was the stubborn adherence to the theory that two persons were involved, one who committed the murder and another who helped with a "clean-up" of the scene. Three of the most credible witnesses were Julie Evoy, Patrick Dooley Jr. and Cindy Young in her first formal statement. This is what they said:

- Julie Evoy answered a knock on her door shortly before 3:00 a.m. A man she later identified as Paul Druken, asked for "Brenda". She directed him to the door adjacent to hers and heard a knock. A few minutes later, she heard a sound like furniture moving.
- Patrick Dooley Jr. heard a kick on the front door of Brenda Young's apartment between 2:45 and 3:00 a.m. He also heard a noise like a table tip over and "thought I heard Brenda".
- In her statement to Constable Hogan, Cindy Young said she was awakened by "a big bang" she thought was the coffee table tipping over. She then heard her mother's voice saying: "no, no, Cindy, leave me alone, leave me alone"; and an unfamiliar male voice saying: "be quiet Brenda".

Rather than attempting to make sense of this information, Julie Evoy was called in support of the clean-up theory. Patrick Dooley Jr. was labelled as unco-operative and was not called as a witness. Cindy Young was manipulated to say the voice she heard was Randy's and then to say she also heard her mother ask "Randy" to stop.

If logical inferences had been drawn from the information described in the previous paragraph, the "clean-up", two persons theory would have to be seriously re-assessed. The following possibilities would have to be considered:

- The time of the table tipping was around 3:00 a.m., according to Julie Evoy and Patrick Dooley Jr.
- Brenda Young was still alive at that time since Cindy Young, and, possibly, Patrick Dooley Jr., heard her voice after the table was tipped.
- The male voice was not Randy Druken since his voice was very familiar to Cindy Young, and this one was not familiar.
- Paul Druken was the only remaining suspect.

Moreover, the forensic evidence of the scene contradicted the assumption that a clean-up had taken place.

**(iii) The Police Theory:**

No attempt was made during or after the investigation to write down exactly "what happened" in light of the evidence gathered in the investigation. This was done in the Parsons investigation and, although the theory there had many flaws, there was at least an attempt to articulate a coherent hypothesis as to what occurred. In his written submissions, Brian Casey, counsel for the RNC Association, attempted to articulate what the police theory must have been, based on the testimony of Lieutenant Peddle and Constable Randell. It is as follows:

- at about 10:00 pm, Brenda drove Randy home;
- at about 10:30 pm, Randy left the area for a second time, got in a car as a passenger, and drove away (Phyllis Duke evidence). There is no explanation for how or why he returned between 10:00 p.m. and 11:00 p.m. Because of the travel time between his parents' house and 194 Empire Avenue, it might well be impossible for him to get back to Brenda's that quickly. Cindy was still awake when Brenda and Randy left, and did not report hearing anyone return;
- at about 1:00 a.m., Brenda returned home alone with her salad from Wendy's, changed her clothes, ate her salad. The Dooleys did not hear her come in at all;
- Shortly afterwards, Brenda then put her pumps back on to go down stairs to answer the door (although nobody downstairs heard a knock or a bell). The Dooleys did not hear her go downstairs at all although she had to be wearing the pumps which they said were noisy on the stairs;
- at about 1:15 a.m., Randy again returned to the apartment, climbed the stairs with Brenda, she kicked off her shoes, he kicked off his shoes and he killed her. The Dooleys heard the footsteps and some conversation from Brenda, but not from Randy who usually shouted. It appears from the fact that her voice died away that she was killed at the top of the stairs, perhaps before entering her apartment, without leaving any bloodstains or other evidence. The officers testified that they interpreted what Madeline Dooley said she overheard to be the actual murder itself;
- Even if this was interpreted not to be a stabbing but a strangling, the pathologist found no evidence she was strangled. If she was strangled before she was stabbed, it does not account for the defensive wounds or the number of wounds. This evidence was inconsistent with the pathologist's evidence;

- On this theory, Randy then (single-handedly) carried Brenda Young's body inside the apartment, placed it on the couch (without leaving any traces of blood elsewhere) and let her bleed on the couch;
- Randy either returned a fourth time at 2:45 a.m. to let his brother Paul in, or remained in the apartment for an hour and a half for no particular reason. If he was inside the apartment, he waited for Paul to knock before letting him in;
- At about the same time, for reasons the police cannot explain, Cindy Young and Pat Dooley Jr., both report hearing Brenda Young (dead for more than an hour) speak, and then heard the coffee table tip over;
- Paul, on the police theory, was called to the apartment to assist in "altering the scene". For some reason, although Randy had been alone in the apartment with the body for more than an hour, Randy wanted Paul's help in (a) moving Brenda's body from the couch to the floor (although he had single-handedly carried her from the stairs to the couch, without leaving a trace); (b) taking her panties and putting them near her neck; (c) putting out rubber gloves, a cleaning bucket and mop and (d) tipping over the coffee table. The police never had a credible explanation why a second person was needed at the scene an hour after the murder if that was all that was altered, or what value there was to the murderer in having those four steps taken at all;
- Although Brenda was apparently killed a the top of the stairs, outside the apartment, proof of Paul's involvement was found in the placement of cleaning supplies in the kitchen. There was no physical evidence of a clean up in the kitchen, the living room or the area at the top of the stairs. There was, of course, no need to clean up the kitchen, because nothing took place there;
- On this theory, although Paul knew he was being asked to alter a murder scene, he knocked on the door of an adjacent apartment, providing someone an opportunity to identify him – by the same token, Randy was not waiting inside at the door to let him in.

I do not necessarily adopt this as a complete description of the police "theory" in this case but find it helpful in demonstrating the difficulty in attempting to make sense of any case against Randy Druken. Even this contradictory collection leaves out the incongruous "screaming" alleged by Madeline Dooley.

The police cannot be expected to reconcile every inconsistency in the evidence of each witness. Nor are they required to reconcile inconsistencies amongst different witnesses. However, the police are expected to identify them, further investigate where necessary and assess the evidence as a whole. In the murder investigation of Brenda Young, that was not done.

Why was the clean-up theory necessary at all? I agree with the following conclusion from the same submissions:

> The police, having identified Paul Druken as the man at the back door, invented the clean up theory to reconcile Madeline Dooley's account of hearing something at 1:15 a.m. or 1:30 a.m. with Julie Evoy's account of seeing a man between 2:30 and 3:00 a.m. As a first theory it was fine, but it should have been discarded when the police found it did not fit the facts. The police, despite having ample information which pointed to Paul Druken, failed in their duty to consider it.

The theory must derive from an objective assessment of the evidence. Here, the evidence was assessed with a view to supporting an unsupportable theory.

**(d) The Alibi and Attempting to Obstruct Justice:**

**(i) Alibi Evidence Generally:**

The issue of properly interviewing witnesses arose in relating to the alibi of Gregory Parsons as well as that of Randy Druken. This also has been a sensitive issue in previous public inquiries. The RNC had since adopted the policy that:

> ...alibi witnesses should be interviewed by investigators who are not directly involved in investigating the accused.

The AIDWYC brief on the Systemic Phase went further and stressed that:

> ...it is essential that the entire record of all contact with potential alibi witnesses be recorded, ideally (as with suspect statements) on videotape. No other method of recording should be permitted to satisfy a trier as to the conduct of the investigators and the volition of those witnesses on whose testimony an innocent accused's fate may well rest...Where Crown witnesses are asked to reconsider their earlier statements, a videotaped record is essential to determine the source and reliability of their

> fresh recall and, of course, the influence, if any, of those who are asking the questions.

I have already recommended that all interviews conducted in major crime investigations be recorded by portable audio recorders provided to officers. I agree that the videotaping of interviews is highly desirable, when feasible, particularly with respect to alibi witnesses, whether supporting the accused or the police position.

**(ii) Attempting to Obstruct Justice:**

Staff Sergeant Singleton testified that, early in August, he discussed with Lieutenant Peddle, the alibi provided for Randy Druken by Shirley Druken and John Ring. Lieutenant Peddle told him that he had been in contact with the Crown attorney and a decision had been made to arrest both of them for attempting to obstruct justice by providing a false alibi. He added that they would be arrested and, while taken to the police station, a live listening device would be placed in their home. (Their telephone already was subject to electronic surveillance but they appeared to have surmised as much and were very cautious in their telephone conversations).

On August 9th, Staff Sergeant Singleton prepared an operational plan for the arrest of Shirley Druken and John Ring. Constable Randell was recalled from annual leave to participate in the arrest the next day. They were arrested on August 10th, and charged with breaching section 139 of the *Criminal Code* i.e. attempting to obstruct justice by providing a false alibi for their son and stepson, respectively, Randy Druken. While they were away, a live listening device was installed in their home. They appeared in Provincial Court and were released from custody on an undertaking to appear in Court on August 26th with no specific conditions attached.

The offence of attempting to obstruct justice by providing a false alibi requires not only that the alibi be false but that it be a deliberate fabrication. Such a charge is highly unusual and is laid only in the clearest of circumstances, particularly since the deliberate fabrication must be proven beyond a reasonable doubt in order to convict. The alibi may be false but merely mistaken, in full or in part. Mere disbelief of the alibi is insufficient. There must be reasonable and probable grounds to believe there was a deliberate fabrication, **on the evidence available.**

While such charges are unusual, they are unheard of when the principal, for whom the alibi has been given, has not yet been tried. In this case, Randy Druken had not even been charged, let alone tried. In spite of almost 50 years as a criminal defence counsel, trial and appellate judge and

law reformer, this is the first such case I have seen. The DPP testified that no such case has occurred in Newfoundland before or since. Nor was there ever any explanations as to why those charges had to be laid at the time they were.

What were the reasonable and probable grounds for taking such an extraordinary measure on the evidence available? Shirley Druken was extremely co-operative from the outset. She told the police a search warrant was not necessary, allowed them into her home and provided access to Randy Druken's clothes. She gave a statement in her home and later attended at the police station, voluntarily, to take a polygraph test when she gave additional statements about the alibi, all of which were consistent.

However, Lieutenant Peddle concluded from the polygraph he administered to her that she was "deceptive". He agreed that it was undesirable for him to have administered the polygraph because of his role in the investigation. The possibility he erred was underlined by the subsequent analysis of her testing by two other polygraph experts. They concluded that she was "truthful" and "not deceptive", respectively. In any event, polygraph results are not admissible in court and should never form the sole basis for finding reasonable and probable grounds.

The remaining basis to conclude on August 10th, that Shirley Druken was lying, consisted of:

- The Youngberg telephone calls, which had not been fully investigated and later proved to be ephemeral.
- Cindy Young's recollection that she heard Randy's voice, in response to improper questioning, in a statement that contained other contradictory responses and was also contrary to an earlier statement, properly taken, a few days earlier.
- Madeline Dooley's statement, taken in coercive circumstances, in contradiction to her statement given the previous day and alleging she heard loud screaming, when no one else in the building did.

There also was strong evidence that Randy Druken was driven home shortly before 10:00 p.m., which supported the alibi.

In my view, reasonable and probable grounds did not exist to support the charge of attempting to obstruct justice. Constable Randell and Constable Paul Hierlihy (now Sergeant) swore the informations. They testified that they felt they had such grounds, but if so, the basis was subjective and not on the facts available at the time. The charges may have been laid at the specific direction of Lieutenant Peddle. In any event, he was ultimately the engineer

of this entire strategy. All three officers must take responsibility for this abuse of the process of laying charges, and primarily Lieutenant Peddle.

There is no written record of Lieutenant Peddle's contact with the Crown in relation to the laying of these charges. His notes make no reference to this whatsoever. However, a number of police officers testified that these charges were laid with the knowledge of the Crown. The submissions of counsel for the DPP's Office are helpful in sorting out what probably occurred. She stated:

> Bernard Coffey was the prosecutor liaising with the police at this stage of the *Druken* proceedings. He testified that he at no time provided an opinion to the police on the existence of grounds to charge Shirley Druken and John Ring, nor on the merits of continuing their prosecutions. He did allow, however, that he was aware that the charges were to be laid, and that his lack of interference could have been interpreted by police as consent.

I agree with Mr. Coffey's suggestion that his non-intervention might have been interpreted as tacit approval of these charges. In fact I believe this is what occurred. Lieutenant Peddle was in regular contact with Bernard Coffey in drafting the applications for the wiretap authorizations and they must have at least discussed this extraordinary initiative.

It is important to keep in mind the nature of Crown-police interaction at that time which tended to be informal and even casual. It is true that the police have the ultimate responsibility to determine whether or not reasonable and probable grounds exist to lay a charge. However, this was an unusual charge involving the administration of justice, in exceptional circumstances. According to my understanding of practices at that time, the Crown attorney would have an informal responsibility to express his views to the police about the propriety of the police proceeding in this unfortunate manner. It is even possible that Bernard Coffey did so and Lieutenant Peddle chose to ignore him, although he testified he would not have gone ahead if the Crown had objected. The absence of any police documentation of Crown advice they may have received leaves the responsibility for laying these charges with the police rather than with the Crown.

The issue of the police-Crown relationship also arose in the previous chapter. The Police-Crown Relationship Policy recently adopted, including the protocol for obtaining legal advice, is referred to there, at pp. 131 and 138, as well as Annex 9.

It was also an abuse of proper process to execute an arrest of Shirley Druken and John Ring. The power to arrest is circumscribed by very specific criteria as to the legal basis on which the related discretion is to be exercised. The proper procedure here would have been simply to serve them with an Appearance Notice under the *Criminal Code*. There was no need to: Establish identity; Secure evidence; Prevent future offences; Ensure future attendance in Court. This was confirmed by their immediate release from custody on only the undertaking to appear in court on August 26th, subject to the general conditions of keeping the peace and being of good behaviour.

There was evidence before me that one of the reasons for taking Shirley Druken and John Ring into custody may have been to provide an opportunity to install a live listening device in their home. Certainly that was done. This also would be an abuse of the power to arrest.

What was the motivation for the obstruction charges?

After the proceedings on these charges were stayed, Shirley Druken gave an interview with the CBC and offered this explanation from her perspective:

> Shirley Druken: When they charged me and Mr. Ring they probably thought they were going to shake Randy up and say, well you know, I can't have mom being charged and you know, and I gotta come forward but I mean, the young fellow can't couldn't come forward, you know, and admit to something that he didn't do.

It does not seem likely to me that the police would expect that by laying these charges, they would induce Randy Druken to come forward and confess to the murder. That is particularly unlikely when they knew that Shirley Druken and John Ring as well as Randy Druken, were likely receiving legal advice about the dubious validity of these charges.

Another explanation might be that the police deliberately hoped to contaminate the jury in anticipation of Randy Druken's future trial. As the submissions of Commission Counsel (Hearings) suggested:

> The potential consequences to Randy Druken's trial were devastating. His alibis had been charged with giving a false alibi before Randy Druken's murder trial in which the Crown would allege the alibi was false. There was substantial publicity. Since the charges were stayed, this cast a shadow over Randy Druken's defence...

It is not possible to ascertain the effect of these charges upon the jury at the subsequent trial. The police press conference trumpeting the obstruction charges and the media opportunities presented by an arrest and immediate court appearance are suspect. But I do not believe that Lieutenant Peddle was thinking that far ahead.

In my view, this was simply another brazen and reckless attempt to "stir the pot". This *modus operandi* was referred to *supra*, at pp. 192 *et seq*. The objective was to publicize the obstruction charges with a view to encouraging/intimidating other witnesses to come forward. It was motivated by "noble cause" syndrome arising from tunnel vision.

**(e) The Jailhouse Informant: Mr. X:**

After Randy Druken was charged with second-degree murder, on August 20th, Wayne Gorman was assigned the file, as the Crown attorney who would conduct the preliminary inquiry and trial. In view of the many inconsistencies and weaknesses in the prosecution case, both he and Lieutenant Peddle must have been delighted to learn from the RCMP, in late October, that an informant was identified, who claimed that Randy Druken confessed to him that he killed Brenda Young. They were eager to rely upon his evidence even though it should have been apparent that he was a totally unreliable "con artist".

The circumstances of his emergence were described in the Chronology of Events, *supra*, at pp. 200-1. There were a number of factors that should have alerted the police and Crown to the danger of relying on this witness:

- Many of the details as to how the police thought the crime was committed, particularly the clean-up theory, were made public in early August. This was because of the failure to obtain a sealing order in a search warrant application. His knowledge was not unique.
- Mr. X alleged the confession was made over two months prior to him revealing it. And that was done only on the occasion of his arrest for a parole violation.
- He had been on parole for 45 fraud-related charges and the parole violation was based on more fraud-related offences.
- He was sentenced for the more recent offences on November 9th, the same day that Lieutenant Peddle interviewed him and determined he was a reliable witness. The trial judge rejected the Crown submission of a one-year jail sentence and sentenced him to 20 months. He said Mr. X had learned nothing from his past sentences, that "as soon as he gets out he'll be right back at it" and that anything he says is "simply lip service".

- The RCMP concluded he was lying when he provided information about an armed robbery, at the same time as he first related the alleged confession by Randy Druken.
- He was given a polygraph test by Lieutenant Ledwell of the RNC, on October 26th, which he failed.

At that time, the police had much greater faith in the polygraph than they do today, although Lieutenant Peddle testified before me that he still believes the results are accurate 80-90% of the time. Nevertheless, he chose to ignore the results on this occasion.

At a meeting on November 4th, Wayne Gorman asked what happened to the informant. Constable Randell replied that he had failed the polygraph test so he assumed he would not be a witness and did no further follow-up with him. After some discussion, Mr. Gorman asked that he be brought in for a KGB interview to hear what he might have to say. This was done on November 5th, and, after viewing the interview, Mr. Gorman concluded that Mr. X was credible. Lieutenant Peddle reached the same conclusion but conducted a further interview on November 9th, when Mr. X "stood up very well" to testing and challenging of his story. He concluded:

> ...he seemed to stand up very well to it, he answered the questions very well and...after the interview I felt that...he was telling the truth, that he seemed to be believable to me.

A second investigation team was assembled specifically to check out various facts contained in Mr. X's statement.

All of the following details proved to be false:

- **The murder took place in the kitchen.** The RNC Forensic Unit found no physical evidence of this. An RCMP expert was asked to provide an independent report and reached the same conclusion.
- **The clothes he wore were buried in the graveyard.** The investigators obtained a search warrant and searched both graveyards but found no clothes.
- **Brenda Young returned home at 12:00 a.m. with another man, who left at 1:00 a.m. when the murder occurred.** Joanne Youngberg confirmed that Brenda Young was at her place until 12:25 a.m. when she drove to a Wendy's outlet close to her home. A receipt indicated she purchased a salad at 12:58 a.m. and a Wendy's employee confirmed she was the last customer before closing at 1:00 a.m. The evidence established that after returning home she changed out of her clothes and ate the salad.

- **Brenda Young was wearing her clothes at the time of the murder.** The forensic evidence established she was wearing her nightgown which had cuts that matched the stab wounds. Her clothes were found on the bathroom floor.
- **Randy Druken went to his sister's house to clean-up after the murder.** The investigators established this clearly did not occur.
- **Paul Druken was driving a car he bought from Billy Bennett.** Mr. X said he had seen the car impounded by the RNC and identified it. The investigators determined that Billy Bennett's car had been written off and sold to a taxi company for parts.
- **Randy Druken used taxicabs travelling to and from Brenda Young's residence.** All of the taxi companies in the city were contacted. No cabs came or went to or from her address or even its close proximity.
- **Randy Druken "shot up" three times after being upset with Brenda Young.** He gave blood and urine samples when first requested by the police the next day. There were no traces of drugs or metabolites in his system.
- **He stabbed Paddy O'Neil in a fight over Brenda Young a few weeks prior to the murder.** This was not accurate. The party and stabbing occurred in November of 1992. Brenda Young was not present. The fight arose when Randy Druken teased Paddy that his brother had gone out with Paddy's girlfriend.

Constable Randell expressed concerns about these discrepancies but Lieutenant Peddle and Mr. Gorman did not think they reflected on the credibility of Mr. X. He was merely repeating what he was told by Randy Druken. Therefore, any inaccuracy or deception reflected on Randy Druken rather than on Mr. X. This rationale provided an unassailable moat around anything contained in Mr. X's statements.

At this stage, the preliminary inquiry was imminent, the file was firmly in the control of Wayne Gorman and the decision was made to call Mr. X as a witness. The issue of Mr. X is re-visited in relation to the Judicial and Related Proceedings which follow.

**(f) Conclusion:**

In my view, Randy Druken never should have been charged with the murder of Brenda Young. The police had ample reason to focus on him immediately as the prime suspect. But when the pieces began not to fit they should have modified their perspective of the facts. Instead, they worked on changing the evidence of vulnerable witnesses. Mr. X was embraced with open arms when he should have been recognized as a scoundrel. The laying of the obstruction charges and related arrests were abusive.

The investigation and tunnel vision were driven mostly by Lieutenant Peddle but the other members of the investigation team, particularly Staff Sergeant Singleton, were wilful passengers. This investigation occurred not long after the Catherine Carroll murder investigation and many of the same practices and attitudes prevailed. As with the previous investigation, the tunnel vision was not deliberately adopted through malice but was driven by systemic forces and an unshakeable belief in the guilt of one person to the exclusion of all others.

In my Conclusion to the Police Investigation section of the previous Chapter, *supra*, at pp. 131-3, I described the changes made to the RNC in more recent years, which are very encouraging. All of those observations are applicable here as well. I do not believe that an investigation of the kind that occurred in the Brenda Young murder would be conducted by the RNC today.

**4. Judicial and Related Proceedings:**

**(a) Crown: Pre-Trial:**

**(i) Attempt to Obstruct Justice:**

It already has been suggested that Lieutenant Peddle likely discussed the proposed charges against Shirley Druken and John Ring with Crown attorney, Bernard Coffey. No formal opinion was requested but Mr. Coffey acknowledged that his failure to intervene may have been interpreted as tacit approval. Lieutenant Peddle could not recall any conversation with the Crown on this matter and there was no written record of such a discussion in his notes or elsewhere. He testified before me that:

> ...we sought advice from them and consulted with them on what we were doing in any sort of situation of that nature...of any high profile...any serious charges and...if they raise concerns or have problems with it then...we wouldn't do it.

Counsel for the DPP's Office submitted:

> It is important to appreciate that the Crown was and is in no position to consent to the laying of these or any other charges by the police. Any knowledge the Crown has about a pending charge is of no use to the police unless the police choose to request their advice and act on it.

I have already concluded that Lieutenant Peddle and the two officers who swore the informations had to take responsibility for the laying of these charges.

However, the responsibility shifted once the charges were laid and the Crown assumed carriage of the prosecutions. At that point the Crown must decide whether or not to prosecute a case. In these cases, the extraordinary nature and timing of the charges, imposed an acute responsibility to determine whether they should proceed or be abandoned. Instead of fulfilling this responsibility, it was only after a re-scheduling was denied, that a stay of proceedings was entered. This cast a shadow over key defence witnesses.

Mr. Coffey appeared in court on August 10th, the day of the arrests, when the matter was adjourned to August 26th. Meanwhile, Randy Druken was charged with murder on August 20th. The obstruction charges were set over again to September 7th when Mr. Coffey sought to have the preliminary inquiry scheduled for some time after the preliminary inquiry on the murder charge. The presiding judge refused and scheduled the preliminary inquiry on the obstruction charges for October 25th. On September 21st, Mr. Coffey entered a stay of proceedings on these charges.

Prior to the stay of proceedings, defence counsel had repeatedly requested disclosure from the Crown, both in writing and in court, but none was forthcoming. Counsel for Mr. Coffey stated that he discussed these charges with Mr. Gorman, who was handling the murder prosecution, and:

> Concerns were expressed concerning the timing of disclosure and the possible intimidation of witnesses. There was also concern about having to call certain witnesses in both the proceedings...

Mr. Flynn also discussed these charges with Mr. Coffey on an earlier occasion.

I have already expressed my view that reasonable and probable grounds did not exist to lay these charges of attempting to obstruct justice. Mr. Coffey should have reviewed the evidence to determine whether there was any reasonable prospect of the recommencement of proceedings. He then should have concluded that grounds did not exist for laying the obstruction charges in the first place.

In assessing the prospect of recommencement of proceedings, reliance should have been on the evidence that was then available and not on speculation that the judicial proceedings to follow might produce evidence to support the charges. At the time of the stay, the Crown had the additional evidence of Phyllis Duke placing Randy Druken in the neighbourhood at 10:30 p.m. or 11:00 p.m. and Cindy Young hearing her mother say: "Randy".

For reasons already discussed, this was weak evidence on which to base a murder prosecution. The mere fact of the existence of some evidence contrary to the alibi, was not a sufficient basis for grounding the obstruction charges.

In these circumstances, a stay of proceedings should not have been entered. The charges should have been withdrawn. In the event that grounds for such charges should have arisen in future, the charges could have been laid again.

**(ii) Disclosure:**

Reference has been made to the failure to disclose a number of polygraph statements, *supra*, at p. 213. These statements were sealed by Lieutenant Peddle shortly after they were taken and were not disclosed by him to the Crown, let alone the defence. Responsibility for this significant breach of the disclosure obligation rests with the police rather than the Crown.

However, the Crown was responsible for another serious breach of its responsibility to provide full disclosure. At least by November 1993, prior to the preliminary inquiry, Wayne Gorman was fully aware of the existence of the wiretap evidence. At that time he sent notices of interception to the subjects of the wiretaps as required by the *Criminal Code*. He probably had this information by early September. These interceptions were not properly monitored, *supra*, at pp. 217 *et seq.*, and the monitors' notes represented only a part of the massive volume of tapes collected. Constable Randell did listen to some of the tapes while assisting Mr. Gorman. However, it appears that his entire focus was on trying to identify incriminating evidence. He could only recall bringing one conversation to the attention of Mr. Gorman. This was a conversation between Randy and Shirley Druken, which he perceived as possibly being suspicious.

Mr. Gorman appears to have concluded that the wiretap evidence was not significant and may have relied on police advice in doing so. This did not relieve him of his obligation to provide full disclosure to the defence. The summaries of the intercepted conversations in the monitors' notes and access to the tapes should have been provided to defence counsel, William Collins, as soon as they were received from the police. Instead, defence counsel only learned of the wiretap on the Dooley residence over one year later and three weeks into the trial when the tapes and summaries were then requested and handed over. Mr. Gorman failed in his duty of providing full and timely disclosure.

Mr. Collins and his secretary worked frantically to identify and transcribe relevant portions of the material ultimately provided. But the circumstances were extremely unfair. Randy Druken's counsel had been deprived of the opportunity to analyse and hear the notes and tapes in advance, so that witnesses could be cross-examined at the preliminary inquiry, particularly on their conversations with each other.

Mr. Collins was able to identify segments that demonstrated that Phyllis Duke gave statements on the heels of media reports about the case. However, there were other aspects of the wiretap evidence that were fertile areas for cross-examination but were not discovered. For example, the wiretaps captured investigators asking whether witnesses might reveal more if Randy Druken were to be charged. It showed the Dooleys, Dukes and Josephine Dyke all discussing evidence in the case with each other. The example was given, *supra*, at pp. 195-6, of Madeline Dooley changing Josephine Dyke's belief in Randy Druken's innocence. In turn, Mrs. Dyke suggested Cindy's recollection would change. Two weeks later, Cindy told the police, for the first time, that she heard her mother call out the name "Randy".

The wiretap evidence about Madeline Dooley, in particular, would have provided opportunities for her cross-examination at the preliminary inquiry. The Crown failure to provide full disclosure in a full and timely manner deprived the defence of a full opportunity to cross-examine this witness. This opportunity was lost forever when Madeline Dooley was found to be insane by the time of the trial. The testimony she gave at the preliminary inquiry was allowed to be read as evidence at the trial because of her inability to testify. This is specifically permitted by section 715 of the *Criminal Code*, subject to this important *proviso*:

> ...unless the accused proves...that he did not have full opportunity to cross-examine the witness.

In my view, the non-disclosure by the Crown of the wiretap evidence of Madeline Dooley, prior to the preliminary inquiry, was a denial of such an opportunity. Therefore, the reading of this evidence also was a breach of section 7 of the Charter, denying the accused fundamental justice.

**(iii) Crown Role in Trial Preparation:**

**General:**

After Randy Druken was charged with murder, on August 20, 1993, Crown attorney Wayne Gorman was assigned the file. Constable Randell was the police officer assigned to convey all of the police information and

documentation to Mr. Gorman and to assist him in preparing for court. Their working relationship is described, *supra*, at pp. 203-4.

The responsibility of the Crown attorney at this stage is to learn as much as possible about the evidence established by the police investigation. From the perspective of presenting the case in court, any perceived "gaps" or inconsistencies in the evidence would be identified for possible further investigation.

Of course, the primary responsibility for putting together a comprehensive and credible case against the accused lies with the police. The information presented to the Crown attorney for prosecution should identify weaknesses as well as strengths in the police evidence. In this case, there was no comprehensive police "brief" which would summarize and assess the evidence for the benefit of the Crown attorney. The difficulties with the police "theory" were discussed *supra*, at pp. 255-7. As Lieutenant Peddle testified, the problem was not that the police analysis was inadequate but that no analysis was done at all. As a result, Mr. Gorman simply received a mass of documentation including multiple statements from the key witnesses, containing glaring inconsistencies. An important aspect of pre-trial preparation would be to interview those witnesses and try to determine exactly what each would say when taking the stand in court.

The Role of the Crown was discussed in the previous chapter, *supra*, at pp. 134 *et seq.* That entire discussion is relevant to this chapter as well, but I wish to draw particular attention, once more, to the following passage from the Police-Crown Relationship Policy:

> ...Once a charge had 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.

It appears that in this case, just as in the prosecution of Gregory Parsons, there never was a serious decision taken by the Crown, whether or not to proceed with the prosecution. Rather, the police belief in the guilt of Randy Druken, based on tunnel vision, was simply accepted by the Crown from the beginning.

Mr. Gorman never fulfilled the role of acting "as a challenge function to the police". Instead, he used his considerable legal skill and his industry to prepare the police evidence for presentation in a manner that would best ensure a conviction. I do not believe that Mr. Gorman deliberately misrepresented the evidence. Rather, his overriding belief in Randy Druken's guilt likely caused him to interpret and marshall it in a manner to support that belief. In this respect, he did not act with complete objectivity and fairness.

**Mr. X:**

The reliance on the jailhouse informant, Mr. X, as a key witness at the trial falls squarely upon Mr. Gorman. It appears that after Mr. X failed the polygraph, Constable Randell assumed he would not be called as a witness and planned no further follow-up with him. It was entirely at the initiative of Mr. Gorman that Mr. X was subsequently brought back for a KGB interview which Mr. Gorman watched through a monitor. With the encouragement of Lieutenant Peddle, Mr. Gorman was satisfied that Mr. X was a reliable witness. Once he made that decision, nothing would cause him to re-consider, in spite of all of the evidence that he had been "duped", which he ultimately acknowledged before me. Counsel on behalf of the DPP's Office was candid in her submission that the evidence of Mr. X simply should not have been called.

In maintaining his reliance upon Mr. X, Mr. Gorman developed two rationalizations. The first was that Mr. X was aware that the body had been moved. It did not matter that his statement was that the body was moved from the kitchen to the living room floor, contrary to the incontrovertible forensic evidence. The second provided a simple explanation for all of the blatant discrepancies in Mr. X's statements: These were not the responsibility of Mr. X. He was merely reporting lies told to him by Randy Druken. This begs the question of what possible reason there could be for Randy Druken to tell such lies while confessing to the murder itself. In my view, these rationalizations were the product of tunnel vision.

In his testimony before me, Mr. Gorman continued to emphasize the significance of Mr. X knowing that the body had been moved. He stated that this was one piece of information that had never been made public prior to Mr. X coming forward. That fact only became known after RCMP Sergeant Gorman provided his forensic report a year later. However, Mr. X, himself, refuted that proposition in the very KGB interview that Mr. Gorman watched and that convinced him of Mr. X's reliability. That interview contained this exchange:

| | |
|---|---|
| Mr. X: | Randy told me he stabbed her in the kitchen. |
| Cst. Randell: | In the kitchen. |
| Mr. X: | I do have the understanding that, that's not where her body was found. |
| Lt. Peddle: | Where do you get that understanding? |
| Cst. Randell: | Can you explain that to us? |
| Mr. X: | Well I get that understanding from news broadcasters and papers and just general information I've heard around right. Like, Randy never you know said that to me. |

The contradictions and weaknesses in the evidence of Mr. X continued to accumulate through subsequent interview, the preliminary inquiry, and the trial. But Mr. Gorman remained oblivious to them. His continued reliance on Mr. X demonstrated a serious lack of judgment.

In fairness to Mr. Gorman, he was encouraged in his assessment by a senior and experienced police officer in Lieutenant Peddle. Also, the Druken prosecution occurred prior to the Morin and Sophonow Reports. The potential unreliability of jailhouse informants was long recognized by our courts, but the true appreciation of their danger to the administration of criminal justice only became apparent with these reports. When he became DPP, Mr. Gorman adopted a policy for dealing with such potential informants. He testified that, today, he would go even further and not permit their testimony in any circumstance, whatsoever, unless it is corroborated by an electronic recording of the alleged conversation with the accused.

In my view, the best approach to the potential testimony of jailhouse informants is that articulated by Commissioner Peter Cory in the Sophonow Report and attached as Annex 14. I recommend that this recommendation be incorporated into the *Crown Policy Manual* of Newfoundland and Labrador for dealing with jailhouse informants.

**Cindy Young:**

Mr. Gorman acknowledged that he had no expertise or experience in interviewing child witnesses. However, he formed the opinion that Cindy Young was afraid of Randy Druken and that she would recall more "under the right circumstances". There was no rational basis for this opinion. In fact, the expert, who was retained to assist the police in the videotaped interview of Cindy, testified:

> ...she was being pretty judicious in her...her comments about Randy Druken, that is, she was telling us the good

> and the bad. And... a nine year old, who's truly afraid of somebody would not want to say anything bad about them at all...and she did. So...I didn't think of her...in a nutshell, as being afraid.

This expert, Lorna Piercy also told Constable Baggs, at the end of that interview, that further questioning could be counterproductive. It could cause her to "remember" more to satisfy interviewers rather than based on what she recalled. This view was reinforced by the expert testimony of Dr. Yuille, *supra*, at pp. 234 *et seq.*

Mr. Gorman interviewed Constable Hogan, who had taken the first formal statement from Cindy. He testified that when Mr. Gorman learned he and not been involved in any subsequent interviews with Cindy, he handed Constable Hogan a copy of the videotaped statement, which they discussed together with additional statements. He advised Mr. Gorman of his view that she had been interviewed far too many times, that the questioning was not properly done and that these statements were of little evidentiary value. Constable Hogan said that he was then advised he would not be called as a witness. Mr. Gorman did not recall any such discussion and said, if it had occurred, he would have asked Constable Hogan to put his views in writing. No notes of this meeting were available and Constable Hogan was not called as a witness.

Lorna Piercey also was asked to meet with Mr. Gorman and did, together with Constable Baggs. They met for approximately one-half hour but the discussion was mostly between Mr. Gorman and Constable Baggs. Ms. Piercey was not asked for her views on Cindy Young's reliability. She was not called as as a witness.

Wayne Gorman met with Cindy Young at his office on November 13, 1993, just prior to the preliminary inquiry. He had prepared a 15 page set of questions to review with her and the meeting lasted one hour and ten minutes. There are no notes of this meeting. As the submission of the RNC Association states:

> She did not testify at the preliminary hearing (which would have given defence counsel an opportunity to cross examine her on what she recalled, and would have prevented her statement from further "evolving" before trial).

Mr. Gorman testified that he did not call her at the preliminary inquiry because of her age and the circumstances of the case. In view of Mr. Gorman's opinion that Cindy would have greater recall in "the right

circumstances", it is also possible that he did not want to "preserve" her recollection through testimony at the preliminary inquiry. In other words, he was hoping it would "evolve".

In 1994, following the preliminary inquiry but prior to the trial, Mr. Gorman had Constable Randell bring Cindy to his office for three more meetings, on March 19, July 6 and August 24. On each occasion, he told Constable Randell he would meet alone with Cindy. These meetings took from one to 1 ½ hours each. There are no notes for any of these meetings. On October 1st, Constable Randell drove Cindy to the court house, where they met Mr. Gorman. The three of them sat in the jury chairs and Mr. Gorman reviewed her evidence. Constable Randell's brief notes do record a further evolution of her recollection. The significant additions are that she heard Randy Druken's voice shortly after hearing the door open and close. She fell asleep and was awakened by the coffee table tipping over. She heard Randy's voice again. The identification of this voice had now become unequivocal.

Mr. Gorman's last interview with Cindy was on November 7th, shortly before the trial. For the first time in six interviews, all of her answers are recorded but the questions are not. Constable Randell's notes indicate that she said the voice "sounded" like Randy but later said she was "certain it was Randy". The contexts in which she made each of these statements are important to know but are not available. This interview was just over two hours long.

Mr. Gorman gave a number of explanations for his manner of dealing with Cindy Young. He said that, after his first interview, he wanted to maintain contact with her and make sure she would not be harmed by being called as a witness. Only a small portion of each interview related to her evidence. He would also talk to her about school, the farm, animals and other subjects on a social basis. Unlike an interview with an adult, he would not prompt her to stay on topic. He met with her alone so that she would be comfortable speaking directly with him, without a police officer present.

I do not find these explanations convincing. Cindy had submitted to two lengthy interviews shortly after the murder, over a year prior to the last one. Neither suggested any limit on her capacity to remain focused. In fact, her first statement, only hours after finding her mother's body is quite extraordinary in that respect. Mr. Gorman's first interview with her dealt with 15 pages of questions in just over an hour. Nor was there any reason to try to make Cindy feel comfortable alone with Mr. Gorman, without anyone else present. Finally the subject of her evidence covered a very short period of time, perhaps a few seconds and no more than a minute. It is doubtful that

Mr. Gorman had a great deal of discretionary time to keep inviting her back to talk about her school, the farm and the animals. He should not have discussed her evidence with her on six occasions and should never have met with her alone.

On balance, I am of the view that he sought to enhance her recollection of events in order to strengthen the identification of Randy Druken at the scene. I do not find that he attempted to manufacture evidence but he honestly believed her full memory would achieve that identification. His initial opinion in this respect was as misguided as his faith in the reliability of Mr. X. He should never have met alone with a child witness and all of the interviews should have been properly recorded. Clear guidelines should be provided in the *Crown Policy Manual* for interviewing child witnesses.

**Patrick Dooley Jr.:**

The police strongly believed that Patrick Dooley and his son, Patrick Dooley Jr. knew much more than they were telling the police. This was reinforced by the statement of their mother and grandmother, Madeline Dooley, that she heard Brenda screaming at Randy to stop. She claimed to have heard this between 1:00 a.m. and 2:00 a.m. The police accepted her recollection and concluded that the Patrick Dooleys must have heard this as well and were not being forthright. Of course, the Dukes did not hear screaming either. Nor did the Evoys. Nor did Cindy.

Patrick Dooley Jr. voluntarily attended at the police station the day after the murder and gave a statement. He said he was in bed at approximately 2:45 a.m. when he heard a kick at Brenda Young's door. He was "not sure" but thought he then fell off to sleep. When questioned further, according to police notes, he "became hyper" and was taken into another room for further questioning by Lieutenant Peddle. He did not depart from his initial statement. A few days later, in a telephone conversation, he was "hostile" about having to speak to the police again but did add that he also heard a noise like a table tipping over and creaking, like someone creeping around. In a subsequent statement, given when he voluntarily submitted to a polygraph examination, on August 31st, he added: "I'm not sure but I thought I heard Brenda".

Constable Randell testified that there was a general feeling within the investigative team that Pat Dooley Jr. was not telling the whole truth. In fact he had told his cousin that after the kick on the door, he heard Brenda Young call down and later heard someone sweep off the contents on the coffee table. He told the police he was lying to his cousin. Constable Randell described him as being unco-operative and hostile.

However, Patrick Dooley Jr. did co-operate to a considerable extent. He attended at the police station voluntarily and gave a statement on the day of the murder. It appears that it was only after extensive questioning that he became "hyper" and wanted to leave. On August 31st, he voluntarily attended at the police station, gave another statement and took a polygraph test. He was subjected to extensive and repetitious questioning by Lieutenant Peddle in which he was honest in revealing past criminal activity and other personal details.

After being told he failed the test, the "grilling" continued and he maintained the truthfulness of his initial statement. He said he was not concerned about having to testify in court, he was not afraid of Randy Druken and he was well aware of the seriousness of the matter. He was confronted repeatedly but repeatedly said he was telling everything that he heard and that it was the truth. He contradicted his grandmother by saying he heard no screaming and by giving a different time for what he heard. He also refused to discuss his father's statement and insisted that should be discussed directly with his father.

It was only after more than two hours that he said he was leaving because:

> I'm really tired. I'm sick of this.

Still, he submits to further questioning and yet again says:

> I'm telling you the truth and you don't believe me.

As the questioning is drawing to a close, the following exchange occurs:

| | |
|---|---|
| Dooley: | You are harassing us. |
| Peddle: | It's a murder! |
| Dooley: | I know it's a murder! |
| Peddle: | It's a murder. |
| Dooley: | We knows who it was. We were friends with her. It's nothing to you and it's nothing to any of the other police officers. |
| Peddle: | It's a great deal to me. |
| Dooley: | I don't believe it. |
| Peddle: | It's a great deal for me, okay. |
| Dooley: | Yeah. Drive me home now, alright... |

In my view, the reaction of Patrick Dooley Jr. is perfectly consistent with a witness who is frustrated by attempting to co-operate but repeatedly is being told that he is lying. In fact, his statement is perfectly consistent with another

credible theory of what happened, which both the police and the Crown refused to consider, *supra*, at pp. 252-4.

Mr. Gorman would have read the statements of Patrick Dooley Jr. before seeing him but, no doubt, also heard from Constable Randell of the police perception of his refusal to co-operate. Patrick Dooley Jr. attended voluntarily at Mr. Gorman's office to be interviewed on November 14, 1993. After being served with the notice of interception, the interview commenced at 2:10 p.m. He stated that he thought he had heard Brenda Young's voice but could not identify it with certainty. Mr. Gorman confronted him by reading the obstruction section of the *Criminal Code* to him. At that point, according to Constable Randell, he became "irate" and stormed out of the office. This occurred at 2:30 p.m.

When testifying, Wayne Gorman agreed that the statement of Patrick Dooley Jr. supported the conclusion that Brenda Young was alive at 2:30 a.m., contrary to the statement of his mother, which was adopted by the police and the Crown. He was not called as a witness at the preliminary inquiry or the trial. Mr. Gorman is now of the view that he should have been called, at least at the preliminary inquiry, to determine what his evidence would be under oath.

**Judy Janes:**

Judy Janes was the companion referred to in Phyllis Duke's statement, who accompanied her to play bingo on the night in question. The complete absence of co-ordination in the police investigation is reflected in the failure to interview her about that night. She finally was interviewed on November 14, 1993 and again on the 18th, at the request of Wayne Gorman. Her statement appears to contradict Phyllis Duke's account that she had gone for a walk when she saw Randy Druken, *supra*, at pp. 245-6. No follow-up interview was directed to explore this contradiction of a crucial element of the Crown's case. Mr. Gorman did interview her and concluded that she was credible. There is no record of this interview.

Mr. Gorman did not call her as a witness at the trial. This was contrary to his position that there are frequently inconsistencies in the Crown's case but they should be presented in court for the jury to decide. In my view, the failure to call Judy Janes as a Crown witness was unfair.

In general, I find that there was an element of selectivity at play in the decision not to call any of these witnesses: Constable Hogan, Lorna Piercey, Patrick Dooley Jr. and Judy Janes. I do not find that Mr. Gorman deliberately attempted to misrepresent the evidence. But his acceptance of the police case,

based on tunnel vision, prevented him from appreciating the significance of what each of these people had to offer.

**(iv) Deciding to Prosecute:**

Differing views were expressed as to Mr. Gorman's responsibility in assessing the reliability of the evidence before deciding to prosecute the case against Randy Druken. Counsel for the DPP's Office submitted that the Crown could not:

> ... consent to the suggestion that part of its gatekeepers function is to decide as to which witness to call in a case by predetermination which it believes (absent clear deceit). Such an exercise is by its nature subjective and lends itself to abuse. For the prosecutorial service to perform this function would be to usurp the role of the triers of fact.

In her oral submissions, she added then the Crown could not agree with:

> ... the suggestion that prosecutors should be engaging in pre-trial personal analysis of statement inconsistencies with a view to discarding the evidence which is not internally consistent or consistent with others ...

However, she later added an important qualification when she stated:

> ... the trial attorney cannot be subjectively determining which witnesses it believes and which it doesn't believe in the **absence of glaring inconsistencies.** [Emphasis added.]

In this respect, her position does not contradict that of counsel for the RNC Association, who stated:

> The role of the prosecutor was not simply to determine if the witness had some admissible evidence which could be useful to the trier of fact. His role was to determine whether particular evidence reached a threshold of reliability, below which that evidence should not be led at all. He is a gatekeeper.

I interpret his reference to a "threshold of reliability" as encompassing "glaring" inconsistencies as well as other indications of unreliability.

The responsibility of the Crown to decide whether to prosecute, after a charge has been laid by the police, was discussed in the previous chapter,

*supra*, at pp. 139-41. It was pointed out that the classic statement in the *Boucher* case specified that the Crown responsibility is:

> ... to lay before the jury what the Crown considers to be **credible** evidence ... [Emphasis added]

This is reflected in the *Crown Policy Manual* which requires the Crown to determine whether there is the probability of conviction. In doing so, one of the factors to be assessed is "the credibility of the various witnesses".

In my view, Mr. Gorman did not objectively assess the reliability of the witnesses who formed the foundation of the Crown's case. He initiated reliance upon the testimony of Mr. X and did not meet his ongoing obligation to reassess that evidence after glaring inconsistencies and contradictions multiplied.

In spite of his lack of expertise or experience in dealing with child witnesses, he made invalid assumptions about Cindy Young's evidence. He engaged in improper interviewing practices. He did not assess all of her evidence but encouraged it to evolve so he could select and advocate those elements that most supported the Crown's case. He ignored an opportunity to understand her testimony by not seeking the advice of Lorna Piercey when he had the opportunity. If he had, he would have understood that her statements were not evolving towards truth but deteriorating towards greater unreliability.

The unreliability of Madeline Dooley as a witness was discussed *supra*, at pp. 236 *et seq.* Quite apart from the glaring inconsistencies in her statements, her confusion and mental capacity should have been a concern. The Crown policy, referred to above, also lists "the capacity of witnesses" as a factor the Crown should assess in determining whether to prosecute. Quite apart from any other factors, how could Madeline Dooley, with her hearing problem, have heard Brenda Young "screaming" at Randy to "stop", when no one else in the building or in the apartment heard it? Madeline Dooley's evidence was a cornerstone of the Crown's case.

With respect to Phyllis Duke, counsel for the DPP's Office submitted:

> Mr. Gorman testified that Mrs. Duke always impressed him as an honest woman trying her best to recount truthfully what she knew. He advised she was an illiterate and unsophisticated individual, and that you had to know her to appreciate her presentation.

The total unreliability of her evidence was addressed, *supra*, at pp. 242 *et seq.* Mr. Gorman may well have been impressed with Mrs. Duke's honesty but the assessment of her reliability could not have been objective. It must have been a product of the police theory of Randy Druken's guilt, to which he prescribed.

An even greater concern is the Crown handling of the evidence of Judy Janes, which directly contradicted that of Phyllis Duke. On the eve of the murder, they went to play bingo together and returned at about 10:30 p.m. Phyllis Duke gave a variety of versions of what next occurred while Judy Janes gave only one. While Phyllis Duke's story changed in many respects, it was consistent in one respect. She said that upon returning from bingo, Judy Janes returned to her own home. It was while waiting for her to come to the Duke home to play cards that Phyllis Duke took the walk that caused her to see Randy Druken between 10:30 and 11:00 p.m. She said this in her sworn videotaped statement, in her testimony at the preliminary inquiry and at the trial.

The testimony of Judy Janes at the trial was unequivocal. She left bingo with Phyllis Duke and they went directly to the Duke residence, where she entered, right behind Phyllis Duke. Judy Janes was far more credible then Phyllis Duke but was not called as a Crown witness nor cross-examined when called by the defence. As stated previously, the failure of the Crown to call Judy Janes was a repudiation of the position of both the Crown and Mr. Gorman that he had fulfilled his responsibility of simply calling all relevant evidence and letting the jury decide.

Once more, I do not attribute any malice on the part of Mr. Gorman. He was the recipient of a massive amount of conflicting evidence that was never properly analyzed by the police. He was a highly skilled lawyer, very industrious and highly motivated. He applied these skills to compensating for inadequacies in the police case rather than confronting them. This is a common systemic danger in a Crown culture that does not recognize the importance of critically analyzing the results of a police investigation, particularly one that was fuelled by tunnel vision.

**(b) Crown: Trial:**

**(i) Introduction:**

In the previous chapter, I discussed the role of the Crown, *supra*, at pp. 134 *et seq.* A delicate balance is required between the dual responsibilities of being an advocate in an adversarial process yet never "winning or losing". A conscious effort must be made to resist systemic influences which may

contribute to a Crown culture of "winning" above all else. These systemic factors are similar to those leading to tunnel vision on the part of the police. As I quoted from the AIDWYC brief:

> 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, ... the weaker the case, the greater the incentive to overreach.

The danger of unduly influencing a jury is compounded by the unique stature and power of the Crown attorney throughout the trial process.

I have found a similar pattern of overreaching Crown advocacy in the Druken prosecution to that which occurred in the prosecution of Gregory Parsons. Indeed, at one point in his closing address, Mr. Gorman alluded to himself as the thirteenth juror. There are examples of excessive leading and interference with cross-examination to protect weak Crown witnesses.

**(ii) Witnesses:**

During his examination of Madeline Dooley, the following exchange occurred:

> Q: For a visit. Okay. Do you remember what time **they arrived**, or they started to arrive?
> A: Well between 12 and 20 after 12 or 12:30 **they left** the house.
> Q: Okay, that would be at night.
> A: Right. But my daughter Bernadette, I think that she left around 10 or quarter after 10.
> Q: So the last person then appeared to leave at around 12:30 or so. Okay.

It appears that, to avoid the risk of exposing her confusion, Mr. Gorman simply glossed over her mistake and did not return to his original question.

Mr. Collins picked up this discrepancy on cross-examination:

> Q: Okay. Now I noted when my friend was questioning you he asked you what I consider to be very clear questions as to "what time the company arrived" is the exact word he used, and yet when you answered him you responded as to when they left. Why was that?

A: When they left, when my company came in they came over to see me, they were all relations, and when they left it was between 20 after twelve or 12:30.

Q: No Ma'am, but that's not my question what I asked you. The question I asked you is that my friend asked you when your company arrived, and when you answered the question you didn't answer that question; you told him when they left. Why did you do that?

MR. GORMAN: Perhaps you could just be asked the question.

A: Because on the count that the last statement I was told just to start when I seen Brenda.

THE COURT: I think she's just confused.

MR. COLLINS: Well ---

MR. GORMAN: I can clarify the last statement. When I interviewed her I told her that I would be starting at the point in time that she saw Brenda Young in terms of my questions.

Mr. Gorman's first intervention was gratuitous and could serve no purpose other than to disrupt Mr. Collins. The second was also unnecessary. Any such explanation should have been left for the witness to give.

Madeline Dooley had given an innocuous statement in her first police interview. The next day, after her son was told he was a suspect in the murder, she told the police she heard Brenda Young "screaming" at Randy to stop. In the following excerpt, Mr. Gorman leads his witness in the extreme to attempt to get the correct answer. When that fails, he simply comments that her testimony is an accurate reflection of what she heard:

Q: Now Mrs. Dooley, when you first spoke to the police, and when the police first came to you and you told them what you heard or what you remember that night, did you not tell them about this here originally? Did you not tell them about what you heard when you originally talked to the police?

A: I told them what I heard.

Q: Okay, but was it the second time that you spoke to the police that you told them what you heard, or was it the first time, do you remember?

A: What was that, about what Brenda told me?

Q: No, no, what you just described now, about what you heard Brenda say?

A: Oh yes, I told them.
Q: But when the police first talked to you, did you tell them the first time?
A: Yes.
Q: You sure? You sure about that? Was it not the second time when they came to talk to you?
A: Well I could have left out this or a little thing, but I'm sure of my statements. I mean what I heard I heard.
Q: So what you're telling us today is what you heard?
A: Emhem (indicating affirmative).

Mr. Collins also cross-examined Madeline Dooley on this discrepancy. She could not recall that she first spoke to the police the day after the murder. She estimated that it could have been a week, two weeks or a month after the murder. She asserted that she told the police everything, including hearing "Randy stop", on the first occasion she was interviewed. She is then confronted with her first statement in which there is no such reference. The following occurs:

Q: Is there any reference in this statement to "Randy, don't do that. Randy, don't do that"? Is this mentioned in your statement to the police?
A: No.
Q: It is not.
A: But I'd say I mentioned it.
Q: You mentioned it to the police and they never wrote it down.
MR. GORMAN: I don't think that's what she means.
MR. COLLINS: No? Okay.
Q: Okay, what do you mean by ---
MR. GORMAN: Your Honour, my friend knows that she mentioned it to the police subsequently; that's not fair for him to mislead ...
MR. COLLINS: I'm not trying to mislead at all. My friend ... protested so quickly ---
A: That's the first thing I did mention, because on account of that, it probably was the next day they came in, or a month after, or two weeks after.
Q: When would you have mentioned this to the police? Because I just asked you this a few minutes ago. When would you have mentioned to the police about "Randy, don't do that".
A: The first time they came into my house for a statement.

Q: You would have said that to the police. But somehow that did not end up on the police statement. Can you explain that? No you can't.

MR. GORMAN: No, she can't, no. She can't answer for the police.

MR. COLLINS: Okay. Well, we will ask the police about that.

These are completely uncalled for interventions in a perfectly proper cross-examination. In the first, Mr. Gorman attempts to testify on her behalf. The second is a completely spurious allegation. In the third, he interrupts the cross-examination to engage in argument, and he did so, again, on a fourth occasion, two questions and answers later.

The capacity of Phyllis Duke for histrionics is illustrated in her various statements and, particularly, her description of the "chilling" effect of her fear of Randy Druken. Mr. Collins took the position that this was "all an act" and that she was lying on the stand. It is more likely, from the descriptions given by her children, that through her tendency for gross exaggeration, she may have convinced herself of such a fear, to the point of becoming emotionally upset.

Mrs. Duke was interviewed in Mr. Gorman's office on the Sunday evening prior to her testimony. Constable Randell also was present. After she left the office, Constable Randell observed her by the elevator in an emotional state. In a further evolution of her pre-trial statements, she claimed for the first time that when she encountered Randy Druken on the eve of the murder, he spoke to her. When she was testifying, Mr. Gorman asked her what he had said. She refused to answer. The trial judge tried to reason with her, eventually excused the jury, and then persuaded her to answer. After the jury returned, Mr. Gorman continued:

Q: Thank you. Mrs. Duke, speak up please. The same question I asked you earlier, just tell us what happened on Friday in addition to what you testified to earlier.

A: When I came around the corner, he put his head down and I don't know if he was drunk, it seemed like it, and he kept saying "you mind your fucking business and keep your mouth shut" and I just got afraid.

Q: You just repeat again what he said, a little bit louder.

A: He said it, "keep your fucking mouth shut and go in out of it and mind your own damn business"

> and he was mumbling as he was going by. I don't know if he was talking to me or was he just mad. I took it as he was telling me to stay the hell out of things.

On cross-examination, Mrs. Dooley stated that she did not expect to be asked in Court about what Randy Druken allegedly said. She was told that this revelation, made two days earlier, on Sunday evening, would be treated as having been made in confidence. Mr. Collins sought to pin down the nature of this alleged undertaking by Mr. Gorman or Constable Randell when the witness asked for a break to take her asthma spray.

During the break, she had trouble getting her breath and was taken to the hospital. On a doctor's advice, her testimony was able to resume at 2:30 p.m. Under further cross-examination she complained two more times of being too hot and on the second occasion, the judge adjourned court early, to resume the next morning.

I adopt the following submission of Commission Counsel (Hearings) as an accurate description of the deference subsequently given to Phyllis Duke during her cross-examination:

> ... The trial judge made several comments in front of the jury about her frailties and asked her several times if she needed her inhaler and if she was alright. Defence counsel had to sit down and ask her questions and was asked not to raise his voice at her. A review of the transcript suggests that she would experience these difficulties at times in her cross examination where she was being challenged vigorously. For example, she was being asked about the contradiction in her prior statements about whether she had seen Randy Druken during the Thursday evening fight or just heard him. The transcript reflects a clear contradiction. At this point Wayne Gorman told the Trial Judge that she is shaking 'awfully hard' and the court recesses. At another point when Defence Counsel is challenging her on when Randy Druken told her he left Brenda Young's she apparently is having difficulty because the Trial Judge asked her if she was okay and whether she wanted a break.

This treatment of a key Crown witness reduced the effectiveness of her cross-examination by defence counsel. Crown counsel should have become convinced of her unreliability at least by the time of her false allegation of his "undertaking". Instead, he was willing to use her alleged frail health to inhibit effective cross-examination.

Following the discussion of her evidence with Wayne Gorman at six separate meetings over the previous year, Cindy's testimony when called as a Crown witness, became unambiguous. She was awakened by a bang like the coffee table being tipped, she heard her mother say: "leave me alone, Randy, stop it," and she heard "Randy" say "be quiet, Brenda". Mr. Gorman soon asked her about her statement to Constable Hogan, around noon on the day of the murder, in which she said the male voice was not familiar to her. She had the following explanation:

> Yes, I was probably scared and confused and everything and probably I was just blocking everything out of my mind.

She was then specifically asked if the voice could have been that of Gordon Youngberg. For the first time, she was emphatic that it was not him.

However, on cross-examination, she said that the voice "probably" could have been someone else's. Mr. Collins completed his cross-examination at the lunch break and the afternoon began with re-examination by Mr. Gorman. Eventually, the following exchange occurred:

> Q: You don't think so. Okay. Do you remember that you told me at lunch time that Randy's voice sounded similar to his two brothers, Paul and Derek? A. Yes.

This discussion with the witness prior to re-examination was highly improper. The Law Society of Upper Canada Rule governing this situation specifically states:

> 4.04 (e) between completion of cross-examination and commencement of re-examination the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

I have not been able to ascertain any comparable rule applicable specifically to Newfoundland and Labrador. However, I believe it falls within general ethical principles of advocacy which are applicable throughout the common law world.

It is of interest and to Cindy Young's credit, that at the end of her re-examination, she abandoned her unequivocal identification of Randy Druken's voice. She stated that it also could have been Paul Druken, Derek Druken or Gordon Youngberg. In fact, it likely was Paul Druken.

Mr. Gorman also took liberties in the cross-examination of Randy Druken. He repeatedly asked the accused what basis he had for concluding that the various Crown witnesses were lying. This was justified in relation to witnesses such as Mr. X and Phyllis Duke since defence counsel specifically alleged that these witnesses were lying. However, absent such circumstances, it is an improper question. It is asking a witness for an opinion about the credibility of another witness. This is the responsibility of the trier of fact and not the witness. In particular, Mr. Gorman repeatedly asked Randy Druken whether Cindy Young made up stories about him and why she would lie.

Mr. Druken answered that youngsters are prone to being misled. He also said:

> I'm not saying she's making up, Mr. Gorman. I'm saying there's a lot suggested to Cindy.

In my view, this was, indeed, an accurate explanation of the origin of the incriminating evidence given by Cindy Young against Randy Druken. However, this line of questioning should not have been pursued by the Crown in the first place.

I also have some concerns about Mr. Gorman's cross-examination of Shirley Druken. In her first statement to the police on the morning of the murder, she stated that her son returned home at 10:10 p.m. the previous night and went up to bed shortly before 10:30. She went to bed shortly before 1:00 a.m. and arose at approximately 5:30 a.m. She also said that she got out of bed twice in between, to go to the bathroom. In her testimony she specified that she went to the bathroom at around 2:25 a.m. and 3:45 a.m. She stated that at 2:25 a.m., she saw him in bed and he was snoring. She also stated that he was in bed at 3:45 a.m. She explained that she was experiencing a urinary tract infection at the time, slept fitfully and had to go to the bathroom frequently. She said she would have heard if Randy had left the home that night.

In cross-examination, Mr. Gorman questioned her as to why she had not mentioned these times in her first statement. Reference has already been made to the shortcomings of the manner in which this statement was taken, *supra*, at p. 210. Mrs. Druken suggested that either the question was not asked or she had mentioned the times and they were not recorded. She also pointed out inaccuracies in the recorded statement. Mr. Gorman made comments such as the following:

- "No, so for some reason Constable Donovan purposely wrote down things that you never said."

- "So you told Constable Donovan specific times and Constable Donovan for some reason didn't write them down."

These are in stark contrast, to his earlier interruption of Mr. Collins' cross-examination of Phyllis Duke with the comment that "She can't answer for the police".

Mr. Gorman attempted to establish that her statement on the morning of the murder was being embellished at the trial by the additions of details with respect to the times at which she went to the bathroom between 1:00 a.m. and 5:30 a.m.:

> ... it was a long long time ago, yet you tell us now that you can remember exactly. When you were interviewed on June 12, 1993 by the police you never mentioned any of those times to the police did you?

He put to her on eight occasions that her statement on the morning of the murder did not refer to the times at which she went to the bathroom. In doing so, he attempted to create the impression that she had not referred to these times prior to her testimony at the trial.

This was unfair and highly prejudicial to the defence. Mr. Gorman was not aware of Mrs. Druken's first two, pre-polygraph, statements to Lieutentant Peddle. But he was aware of the polygraph statement itself. All of these statements were given by Mrs. Druken on June 15, 1993, three days after the initial statement, on which she was cross-examined. Indeed it is rather ironical that during her cross-examination she referred to one of the pre-polygraph statements of which Mr. Gorman was not aware. On one of the eight references to her original omission of the times, this exchange occurs:

> Q: So for some reason Constable Donovan left, left it out.
> A: Have you got the statement I wrote to Des, wrote out for Des Peddle?

Mr. Gorman showed no interest in the possibility of the existence of such a handwritten statement and simply ignored her reference to it.

However, Mr. Gorman was aware of the polygraph statement itself, which referred to the two occasions when she got up in the middle of the night. There is the following exchange with respect to the first time:

> Peddle: What time was it when you got up again?

| | |
|---|---|
| Druken: | Well, the news now, I got to bed around one and then I have a cigarette, and I do be a while before I goes to sleep, and I'd say the next time then was probably around two thirty, three o'clock, I got up and I went to the bathroom and by that time he was snorin. |
| Peddle: | You got up and went to the bathroom? |
| Druken: | To the bathroom. |
| Peddle: | Did you see him? |
| Druken: | Yeah, well I heard him, I didn't have to see him, I could hear him. |
| Peddle: | Okay, but when you got up to go to the bathroom, did you see him? |
| Druken: | Yeah, yeah. |

And the following with respect to the second:

| | |
|---|---|
| Druken: | Well, I'd say the next time, I can't be sure of the time, but I'd say it was an hour, couple of hours after, because I felt uncomfortable, wanting to urinate where I had this bladder infection - |
| Peddle: | You got up to go the washroom again, did you? |
| Druken: | Yes. |
| Peddle: | And you saw him then? |
| Druken: | I heard him and saw him as well. |

These passages occurred early in the interview by Lieutenant Peddle.

Mr. Gorman testified before me that he had not seen this statement before the trial and that he did not realize that a detailed statement was taken during polygraph tests. However, the record shows that, by letter dated November 1, 2004, Lieutenant Peddle sent to Mr. Gorman a "revised transcript of the polygraph examination of Mrs. Shirley Druken". It is not clear from this letter whether Mr. Gorman had received the original transcript previously but November 1st was four months prior to Mrs. Druken's cross-examination on the following February 27th. More importantly, this very statement was the subject of a *voir dire*, during Mrs. Druken's testimony, but prior to her cross-examination by Mr. Gorman. He must have been well aware of this statement when he was conducting his cross-examination.

During his testimony, I questioned him as follows:

> Commissioner: Mr. Gorman, had you been given by the police, the information you're being given today, through the questions put to you by Mr. Avis, would this have had an effect on the manner in which you have cross examined the witness?
> A: Yes, there would have been for instance, reference to those statements in cross examination, no doubt I would have, if any of her testimony was different from those statements, then I would have obviously referred her to those, and if those statements ...
> Commissioner: You would have never have said, you never told the police this.
> A: Oh no, I mean if the statements were ...
> Commissioner: You would have said you told the police but only a few days later.
> A: Right, exactly, no, of course not.

At that time, I had not yet reached the conclusion that Mr. Gorman was, in fact, aware of the polygraph statement during his cross-examination of Mrs. Druken. I believe his answers to my questions are an acknowledgement of the unfairness of the cross-examination that did occur on this issue. However, I hasten to add that the failure of defence counsel to re-examine his witness on this issue mitigates Mr. Gorman's responsibility for any adverse consequences that might have resulted from his questioning on it.

I do not believe that Mr. Gorman deliberately misled me respecting his knowledge of the polygraph statement. The events occurred over ten years prior to his testimony before me. He was mistaken and because of his subsequent professional experience and development, he even might have assumed that he was not aware of the statement or, otherwise, he would not have cross-examined in the manner that he did.

I have already commented on the failure of the Crown attorney to make an objective assessment of the Crown's case prior to proceeding to trial. Tunnel vision led to the resurrection of Mr. X after he had failed the polygraph, clinging to the clean up theory as a result, failure to assess the reliability of Madeline Dooley and Phyllis Duke and the treatment of Cindy Young.

The unreliability of the Crown's evidence was even further exposed at the trial stage. Phyllis Duke's bizarre assertion that Mr. Gorman undertook not to question her about an alleged statement by Randy Druken is one example. She mentioned this statement only two days before her testimony and then, at trial, alleged an undertaking that Mr. Gorman had to contradict as being completely false. This incident, directly involving Mr. Gorman,

should have sent a strong message to him about her reliability but the prosecution pressed on.

Terry Walsh is the brother of Brenda Young. He lived in Ontario at the time of her murder and Randy Druken's subsequent trial. He returned to St. John's for her funeral in June of 1993. He did not contact the RNC at that time, although he testified at the trial that he was convinced of Randy Druken's guilt from the outset. He was contacted by the OPP the following month but had little relevant information to offer. He was contacted by the RNC in September of 1994 and subsequently testified at the trial. His partner and mother of their two children, Colleen Campbell, also testified at the trial.

Mr. Walsh testified that, prior to September of 1992, he had very limited contact with Brenda Young, but from then until the time of her death, they spoke by telephone approximately 17 or 18 times. He testified that in these telephone calls, she told him about Randy Druken assaulting her and threatening to murder her if she tried to move to Ontario. His evidence also evolved. For example, on October 31st, he met with Wayne Gorman and Constable Randell to review telephone records obtained from Ontario about the alleged calls.

Constable Randell's notes indicate that following a discussion he had with his grandmother, Josephine Dyke, "Terry remembered an additional incident". The notes go on to state that he disclosed the following:

- Randy & Brenda were at Lisa Legrows kids christening
- Brenda kissed either Lisa's boyfriend or one of the Owens's
- Randy struck Brenda & then drove reclesly [sic] up Eliz. Avenue
- when pulled into Brenda's driveway he broke out the windshield
- dragged her out of the car & into the house by the hair of her head
- Told her that if she didn't stop her bullshit she would leave in a bodybag.
- Terry never said this before because he did not remember full details of event & when it occurred.

When Mr. Walsh arrived two weeks earlier from Ontario to testify, he was accompanied by Colleen Campbell, who revealed for the first time that she also had a number of similar telephone conversations with Brenda Young.

Their evidence was extremely unreliable. The "body bag" recollection is strikingly similar to the threat allegedly heard by Phyllis Duke on the Thursday before the murder. The christening incident was described by Lisa LeGrow at the preliminary inquiry and the "body bag" was also referred to by Mr. Walsh's sister, Linda Clarke.

Constable Randell was assigned to investigate the telephone records of the alleged calls between Ontario and St. John's, with a view to verifying the testimony of these witnesses. Their testimony and the telephone records cannot possibly be reconciled. Yet Mr. Gorman continued to assert the reliability of these two witnesses. On the re-examination of Terry Walsh, he said that he had nothing to gain from his testimony and that if he and Colleen Campbell had concocted their evidence, they would have done a better job of eliminating the inconsistencies between them. Mr. Gorman also advocated their reliability in his closing address.

When Mr. Walsh was testifying on the *voir dire* prior to the trial, he had received two telephone calls at his hotel room, when the caller hung up after he answered. At the subsequent trial, Mr. Gorman brought an application to introduce evidence of these calls to demonstrate an attempt by Randy Druken to intimidate the witness. This was extremely unfair since there was absolutely no evidence to suggest these calls were made for the purpose of intimidation and there was absolutely no evidence to link the caller to Randy Druken. The trial judge rejected the application on the basis that the evidence had no probative value and would be profoundly prejudicial. In fact, when Constable Randell thoroughly investigated these calls, he concluded that they were probably from Colleen Campbell, who was in Ontario at the time.

**(iii) Closing Address:**

The Crown's overreaching advocacy can also be demonstrated by a few examples from his closing address to the jury. Reference was made earlier to the Crown statement that no one else had a reason or motive for killing Brenda Young, *supra*, at p. 205. In my view, this was effectively the same as the Crown statement in the Parsons case to the effect: If Greg Parsons didn't do it, who did? Such a comment was found by the Court of Appeal to be improper and this formed one of the three grounds on which a new trial was ordered in the Parsons case.

This theory of "exclusivity" was discussed in the previous Chapter, *supra,* at pp. 146-7. In addition to the statement described above, Crown counsel in the Parsons case stated:

> 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.

Crown counsel in the Druken case stated:

> ... the evidence points only to the accused and not to anyone else, not some strange blond, not to some weird person who for some reason, somehow, went in to Brenda Young's apartment ...

And also:

> ... so it would have to be some bizarre stranger who for some reason picks her apartment out of the blue.

This "exclusivity" approach is based on the premise that the police investigation was thorough and only uncovered the accused. Mr. Gorman also referred to Constable Randell, as the chief investigator, and said:

> We know from his testimony that the police were unable to find any evidence to suggest that anybody else had ever threatened or harmed Brenda Young other than the accused.

This entire position is unfair. It suggests an obligation on the accused to identify some other perpetrator, contrary to the presumption of innocence.

The Crown's closing address was also extremely unfair in stating that the defence was alleging a "conspiracy". This misrepresented the defence's position. It was a distortion to say that the defence was alleging that the police and Crown witnesses were conspiring to obtain a false conviction. Mr. Gorman referred to the absence of any police evidence of another perpetrator and added:

> Now you can accept that evidence, or you can accept, if you like, and reject it by accepting this conspiracy theory that the police are out to get Randy Druken ... Constable Randell if you can conclude that he's involved in this -- if he's the chief investigator in a conspiracy, one would, I think, reasonably conclude that he would have to be heavily involved.

He then asked the jury whether Constable Randell's conduct was such as to suggest he was involved in a conspiracy.

At the outset of his closing address he characterized the defence position as follows:

> ... For the most part, I think what Mr. Collins is saying to you and what the accused said to you when he testified, is that if not every crown witness, virtually every crown witness was lying, that the police have a vendetta or a conspiracy which they are conducting or have conducted in relation to this case, and as a result, you should not accept any of the evidence of these people who, to use the words that Mr. Collins used over and over, who are obviously lying.

Mr. Collins did allege that some Crown witnesses were lying and was later proven to be absolutely justified in relation to Mr. X. He did not allege that all of the Crown witnesses were lying. I have already commented on the impropriety of Mr. Gorman cross-examining Randy Druken as to why Cindy Young would lie. He also told the jury that it was part of the defence case that she was lying.

Mr. Collins did allege that Terry Walsh and Colleen Campbell were concocting their evidence together. It is also obvious that there was cross-contamination of the evidence of Crown witnesses. However, Mr. Collins never alleged a conspiracy on the part of the police and Crown witnesses. Yet Mr. Gorman referred to such an alleged "conspiracy" at least ten times. For example, with respect to Phyllis Duke:

> ... just part of a big act and part of a big conspiracy ... this is all some big conspiracy she's involved in ...

And in terms of Mr. X:

> If [he] was out to get Mr. Druken as part of this grand conspiracy that the defence puts forward to you ... again when you're thinking in terms of is [Mr. X] involved in this grand conspiracy ... why would he lie ...

He stated that Terry Walsh would not have testified that Brenda Young told him Randy Druken was very good with the children:

> ... if your purpose in life is to come to court and be involved in a conspiracy to convict someone ... You could say what you want if you're involved in a conspiracy to come down to lie ...

This tactic on the part of the Crown was unfortunate, dangerous and had no basis from the position taken by the defence. It could leave the jury members

with the impression that in order to acquit, they would have to accept a theory that the police and all of the Crown witnesses had engaged in a conspiracy to convict Randy Druken based on false evidence.

I have also alluded to the importance of the evidence of Judy Janes, who was not called or cross-examined by the Crown. In his closing address, Mr. Gorman glossed over her testimony with the following comment:

> Mrs. Duke saw the accused on Friday at the time that she said, and the timing pretty much is corroborated by the lady who went to bingo with her. Judy Janes gave testimony, and the times that they went and the time they came back are very much similar.

Mr. Collins had already said, in his closing address, that whatever version of Phyllis Duke's evidence was adopted, it was "completely different" from that of Judy Janes. Rather than make any attempt to explain the contradiction, or even acknowledging it, Mr. Gorman told the jury that her evidence corroborates that of Phyllis Duke.

The trial judge did not mention Judy Janes in his charge to the jury. Mr. Collins later drew this omission to his attention and stressed its importance in relation to Mrs. Duke's credibility. Mr. Gorman responded:

> What Judy Janes testified to was one, if she won at bingo that night, she would have went home first, prior to going to Mrs. Duke's. She does not know she won, if she won at bingo or not, she could not remember one way or the other; ... **I recall that very specifically** ... [Emphasis added]

Mr. Collins responded that he could not be as certain but this was his recollection:

> My lord, I have to check my notes on that to be fair, I'm relying on my memory, he is right in saying the question – she said if I had won at bingo, I would have gone home. She did say that, she states if I recall, I'm doing this from memory now my lord, that she would have gone into the house directly behind her ...

Mr. Gorman then asserts once more that his **"recollection is very clear"**. The trial judge then reads from his notes:

> I went to Phyllis' house, normal thing to do, went to her house, **I didn't win**...

Mr. Gorman is adamant that his recollection is accurate:

> ... your note doesn't reflect it but my memory and my friend's memory appear to be in agreement on this and that is that Judy Janes testified very clearly that if she had won that night, she would have went home first and she could not remember whether she won or not. Your note seems to indicate that you're record – recollection of it was that she said something about not winning, but my recollection of it and **I think this is exactly correct** was that she said that she could not remember and that's there's a whole reason why she testified to if she had won, she would go home, but she could not remember whether she had won that night or not. I don't think you should redirect the jury in relation to Judy Janes.

This is a mis-statement of Mr. Collins' position. He did not state that Judy Janes could not remember if she won. He was saying that since she followed Mrs. Duke into her house, she must not have gone home first, i.e. did not win.

In fact, the transcript of Judy Janes' testimony confirms that Mr. Collins and the notes of the trial judge are correct and Mr. Gorman is wrong.

> Q: That particular evening would you have gone directly to Phyllis' house or would you have gone in your house first? A. I would go into Phyllis', if I had won I would have went home and to my knowledge **I didn't win that night,** so I would go into Phyllis'.
> Q: So, would you and her have walked home together? A. Yes.
> Q: Then you would have both entered her house at the same time? A. Yes, either she'd go in – yeah, she would go in first and then I would go in after.
> Q: But directly behind her? A. Yeah, yes.

The problem is not that Mr. Gorman was wrong. It is that he advocated his erroneous recollection with such absolute certainty, even in the face of the trial judge's notes to the contrary.

I do not say that Mr. Gorman deliberately misled the trial judge but his overreaching advocacy at least distorted his recollection. His strategy with respect to Judy Janes was that the less the jury heard about her the better. He did not call her as a witness. He did not cross-examine her. And he did not want the trial judge to remind the jury about her. Again, this is contrary to

the Crown's position before me that it should simply present all of the relevant evidence and let the jury decide.

(c) **Defence Counsel:**

Unlike counsel for Gregory Parsons, counsel for Randy Druken did not testify before me as to the conduct of his defence. I was advised by Senior Counsel (Hearings), that although Mr. Druken waived his solicitor-client privilege, there appeared to be no reason for him to testify. None of the parties with standing expressed the desire to explore issues with him as a witness. Unlike Gregory Parsons, Randy Druken took the stand as a witness. Many aspects of conducting a criminal defence are "judgment calls" that cannot be characterized as "wrong" at the time of making them but only after the consequences become apparent.

I do not wish to "second guess" Mr. Collins' conduct of the defence in this case. I am not drawing conclusions or making adverse findings about his conduct. However, it is necessary to raise some questions about the conduct of the defence that may well have influenced the ultimate outcome of the trial, i.e. the conviction of Randy Druken.

In the previous section, it was pointed out that Crown counsel cross-examined Shirley Druken on her statement to the police on the morning of the murder. That statement mentioned she had been up twice in the middle of the night to go to the bathroom but did not refer to the specific times. In her trial testimony she referred specifically to 2:25 a.m. and 3:45 a.m. In fact, Crown counsel was aware that she had referred to similar times in her polygraph interview which occurred three days later. Mr. Collins did not re-examine Mrs. Druken on this issue to bring out her earlier reference to such times.

The trial judge had ruled earlier that reference could not be made to the polygraph statement to demonstrate that Mrs. Druken had been treated more harshly by the police than Crown witnesses. It is possible that Mr. Collins felt that this ruling precluded its use on re-examination as well. However, the Crown allegation of recent fabrication by the witness created an entirely different situation. The use of the earlier consistent statement would have been admissible for the limited purpose of rebutting the allegation of recent fabrication.

Even if the trial judge, had ruled against using the polygraph statement for that purpose, another earlier statement made by Mrs. Druken was even more specific. On the day the obstruction charges were stayed by the Crown, she gave an interview with CBC News and stated:

> **Shirley Druken:** Randy got in at exactly 10 after 10 and he watched TV for a while and he went to bed 10:30. When I came up to retire for the night, ah it was after 1 and Randy was snoring

> his head off and, ah 25 after 2 I went to the bathroom and Randy was in bed then and I went again quarter to 4 and Randy was in bed. I got up 6 o'clock that morning. ...

This statement was made on September 23, 1993, well over a year prior to her cross-examination on February 27, 1995. It could have been introduced on re-examination by defence counsel.

I discussed the failure of the Crown to provide timely disclosure to the defence, of the wiretap evidence, *supra,* at pp. 267-8. This deprived the defence of an opportunity for full cross-examination of Madeline Dooley, in particular.

The issue of this denial of a full opportunity to cross-examine, due to non-disclosure by the Crown, does not appear to have been raised by defence counsel on the Crown's application to have Madeline Dooley's earlier testimony read to the jury. There is no reference to it in the trial judge's reasons for allowing the application. Since the massive wiretap evidence was only disclosed after the start of the trial, it would have been impossible for defence counsel to ascertain its importance in this respect.

A more fundamental question is why Paul Druken's presence at the scene was denied. Instead, he was called as a defence witness. This position put the defence in conflict with one of the few highly reliable and consistent Crown witnesses, Julie Evoy. Moreover, the Crown forensic evidence completely contradicted the theory of a "clean-up", leaving another plausible explanation for Paul Druken's presence at the scene at 2:45 a.m.. The evidence placing Randy Druken at the scene was weak and inconsistent. An alternative defence strategy, to the one adopted, might have been to encourage the jury to accept that it was Paul Druken who knocked on Brenda Young's door at 2:45 a.m. The combination of Mrs. Evoy's evidence with Cindy Young's first statement point to the murder occurring shortly after that knock on her door. Mr. Collins did not have to convict Paul Druken but could have merely used his presence to raise a reasonable doubt.

I do not know what instructions Mr. Collins received from his client. Although solicitor-client privilege was waived, intruding on such communications should only occur when absolutely necessary. I do observe, however, that some defence counsel are rigid in terms of what restrictions they will accept from their clients in conducting their defence. Some take the position that their clients may only make two decisions: (1) How to plead, and (2) Whether to take the stand. They insist that all other decisions in conducting the defence are ultimately made by counsel. Of course, it would be foolish not to obtain the client's insight and inclination before making such decisions. In this case, the dynamics of conducting a defence which pointed a finger towards Paul Druken may have been influenced by the close family relationship involved.

Nor is it readily apparent why defence counsel found it necessary to characterize Phyllis Duke as a liar, rather than merely a "bumbler". Characterizing her as a liar may have enhanced the sympathy of the judge and jury for her. It opened up the opportunity for the Crown to cross-examine Randy Druken on why she would lie as well as inviting similar comment in the Crown's address and the judge's charge.

It is not difficult to characterize her evidence as inconsistent, confused, mistaken, exaggerated and, generally, unreliable. But the self-imposed burden of proving that she was a liar may have been counterproductive. Indeed, the conclusion of the second investigation, supported by her own children, was that she was hopelessly unreliable. However, it is possible she convinced herself of her own truthfulness.

These observations are not meant to be critical of Mr. Collins. He may well have had compelling reasons for the decisions he made in conducting the defence. Of course, hindsight about the presence of Paul Druken at the scene is also bolstered by subsequent knowledge of the DNA evidence. Counsel for Mr. Gorman, John Dawson, generously stated that:

> Defence counsel is to be commended for his dedication to vigorous defence of his client throughout.

I also commend Mr. Collins for his many years of dedication to his client, often in difficult circumstances.

**(d) Trial Judge:**

I am of the view that the trial judge conducted the trial in a fair manner. The jury probably was left with the impression that he believed Randy Druken was guilty. However, I agree with the following comments of his counsel with respect to his charge to the jury:

> In his review of the evidence the Trial Judge did raise a number of points for consideration by the jury, but he was always careful to emphasize that it was for the jury to determine the facts and what inferences should be drawn from the facts.

Nevertheless, it is inevitable that aspects of how the judicial role is exercised may influence the findings of a jury. I will, therefore, offer some of my impressions of some aspects of how this trial was conducted. These comments are not intended to suggest that the trial judge acted improperly in any way but are largely matters of emphasis.

In a previous section, reference was made to Crown counsel encouraging breaks in the trial out of deference to the health of the witness, Phyllis Duke. In this respect, Commission Counsel (Hearings) submitted:

> The Trial Judge makes comments in front of the jury about her emotional strength, the fact that he is concerned about her shaking and the fact that a person can die from an asthma attack.

Of course, there often is a fine line for a trial judge to draw in "protecting" a vulnerable witness, yet in allowing effective cross-examination. Here, the trial judge was very deferential to Mrs. Duke, both in relation to her health and in persuading her to answer the question in the context of her alleged undertaking from the Crown. This may have influenced the jury's assessment of Mrs. Duke but was difficult to avoid.

In his charge to the jury with respect to Mrs. Duke, he said:

> ... is this a cold, calculating woman who is capable of putting an innocent man in prison or was this a woman who was frightened out of her wits, or something in between ... is she in fact an out and out liar ... .

He added that if she did not see Randy Druken, as she testified:

> ... it's an out and out lie, it is a very, very, cold, calculating, serious crime of perjury that she, herself, is committing.

In the previous section, I pointed out that such comment was invited by the defence characterization of Mrs. Duke as a "liar", although the reference to perjury may have been unnecessary. In the first quote above, the trial judge refers to "something in between". In spite of the position of defence counsel, it would have been open to the trial judge to give the jury a clear instruction that they could disbelieve Mrs. Duke without concluding that she lied. They were entitled to conclude that she was merely mistaken.

The trial judge also charged the jury in relation to the alleged defence position of a "conspiracy" on the part of the police and the Crown witnesses:

> Now there's been talk but I suppose what you might call a conspiracy, is there a conspiracy here or not, conspiracy meaning getting together a people to tell an untrue story.

He then refers to nine witnesses from Ontario, Grand Falls and St. John's and asks:

> ... is it possible that all these people, including Cindy, got together somehow and decided to fabricate things that Brenda told them ...

> It's up to you to decide that, you have to decide whether or not they could have somehow all concocted this story of violence... .

After the jury was excused, Mr. Collins objected to this aspect of the charge:

> ... is it possible that all these people got together to fabricate things and you had a long list there. My lord that was - we've never indicated that as a theory whatsoever, that was suggested by my friend in his argument... .

The trial judge immediately recognized the problem and, without calling on the Crown attorney for a response, interjected:

> Alright, I can clarify that.

When the jury returned, he told them that the defence had not alleged a conspiracy, but he added:

> I was giving my view and putting to you, could you consider that there was an overall conspiracy which quite frankly, you may or may not, that's up to you ... .

This does not eliminate the idea of a conspiracy but transfers to the judge the possible suggestion that, in order to acquit, the jury would have to find a conspiracy of the police and Crown witnesses. This could be even more prejudicial to the defence.

The trial judge had not mentioned the witness Judy Janes to the jury. Mr. Collins requested that he do so and I have already discussed the strenuous objection by Mr. Gorman, *supra*, at pp. 294-6. When the jury was recalled, the trial judge included the following in his further comments to them:

> When you're considering the evidence as to what took place after bingo and they came home Mrs. Duke and Judy Janes, I forgot to mention Judy Janes, I didn't consider her evidence as being particularly significant, maybe it is, maybe it isn't but I'll just remind you of Judy Janes and her evidence, take that into consideration also.

It appears that the trial judge did not appreciate the significance of the evidence of Judy Janes in contradicting Phyllis Duke. She was an important defence witness whose testimony was downplayed by the trial judge.

It was submitted to me by Senior Counsel (Hearings) that the charge to the jury was favourable to the Crown. For example, the trial judge seemed to reject the scenario of a stranger or someone who did not know the victim well, as the

perpetrator. He conjectured that Cindy Young's testimony of the light going on and off could have been a signal, supporting the two-person theory. He emphasized that Mr. X was accurate in knowing very early that the body was moved. However, he was, generally, outlining the Crown's case and tempered these with other observations and reminders of the autonomy of the jury in fact-finding.

The trial judge conducted a *voir dire* and rendered a judgment on the admissibility of Madeline Dooley's preliminary inquiry testimony at the subsequent trial. By the time of the trial she had become clinically insane. This judgment is comprehensive and well-written. I relied upon it to a great extent in my assessment of Madeline Dooley's reliability, *supra*, at pp. 240 *et seq.* I cannot take issue with the conclusion reached that her earlier testimony was admissible. However, in my view, it also would have been open to the trial judge to have exercised a discretion to reject this evidence on the basis that it did not meet a basic threshold of reliability.

The judgment quotes this familiar passage from the judgment of my good friend and former colleague, MacIntyre J. in *Mezzo v. The Queen, supra*, at p. 149:

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

In the previous chapter, I declared my perceived conflict of interest since I dissented in that case on the issue of whether a trial judge could engage in a limited weighing of the evidence on a directed verdict application, *supra*, at pp. 167 *et seq.* I also expressed the view, that the recent phenomenon of the demonstrable conviction of innocent people by our criminal justice system, warrants the criterion for a directed verdict to be reconsidered and changed. I agree with the submissions of the RNC Association that such wrongful convictions impose an increased obligation on trial judges to serve as a "gatekeeper".

In the judge's ruling in the Druken case, he stressed the importance of the distinction between "reliability" and "weight". In relation to an application to read in previous testimony pursuant to section 715 of the *Criminal Code*, he stated:

> The "reliability" of evidence, as the term is used by the courts and confirmed in Potvin, goes not to the issue of weight, but to reliability in the way in which the earlier evidence was obtained

> and formally tendered at the preliminary inquiry or by sworn statement as the case may be.

He elaborated that this was restricted to procedural considerations such as whether the earlier evidence was given under oath, in the presence of the accused, with formal authentication and with full opportunity for cross-examination. He distinguished these legal considerations from the weight or quality of the evidence, which "are always for the trier of fact".

I believe that the discretion recognized by the Supreme Court of Canada in *R. v. Potvin*, [1989] 1 S.C.R. 525, is broader. (In that case, I was with the majority.) The Court held that the discretion available under section 715 extended to:

> ... where, even although the manner of obtaining the evidence was fair to the accused, its admission at his or her trial would not be fair to the accused.

In my view, a trial judge could find that it would be unfair to admit evidence such as that of Madeline Dooley since it was so manifestly unreliable that it would be dangerous to rely on it for a conviction. Here, the unreliability of her evidence was convincingly documented by the trial judge in his judgment.

**(e) Conclusion:**

When Wayne Gorman was assigned the Druken murder prosecution on August 20, 1993, he faced a formidable challenge. There was no comprehensive police brief of the investigation and, indeed, no analysis of the case. There were multiple interviews of key witnesses, poor documentation and many inconsistencies. He would have been briefed on the police theory that witnesses felt frightened and intimidated. This provided a rationale for the manner in which the investigation was conducted and for ignoring inconsistencies and contradictions in the evidence. It may well have influenced his treatment of Cindy Young.

Counsel for Mr. Gorman provided the following quotation from a recent House of Lords decision:

> In an ideal world only honest and reliable witnesses would be called to give evidence in court. Relatively few crimes are committed, however, in front of disinterested, sober, upright members of the public. Therefore, in many trials, especially for crimes of violence, both the prosecution and the defence have to rely on witnesses who are anything but honest and reliable.

This is an important reminder in understanding the difficulty a Crown attorney faces in assessing the reliability of a case presented by the police for prosecution.

However, it does not relieve the Crown of the responsibility of carrying out that assessment, initially, and on an ongoing basis. The existence of the Crown culture discussed in the previous chapter, is reinforced by the similar dynamics in the prosecution of the Parsons and the Druken cases. In both, there are weak circumstantial cases but highly skilled, motivated and industrious Crown attorneys. In both cases, they accept the police focus on one individual as the perpetrator, to the exclusion of other reasonable possibilities. In both, they marshalled all of their skills as advocates to "shore up a weak case" and achieve a conviction.

In the Druken case, the warning signs should have been recognized but were not. Madeline Dooley had a medical condition that deteriorated to clinical insanity between the preliminary inquiry and the trial. Phyllis Duke continued to embellish her story right up to two days prior to her testimony. Then, while testifying, falsely alleged that Mr. Gorman had undertaken not to question her on certain matters. Item after item of the story of Mr. X proved to be false under police investigation, yet the Crown pressed on.

In his oral submission, counsel for Mr. Gorman stated:

> ... what we see here ... is that not that anybody was acting in bad faith, not that anybody was so negligent that they committed a dereliction of duty but just that the system that was in place did not have safeguards that it should have had.

I do not find that Mr. Gorman acted in bad faith. Nor do I find that he committed a dereliction. Quite the opposite of dereliction, he was overzealous in pursuing what he perceived as a "noble cause", namely, the conviction of Randy Druken.

The systemic problem was the Crown culture described in the previous chapter, that accepted and supported the police tunnel vision. The conclusions and recommendations made *supra*, at pp. 169 *et seq.*, are equally applicable here.

**5. Post – Conviction: Stay of Proceedings:**

**(a) Introduction:**

Randy Druken was incarcerated as a result of the police investigation on June 14, 1993. He was convicted on March 18, 1995, and spent over three more years in prison when Mr. X came forward on August 10, 1998 to say he had given false testimony. Shortly after a new trial was ordered on June 17, 1999, he was released on bail pending the new trial. He had spent over six years in prison in relation to Brenda Young's murder.

The Introduction to this chapter outlines the salient features of the events following the recantation by Mr. X. I wish to focus briefly on three remaining topics:

- The second investigation.
- The Crown opinions and third investigation.
- The stay of proceedings.

With the latter topic, I take the opportunity to comment more generally on the nature of this historically longstanding Crown power of the *nolle prosequi* or stay of proceedings.

**(b) The Second Investigation:**

On June 6, 1999, Inspector Craig Kenny was assigned to conduct a re-investigation into the homicide of Brenda Young. This was necessary because of the recantation of Mr. X, the DNA evidence implicating Paul Druken and the need for further forensic examination and analysis of exhibits in light of improved testing potential.

When the appeal was heard on June 17th, the Crown consented to the defence application to enter fresh evidence regarding Mr. X. The Crown also agreed that that a new trial should be ordered and it was.

The personnel assigned to the second investigation were as follows:

| | | |
|---|---|---|
| Inspector Craig Kenny | - | Case Manager and Investigator |
| Sergeant Mark Wall (now Sergeant) | - | Investigator |
| Sergeant Geoff Walsh | - | Investigator |
| Constable Jason Sheppard (now Acting Sergeant) | - | Investigator |
| Constable Dave Gray (now Sergeant) | - | Analyst/File Coordinator |
| Paula Pelley | - | Clerical/Data Input |
| Constable Wayne Harnum | - | Forensic Identification (part time) |

A clearly defined operational plan was established and implemented on the major case management model. In my view, this investigation was comprehensive and thorough. As my own findings indicate, I agree with the conclusions reached by this investigation.

These conclusions included the non-existence of any evidence whatsoever from Mr. X, the unreliability of Phyllis Duke's evidence, the tainting of Cindy Young's evidence, which also led to its unreliability, and the absence of any evidence of a clean-up of the scene. One of the most striking findings related to the cigarette butt accidentally discovered amongst the exhibits at the trial. It had been wrapped in a doily and contained red stains, at first thought to be lipstick, but later confirmed to be polypropylene transferred from the rug at the crime scene.

Inspector Kenny's summary of this investigation describes a reconstruction of the crime scene to attempt to demonstrate how the burning cigarette butt could have been transferred from an ashtray on the coffee table to the carpet. This table was placed where it would have been on the carpet at the residence, using the crime scene photographs. A doily was placed on top and the table was kicked over "probably a hundred" times. The Forensic Identification Officer, Sergeant Wayne Harnum, concluded that this testing established that:

> ... it is in all likelihood that the cigarette landed on the carpet around the same time that the coffee table and contents tipped over, leaving one with the inference that this all occurred during the struggle.

This tended to close the circle of Mrs. Evoy seeing Paul Druken at 2:45 a.m., when he asked for Brenda; Mrs. Evoy and Patrick Dooley Jr. hearing a noise like furniture moving or being tipped at around that time; Cindy Young being awakened by a noise like the table tipping and hearing her mother's voice, and; Paul Druken's DNA being found on a cigarette that was likely burning at the time of the struggle. The notes of this Crime Scene Reconstruction (Part 6) are attached as Annex 15.

Inspector Kenny testified before me that, as a result of his investigation, he concluded:

> That there was no credible evidence to implicate Randy Druken or to lay any charges against Randy Druken for the death of Brenda Marie Young.

When asked about Paul Druken, who had died prior to the second investigation, he said that, based on the available evidence:

> I believe there was grounds there to charge Paul with the death of Brenda Young.

At the conclusion of this second investigation, Inspector Kenny's report was filed with the DPP's Office, in accordance with normal procedure.

Ordinarily, any follow-up that might be required, would be referred back to this second investigation team. However, some months later, Inspector Kenny was told that further questions raised by the Crown would be passed over to a completely new team. No reason was given for disbanding the second investigation team at that time.

**(c) Crown Opinions and Third Investigation:**

On September 27, 1999, then DPP Colin Flynn met with Crown attorneys Tom Mills, Nick Westera and Frances Knickle to discuss the Randy Druken file. At the time, a new trial had been ordered but the second investigation was well under way. Mr. Flynn's note of the meeting states:

> ... Mr. Westera and Ms. Knickle were particularly concerned about how they should proceed with the file in view of what they have perceived to be conflicting views of the information available. ...
>
> I suggested to them that they ignore and/or avoid any theorizing by others or any innuendo by others respecting this case. They should determine what the evidence is and make their findings based on the evidence that is available. If, in the end, they reach a conclusion which is not concurred in by their superiors then that is the way it is.

And, later:

> If indeed there is any conflict between opinions, it may be necessary to obtain an opinion from someone outside the province on the advisability of going back to trial on Randy Druken. I indicated to them that the whole process will depend on what evidence is available and the strength of the evidence. It cannot be based on anything else other than the evidence that exists.

He followed up four days later with a memorandum to these three Crown attorneys and to Bernard Coffey, who had become Assistant DPP. He stated:

> Bernard Coffey will oversee the file and the general process undertaken by Nick and Frances. Bernard has intimate familiarity with the facts of the matter, and can provide advice and assistance to both Nick and Frances.

He added that Wayne Gorman also would be consulted and that if a consensus could not be reached on how to proceed, it might be necessary to consult an outside counsel.

On November 16th, the second investigation was completed and Inspector Kenny dropped off copies of the report to Bernard Coffey and Nick Westera. By that

time, Wayne Gorman had been appointed DPP to replace Mr. Flynn, who had taken another position with the Department of Justice. On November 19th, Mr. Gorman sent a memorandum to Messrs. Coffey, Mills, and Westera and Ms. Knickle, indicating that the Crown would seek to have Randy Druken's arraignment put over to February. Meanwhile he requested that each of them provide an opinion to him as to whether further investigation was necessary and whether there was a reasonable probability of conviction.

This was brought to the attention of the Deputy Minister of Justice by Bernard Coffey. She replied that it was never contemplated that it would be appropriate for Wayne Gorman to make the decision as to whether Randy Druken should be retried. She arranged for Colin Flynn to be re-assigned temporarily to assume the role of DPP. She requested that the Coffey, Mills and Knickle opinions be directed to Mr. Flynn. (Mr. Westera was relieved from the Druken file because of his workload.) Mr. Flynn also requested that the three opinions be sent to him but added that he would also be seeking an opinion from "an Attorney General's Office outside the province of Newfoundland". The three local opinions were received by January 24, 2000, and the fourth, from Tara Dier of the Ontario Crown Law Office on August 1st.

The opinion submitted by Tom Mills was accompanied by a covering letter which stated:

> Under the circumstances, I have taken a broad approach to this opinion. I do not refer to the minutiae of the evidence as it is available in the transcripts and statements. Instead I have attempted to synthesize the various testimonies and statements of the witnesses.

The review of the evidence in this opinion is, indeed, superficial. Apart from the past history of violence in the victim's relationship with Randy Druken, it states the "most compelling evidence" as being:

- Cindy Young's statement that she heard "Stop, Randy, Stop";
- Madeline Dooley's evidence that she heard "No Randy. Don't do that ...";
- Phyllis Duke's evidence that she saw Randy on the eve of the murder, when he threatened her, and his subsequent telephone call to her;
- Mrs. Evoy's evidence of the man, who resembled Paul Druken, coming to her door and seeking Brenda's place.

Of course, the jailhouse informant was now out of the picture.

No attempt was made to assess the reliability of this evidence at the time of the previous trial with all of its inconsistencies. The opinion does refer to

weaknesses in Cindy's testimony at that trial but describes her as a "compelling witness". Unlike the second investigation, Mr. Mills does not reject Phyllis Duke's evidence:

> ... Mrs. Duke still places Randy outside the residence on the night of the murder. She still says that Randy made a threatening call to her house. However, none of these statements are absolute. Over a six year period Mrs. Duke has given many statements/testimony. She has a tendency to ramble. The statements in 1999 are, not unexpectedly, considerably weaker.

Mr. Mills is critical of the second investigation for interviewing Mrs. Duke without first "refreshing her memory by statement/testimony". Unfortunately, this begs the question of which of her diverse and contradictory statements should have been used for that purpose.

He also was critical of the second investigation for speaking with members of Mrs. Duke's family to gain insights into her (un)reliability. The opinion states that such information:

> ... appears to have been gathered by the RNC to establish that Mrs. Duke is not a credible witness and should not be relied upon by the Crown. No such attempt was made in the *"re-investigation"* to obtain opinions about the veracity of other witnesses, e.g., Josephine Dyke, Shirley Druken.

The simple answer to that criticism is that Josephine Dyke was not called as a witness at the first trial and, unlike Phyllis Duke, Shirley Druken was clear, cogent and consistent in all of her statements and testimony. He also stated:

> The fact that witnesses are inconsistent in their recall six years after an event when not shown previous statements/testimony is far from surprising.

This totally neglects the glaring inconsistencies of Phyllis Duke at the time of the first trial.

Mr. Mills was critical of the second investigation's failure to pursue allegations of police coercion during statement-taking in the first. He dwells upon such an allegation by Josephine Dyke but she was not even a witness at the first trial. Phyllis Duke also made such an allegation, but the second investigation would be justified in not devoting much time or energy to pursuing it, in light of her complete unreliability. Mr. Mills states:

> The re-investigation leaves hanging serious suggestions of police misconduct while stockpiling statements against a witness like Mrs. Duke.

This "stock-piling" consisted of an **analysis** of her statements in their totality and in relation to each other. This was the kind of analysis that was sorely lacking during the first investigation and the prosecution of Randy Druken. Indeed, I found this analysis of the second investigation to be helpful in forming my own conclusions about the unreliability of Phyllis Duke, *supra,* at pp. 246-8 and Annex 13.

Mr. Mills observes that it was a rational conclusion to place Paul Druken at the scene at the time of the table tipping over and, therefore, at the time of the murder. Then he adds:

> The same evidence does not negate Randy's presence at the scene of the murder.

This observation totally ignores the absence of any reliable evidence placing him at the scene of the murder. There is nothing to "negate". Still, he does concede that this other rational conclusion significantly decreases the probability of conviction of Randy Druken.

After concluding that there was no reasonable probability of conviction, he adds:

> ... The existing evidence however certainly implicates both Randy Druken and Paul Druken in the murder of Brenda Young. Given this evidence, a stay of proceedings would not be appropriate. As the evidence does not appear strong enough to proceed to trial, the investigation should remain open.

In my view, this is a remarkable conclusion. The existing evidence did not "implicate" Randy Druken in any legal sense. The past history of a violent relationship raised a valid suspicion. When there was no reliable evidence to support that suspicion, it should have been suspended. When strong evidence of another perpetrator was established, that suspicion should have been discarded.

The last sentence of this last quote (and also of the opinion) raises a more basic concern. In effect, Mr. Mills is saying that there is no basis on which to continue the prosecution. Yet there should be no stay of proceedings, let alone the introduction of no evidence, with a view to an acquittal. The previous trial was five years earlier. The second investigation has concluded there is no basis on which Randy Druken could be charged and it could uncover no further evidence to incriminate him. It also identified another perpetrator who could be charged and probably could be convicted. Yet Mr. Mills is advocating that the investigation

should continue to try to find evidence to re-try Randy Druken. The tunnel vision that pervaded the first investigation and the prosecution of Randy Druken at the first trial now found its way into the opinion of a Senior Crown Attorney.

The second opinion was provided by Crown Attorney, Frances Knickle. She also recognized that the Crown's case came down to the testimony of the witnesses Young, Dooley and Duke. She did recognize the significance of Julie Evoy's evidence placing Paul Druken at the scene at about 2:45 a.m. Then she states:

> ... It was never refuted or contradicted, and while it did not constitute evidence which explicitly incriminated Randy, it did, as the Crown originally posited, by implication: Paul Druken was present purportedly to assist Randy after the murder was committed.

I simply cannot understand how Julie Evoy's evidence incriminated Randy Druken "by implication" or in any other way. This totally unfounded conclusion also supports the inference of tunnel vision.

This opinion does canvass the reliability of the three key witnesses. She acknowledges that Madeline Dooley's evidence was difficult to reconcile with other evidence and raises other inconsistencies within her statements. She recognizes that Madeline Dooley may simply have confused Thursday and Friday nights. However, since her evidence was frozen in the transcript of the preliminary inquiry, it was essentially the same as at trial. Ms. Knickle disagrees with the second investigation's characterization of Cindy's evidence as "tainted". This seems to be because Cindy was trying her best and "may honestly have thought Randy killed Brenda". She concluded that Cindy's evidence also was essentially, the same as at trial.

Ms. Knickle readily acknowledges that Phyllis Duke's "statements and testimony are fraught with inconsistencies". She adds:

> However, the author disagrees with the subsequent police investigation's characterization of her credibility as being 'suspect'. She may ultimately be unreliable, but there is nothing that suggests Mrs. Duke has intentionally mislead [sic] the police, or the Court.

The second investigation did not conclude that Mrs. Duke was lying. The context of the word "suspect" in the report is:

> ... her credibility is suspect, and her account of events with such drastic inconsistencies and additions, that any future testimony would be negated by her unreliability. This is not to say that Mrs.

> Duke intentionally mislead [sic] the police or the courts, an answer to that only she knows ...

Ms. Knickle also criticized the second investigation for a bias in favour of Randy Druken:

> For example, the subsequent investigation's criticism of Phyllis Duke is singular. No other Crown or defence witnesses has been handled as was done in the subsequent investigation.

This appears to echo Tom Mills' criticism of speaking with family members to gain insights into Mrs. Duke's reliability.

Her allegation of bias goes further in alleging:

> ... a disconcerting familiarity between the Royal Newfoundland Constabulary and the Druken family ... this familiarity may have colored the investigators perceptions of particular events.

She states that the second investigation made a 180° turn from the first. The first focused on Randy Druken to the exclusion of all other scenarios. The second interpreted the evidence in his favour.

It is ironical that, when the second investigation overcame the tunnel vision of the first, with an objective investigation, the Crown seeks to prolong that tunnel vision. She does not conclude that there is no probability of conviction, only that the probability "is low". She adds:

> In the author's opinion the murder of Brenda Young merits further investigation. The author is not satisfied that Randy cannot be incriminated in the matter...

While she purports to say that both investigations lacked objectivity, her own sole focus appears to be on Randy Druken.

The last part of her opinion introduces a possible connection between Brenda Young's murder and the armed robbery of a local CIBC branch. This discussion is rife with speculation and leads nowhere.

The third internal opinion was given by Bernard Coffey, who was Assistant DPP at the time. In my view, this opinion was the most frank, thorough and objective, in spite of its brevity. His conclusions were:

- There was no reasonable probability of a conviction at Randy Druken's pending re-trial.

- Further investigation was not necessary to reach that conclusion since the passage of 6 ½ years would have caused the "fading of any potential witness's memory".
- In addition, in an entirely circumstantial case, discovering further reliable information from then known sources was unlikely.
- There existed "significant, credible forensic evidence" to warrant charging Paul Druken, had he been alive.

His analysis is cogent and includes a reference to considerable evidence to support a reasonable inference that the assault was sexual in nature. This would support a charge of first degree murder against Paul Druken. He went further and said that he would "very like be convicted". He observed that the evidence of Cindy Young and Madeline Dooley, alone, was considered by the first investigation to be inadequate to support reasonable and probable grounds. He stated bluntly that:

> I would not be prepared to present Phyllis Duke to a jury as a credible witness as to Randy Druken having been outside her apartment building after 10:30 p.m. on June 11th.

He agreed with the second investigation's assessment of her unreliability.

Colin Flynn was aware that Mr. Coffey was the Crown contact with the police for the second investigation. He apparently thought that Mr. Coffey's opinion could have been influenced by his working (albeit sporadically) relationship with Inspector Kenny. Mr. Flynn decided he would follow the advice of the external opinion provided by Tara Dier of the Ontario Crown Law Office.

In addition to reviewing all of the written materials, Tara Dier read the three other opinions and met with Colin Flynn, Tom Mills and the second investigation team. She shared Mr. Mills' criticism of the second investigation team. She found it "curious" that witnesses were not shown their earlier statements or interviews before being interviewed. She also found it "curious" that Phyllis Duke's relatives were interviewed about her reliability. She observed that Mrs. Duke was the only witness "subjected to this type of investigation". She described this initiative as being "problematic" and "troubling for counsel". She did conclude that Mrs. Duke's evidence was totally unreliable.

Ms. Dier also seems to take issue with the second investigation's conclusion that Cindy Young's testimony was "somewhat tainted". She seems to condone the manner in which Constable Baggs interviewed Cindy. In assessing Cindy's evidence, she states:

> Nonetheless, it would be difficult to ask a jury to rely on it to convict Randy Druken.

She also points out Madeline Dooley's frailty, limiting her ability to observe and to convey what she observed.

Ms. Dier concluded that there was no reasonable prospect of convicting Randy Druken on the available evidence. She added:

> However, there remains some evidence against him and nothing in the evidence, in my view, precludes his participation.

She did not specify what that evidence against him might be and rejected the possibility of a sexual assault without addressing Mr. Coffey's analysis of this issue. She rejects Shirley Druken's alibi because of the "obvious bias" and because the jury rejected it. She does not take into account that the jury also weighed it against testimony of a confession by the accused.

In view of Ms. Dier's conclusion that there was no reasonable prospect of a conviction, proceeding to trial again and calling all admissible evidence, was not an available option. The available options were:

- To proceed to trial but call no evidence, necessarily resulting in an acquittal, or;
- To stay the charges, with the consent of the Attorney General, pursuant to s. 579 of the *Criminal Code.*

In deciding which option to select, she added:

> In my view it would be inappropriate to enter a stay of proceedings if there is no prospect whatsoever of recommencement. In this case, some reasonable likelihood that additional evidence implicating Randy Druken will come to light is required.

She found such a reasonable likelihood, so the correct option in this case was to enter a stay of proceedings.

Her whole foundation for this choice was this statement made by Patrick Dooley Jr. in the course of his polygraph examination:

> We knows who it was. We were friends with her. It's nothing to you and it's nothing to any of the other police officers.

She notes that this witness had been "unwilling to assist the police" but that he "may very well have" important evidence. She adds:

> This necessarily requires that the witness is approached again in the hopes that he will provide a complete and truthful statement.

In my view, this opinion turns on a fundamental error.

Ms. Dier completely misinterpreted the above statement of Patrick Dooley Jr. When referring to "who it was", he was not referring to the perpetrator of the crime. He was referring to the victim, Brenda Young. The full context of this statement is discussed *supra,* at pp. 275-6. It came towards the end of a two hour grilling in which Patrick Dooley Jr. repeatedly told Inspector Peddle that he was telling everything and that it was the truth. Inspector Peddle tried to emphasize the seriousness of the matter by stating, "It's a murder". The response was, not only that he knew it was a murder, but that he knew the victim, who was a friend of the Dooleys. If there was the slightest impression on the part of Inspector Peddle that Patrick Dooley Jr. was referring to the murderer, one could be sure the interview would not have concluded the way it did.

I find it difficult to understand how Mr. Mills could not have realized Ms. Dier's fundamental error in this respect. When a potentially important witness stated that: "We knows who it was", the obvious response should be to follow up to determine the context in which the statement was made. To do so would have revealed that the foundation for her recommendation was non-existent. I have no basis to conclude that Mr. Mills provided the Dooley comment to Ms. Dier without revealing its true context to her. But he certainly did not exercise due diligence in determining her complete misinterpretation of it.

Tara Dier's opinion is dated August 1, 2000. Based on her advice, and at the direction of Colin Flynn, Tom Mills entered a stay of proceedings on August 30th. On the same day, a third investigation team was established consisting of five officers under the leadership of Inspector William Brown (now Superintendent). His mandate was to review the four legal opinions, to determine what work remained to be done as a result of them and to answer any questions they raised. The new team was probably established because some of the opinions were critical of the second team. In November of 2000, Tom Mills was appointed as DPP.

Inspector Brown testified that his investigation "pretty well concluded" when he received the final report from Constable Deborah Moss (now Constable) on the CIBC armed robbery in January, 2001. This issue was raised in the Knickle opinion but turned out to be speculative and futile. There were some delays in completing the investigation because of the other commitments of some team members. There was also a delay related to a major out-of-province undercover operation and another undercover operation involving this third investigation.

On August 20th, Inspector Brown and two other officers met with Tom Mills and Frances Knickle. Both of these Crown attorneys had rendered previous opinions criticizing the second investigation and advocating further investigation.

The stay of proceedings would expire in ten days. Inspector Brown testified before me:

> I think our intention was to go in and basically say to Mr. Mills that, you know, we had come to a point that we felt we couldn't gather any more information. During, we went over the task list, basically went over what the investigation, what we had done in the investigation ...

At that time, the officers conveyed their conclusion that Paul Druken was a strong suspect and Randy Druken was not a suspect. However, the Crown repeated the criticism in Mr. Mills' earlier opinion, that the second investigation did not provide previous statements and testimony to witnesses before interviewing them. The outcome of the meeting was that the officers agreed to go back and conduct further interviews of witnesses after refreshing their memories.

This was another futile exercise. It produced nothing. However, it did prevent Randy Druken from obtaining an acquittal. The message from Inspector Brown and his colleagues should have been clear to DPP, Tom Mills. There was no prospect of a recommencement of the proceedings against Randy Druken. Mr. Mills should have done the right thing and directed a Crown attorney to appear on the charge but call no evidence. This would result in an acquittal. Instead, the investigation was needlessly prolonged and the stay of proceedings expired ten days later.

Finally, on November 14, 2001, Inspector Brown submitted his "final report" to Superintendent Shanahan, and stated:

> ... this team cannot provide any new information regarding who was responsible for the death of Brenda Marie Young. We believe that we have exhausted all avenues available to gather any new information at this time...

On June 11, 2002, Inspector Brown again met with Tom Mills. Superintendent Shanahan, Constable Moss and Crown attorneys Knickle and Goulding also were present. The meeting lasted about two hours. Inspector Brown testified that both before and after the meeting, he did not believe there were reasonable and probable grounds to charge Randy Druken and he was not even a suspect.

Yet on July 10th, Mr. Mills, wrote to the Chief of Police, Richard Deering, and stated that, "at the conclusion of the June 11th meeting", there was agreement that:

1. the identity of Brenda Young's murderer remained unsolved;
2. there were at least three suspects, namely, Paul, Randy or Derek Druken;

3. "the investigation remains open, however ... there is little further that could be pursued";
4. "Further steps may be required" with respect to the CIBC armed robbery's relation to the Brenda Young murder;
5. there is nothing in the third investigation that affected the stay of proceedings on the murder charge against Randy Druken.

I find this letter to be unusual and misleading:

1. Both the second and the third investigations concluded that there were reasonable and probable grounds to charge Paul Druken. Assistant DPP, Bernard Coffey went even further and expressed the opinion that Paul Druken "would very likely be convicted" of first degree murder.
2. Inspector Brown unequivocally expressed the conclusion of the third investigation, echoing that of the second investigation, that Randy Druken was **not** a suspect.
3. The unilateral declaration that the investigation "remains open" is rather meaningless in the circumstances.
4. Inspector Brown considered further pursuit of the CIBC armed robbery to be "historical" by January of 2001.
5. The stay of proceedings had expired almost a year earlier.

There is no written response from the Chief of Police to Mr. Mills' letter.

The third investigation was driven by the DPP's Office. It was initiated as a result of three of the four Crown opinions and was prolonged unnecessarily. In my view, Tom Mills must bear most of the responsibility for this:

- His initial opinion was highly critical of the second investigation and urged that the investigation remain open.
- When Colin Flynn took over in a "caretaker role" (his words) as DPP, he relied primarily on Mr. Mills in relation to obtaining the Ontario opinion.
- Apart from Mr. Flynn, Mr. Mills was the only Crown attorney to meet with the Ontario Crown lawyer, Tara Dier. Her opinion appears to have been influenced by his views. The documentation disclosed to my staff by the DPP contains no record of the communications between them.
- Mr. Mills entered the stay of proceedings and, as DPP, decided to prolong the third investigation rather than provide an acquittal for Randy Druken.
- The relevance of the CIBC bank robbery to the murder was largely touted by Frances Knickle but he certainly welcomed this theory.

**(d) Stay of Proceedings:**

There are a number of ways in which a prosecution may be terminated other than by proceeding to a verdict. The Crown has a discretion as to which avenue to choose and this prosecutorial discretion, ordinarily, is not reviewable by the courts. The Crown may:

(1) Withdraw a charge at any time prior to a plea by the accused, or with the leave of the court, after a plea has been entered;
(2) Enter a stay of proceedings;
(3) Proceed with the trial but elect not to call any evidence or to stop calling further evidence, and asking the judge or jury to acquit.

The control of a prosecution, and the ability to terminate it as well as the ability to select the manner of termination is an important dimension of the Crown's *quasi-judicial* responsibilities. See *supra,* at pp. 134-7, and, particularly, the passage quoted from Wayne Gorman's article, at p. 136.

The avenues that the Crown selects in terminating a prosecution have different consequences and the choice will depend on the particular circumstances involved. The withdrawal of a charge might be most appropriate when the Crown disagrees with the police that reasonable and probable grounds exist, or where the Crown decides that there is no reasonable prospect of a conviction. The charges of attempting to obstruct justice should have been withdrawn, both because reasonable and probable grounds did not exist and because of the extraordinary nature and timing of these charges, *supra,* at p. 267.

I wish to focus on the decision of the Crown whether to enter a stay of proceedings or to obtain an acquittal by adducing no evidence. A stay of proceedings simply puts the charge on "hold". The proceedings may be recommenced at any time within a year, again, at the sole discretion of the Crown. If the proceedings are not recommenced within a year, they then are "deemed never to have been commenced".

There is a significant legal consequence flowing from which avenue has been chosen. If the accused is acquitted, he is immune from any future prosecution for the same conduct. After a stay has expired, the former accused may be charged with the same offence for the same conduct at any time. This makes the stay of proceedings a much easier choice for the Crown. There is "nothing to lose" by entering a stay so the Crown is relieved of the burden of having to assess the evidence and determine whether a subsequent prosecution is a realistic possibility.

But there is a downside for the accused. A stay of proceedings may leave an impression with the public that the charge is merely being "postponed" or "the

authorities", in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.

The brief prepared by AIDWYC and submitted to me on the Systemic Phase of this inquiry had this to say about the Crown's power to stay proceedings:

> ... the privilege of the stay is such that the Crown never has to say it's sorry – or, for that matter, anything at all. Subject to the rarely exercised power to revive within one year, a stay permanently terminates a prosecution. ... Some empty phrases might accompany the entry of a stay – the invocation of an "ongoing investigation," "after careful consideration," the ever-handy "public interest" – but rarely anything of substance. The Crown, in short, never has to publicly justify its use of the power to stay proceedings.

The brief goes on to refer to the "grey-zone" message conveyed by a stay of proceedings:

> A stay, it is clear, is not an exoneration. There is no admission here of a misconceived or ill-executed prosecution. The defendant is left in a legal – and very public – limbo: no longer an accused but forever shrouded in a cloud of officially induced suspicion. This is a conscious and likely deliberate consequence of the Crown decision to enter a stay of proceedings. It preserves, if barely, the propriety of the initial prosecution and, simultaneously, indelibly tarnishes the defendant.

AIDWYC speaks largely from the perspective of an accused who has been wrongfully convicted. However, the validity of these observations extends to an accused who cannot be exonerated but for whom it is unreasonable to expect any future prosecution in relation to the charge in question.

Counsel for the DPP's Office took issue with any such view. She argued that the presumption of innocence prevails throughout the charging and the one-year period in which the stay is operative. Once that period expires, the accused is deemed never to have been charged so that:

> ... In this respect he is the same as any other person. The assertion that a Stay of Proceedings leaves a cloud of suspicion over a person is a specious argument that undermines the presumption of innocence. This position has no foundation in law and is arguably misleading.

With respect, this analysis is legally correct but practically unrealistic. For example, a person facing a charge of murder is also presumed innocent but is there not a cloud hanging over such an accused?

In contrast to a stay of proceedings a statement by the Crown, in open court, that it has no evidence to present often carries an implicit message that this person should not have been charged. Once the Crown has decided to prosecute (i.e. not to withdraw the charges laid by the police), the accused should be given an acquittal where that decision proves to be ill-founded.

Of course, there may be circumstances where a stay of proceedings is appropriate. In some cases, there may well be a reasonable expectation that the prosecution will be pursued in future.

In the previous chapter, I referred to the testimony before me of Bruce MacFarlane, the Deputy Attorney General of Manitoba, *supra*, at p. 135. I also found it helpful to have his comments in relation to the stay of proceedings, which are reproduced here, in part:

> **Bruce MacFarlane:** I used the stay simply as an illustration. I don't have strong views as to whether to or not you stay or offer no evidence. My point is that there's an obligation at that point to terminate the case. As to the precise mechanism, I think it would depend largely on local practice. The practice in Manitoba would likely be to stay because that's the Crown action.
>
> **Jerome Kennedy:** Okay, do you have any concern, Mr. MacFarlane that the entry of a stay can leave a person hanging in legal limbo or leave a cloud of suspicion hanging over their head as opposed to the entering of an acquittal or a not guilty verdict?
>
> **Bruce MacFarlane:** I think the point that you raise is a very important one and a very difficult one and quite frankly we're dealing with that in another case for which a Royal Commission has been established ...
>
> ...
>
> **Commissioner:** ... The entering of a stay sort of leaves you out on the clothesline. You're just presumed innocent after a year, the charge no longer exists, instead of an acquittal.
>
> **Bruce MacFarlane:** A lot will turn on the individual case and the facts as usual but I would say this, that where

> there is some evidence still pointing to guilt but it doesn't rise to the level of proof beyond a reasonable doubt and there is some anxiety that other evidence may arise, the practice is to enter a stay so that it can be recommenced in the event of further evidence. On the other hand, where on a review it's clear that the wrong person was charged and there is simply no evidence, it seems to me that it would be appropriate to offer no evidence adduce an acquittal.
>
> ...
>
> **Bruce MacFarlane:** I think I can only say that, that the overwhelming practice in the province of Manitoba is to stay and we wanted to be consistent with the normal practice. That's the Crown action and we wanted to take the action that was open to us to terminate the case in the way that we can terminate it.

I found these comments to be instructive in a number of respects.

They indicate that Crown policy with respect to invoking the stay of proceedings varies in different parts of Canada. Mr. MacFarlane explained that how the discretion is exercised depends largely on local practice. In Manitoba, the "overwhelming" practice is to rely upon the stay of proceedings and consistency is an important factor. However, he did recognize the importance of the negative public impression that could be left by a stay. He stated that where there is some "anxiety" that additional evidence might arise, a stay is appropriate, but where there is "simply no evidence" an acquittal should occur.

I believe the Ontario policy, expressed in the legal opinion of Tara Dier is the most preferable. It is that a stay of proceedings should not be entered unless there is a reasonable likelihood of additional, incriminating evidence coming to light. She used the phrase "no prospect whatsoever of recommencement" but I believe that must be qualified by her phrase, "some reasonable likelihood". This standard appears to have been accepted by the DPP, Tom Mills, in the Druken case, but it was not properly applied to the facts of this case.

The wide latitude for prosecutorial discretion in relation to stays and the absence of judicial accountability presents a variety of opportunities for abuse. In the previous chapter, I referred to the Crown's stay of proceedings on the assault charges against Gregory Parsons. The charge was laid with a great deal of publicity while he was awaiting his retrial on the murder charge. The assault charge proved to be totally without merit but the stay of proceedings denied him the opportunity to be exonerated publicly.

Another example is provided in the obstruction charges laid against Shirley Druken and John Ring. I have expressed the view that reasonable and probable grounds did not exist to charge them and that the Crown should have withdrawn the charges, *supra,* at pp. 266-7. Instead, the Crown sought to adjourn the preliminary inquiry on these charges until completion of the preliminary inquiry on Randy Druken's murder charge. When the request for a re-scheduling was denied, the stay was entered. A stay of proceedings should never be used by the Crown as a tactical response to a judicial ruling it does not like.

The *Criminal Code* grants the authority to enter a stay of proceedings to the Attorney General "or counsel instructed by him for that purpose". It is not necessary that the Attorney General provide specific instructions in each case. In most jurisdictions, authority is delegated to Crown counsel on a general basis but often with some further guidance or requirements.

The *Crown Policy* Manual for Newfoundland and Labrador contains "Topic No. 455" with the heading, "Withdrawal of Charges, Staying Charges". It provides that:

> It is the prerogative of the Crown Attorney to withdraw charges or to enter a stay of proceedings. There is a difference between the two options which should be considered when determining which option to utilize. If a major charge is involved then there must be consultation with the Senior Crown. Should the decision be to enter a stay of proceedings, then the police and victim should be advised of the nature of a stay of proceedings. The Crown Attorney should address with the police the possibility of the stay being lifted should circumstances or evidence change. In cases of personal violence, it is incumbent upon the Crown Attorney to discuss the withdrawal or staying of charges with the police and victim and to provide them with the reasons for our decision.
>
> If a new trial is ordered after an appeal and the Crown decides that it will not pursue the matter then a stay or a withdrawal should be entered. Such charges cannot simply be left outstanding without any action being taken.

The Senior Crown Attorney has responsibility for the supervision of all prosecutions within each of the four Regions referred to in the policy. This responsibility specifically includes:

- Approve and review all stays of proceedings to ensure that they are entered in appropriate cases.

- Ensure that reasons are recorded by the Crown Attorney whenever a case is withdrawn or a stay of proceedings entered.

No reference is made to the termination of proceedings by presenting no (further) evidence and requesting an acquittal.

In my view, there are a number of additional shortcomings to this policy. No guidance is provided to the Crown attorney as to when a withdrawal or a stay of proceedings may be appropriate. The documenting of reasons is referred to under the supervising responsibility of the Senior Crown Attorney but not in relation to the responsibilities of the Crown Attorney. The reasons are to be shared with the police and the victim but there is no reference to the accused or the public. The Crown Attorney is only required to consult with the Senior Crown Attorney when "a major charge is involved" yet the Senior Crown Attorney is required to approve all stays of proceedings.

I have already commented on the arbitrary manner in which the stay of proceedings has been utilized in both the Parsons and Druken cases. Clear guidelines are required to ensure that in future this broad prosecutorial discretion is exercised in a manner more consistent with the principle of the Rule of Law. The jurisdiction of Newfoundland and Labrador is not unique in this respect. I note that the Ontario Crown Policy Manual provides equally vague guidance, stating only:

> Crown counsel should ensure that the use of this discretionary power is consistent with the proper administration of justice.

It would be a useful contribution to the administration of justice in Canada if the Attorney General of Newfoundland and Labrador were to raise the need for greater clarity and consistency, in this respect, with his federal, provincial and the territorial counterparts.

Meanwhile, I recommend that the *Crown Policy Manual* of Newfoundland and Labrador be amended by replacing the subject: "Withdrawal of Charges, Staying Charges" with the following:

**Termination of Proceedings**

It is the prerogative of the Crown Attorney to withdraw charges, to enter a stay of proceedings or to call no (further) evidence and request an acquittal. This broad prosecutorial discretion is not ordinarily subject to judicial review, which imposes an event greater obligation on the Crown Attorney to ensure that it is exercised in a fair and principled manner. The following are guidelines to assist in achieving that goal:

1.(a) A **Withdrawal of the Charge** is appropriate where the Crown Attorney decides that;

(i) Reasonable and probable grounds did not exist to lay the charge;

(ii) There is no probability of a conviction; or,

(iii) It is not in the public interest to proceed with the charge.

(b) A **Stay of Proceedings** is appropriate where there is a reasonable likelihood of recommencement of the proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. It is not a basis to stay proceedings merely because a judge has made a ruling unfavourable to the Crown.

(c) It is appropriate for the Crown to commence the trial but to elect **To Call No Evidence**, and request an acquittal, where there is no probability of a conviction nor a reasonable likelihood of recommencement of the proceedings.

(d) Where the Crown has called evidence it is appropriate **To Call No Further Evidence**, and request an acquittal, where the Crown Attorney determines that the evidence is so manifestly unreliable that it would be dangerous to convict. This follows even though there may be some evidence on which the trial judge likely would deny a motion for a directed verdict.

2.(a) The Crown Attorney is encouraged to consult with the Senior Crown Attorney, when circumstances permit, in any case which raises a doubt about the proper course to follow.

(b) Such consultation is particularly desirable in relation to a major charge or where special circumstances exist. Such circumstances might include the prosecution of a public official such as a police officer.

(c) The Director of Public Prosecutions may issue further directions, from time to time, as to when such consultation is required.

3.(a) Wherever a Crown Attorney terminates a prosecution under this Policy, a written report shall be provided to the Senior Crown Attorney that summarizes the circumstances and reasons for the decision that was taken.

(b) Such reports shall be filed in the DPP's Office and made available to all Crown Attorneys to provide assistance in dealing with similar cases.

They are not binding but are merely to provide guidance. They may also form the basis for developing more specific policies in future.

4.(a) As a general practice, the basic reasons for exercising the discretion addressed in this policy, should be expressed in open court. Where a stay of proceedings is entered, the basic reasons should be provided to the accused, the police and the victim, in most cases.

(b) The public reasons provided for a stay of proceedings may be limited by the confidentiality of an ongoing investigation. Still, they should be articulated in the reasons provided to the Senior Crown Attorney.

**(e) Post-script:**

After this Report was completed, I learned that the *Crown Policy Manual* had been amended a few months earlier by adding a new "Topic 460" entitled "Stays/Withdrawals/Calling No Evidence". No attempt was made to integrate this with "Topic No. 455" entitled "Withdrawal of Charges, Stay of Charges" quoted *supra*, at p. 321, and there is considerable overlap. The new section still does not establish criteria for determining when and how proceedings should be terminated. Both the original policy and the recent addition should be replaced by the policy I recommended in the previous section.

The recently adopted policy refers to a "Commentary" which contains a discussion of stays of proceedings and raises some of the issues addressed in my recommendation. Such discussion papers cannot replace an integrated and coherent policy with clear criteria to guide in decision-making and render it more accountable. Indeed, the Preface to the *Crown Policy Manual* refers to "various other directives and memoranda" that outline administrative policies of the Public Prosecution Division, that "should be read in conjunction with this Manual".

This adoption of Topic No. 460, merely reinforces my earlier recommendation of the need for a comprehensive review and revision of the *Crown Policy Manual.*

**(f) Conclusion:**

The Report of the Second Investigation should have put an end to the prosecution of Randy Druken. The results should have been taken at face value, as they were by Assistant DPP, Bernard Coffey. A realistic assessment of the evidence, particularly with Mr. X out of the picture, should have led to the conclusion that there was no reasonable probability of a conviction and no reasonable prospect of the recommencement of proceedings. The Third Investigation appears to have been driven not by the police but by the DPP's Office and, in particular, Tom Mills, who played an increasing role, ultimately becoming the Director of Public Prosecutions and dealing directly with the police on this matter.

The *Crown Policy Manual* should be amended to provide clear guidance to Crown attorneys in determining when and how proceedings should be terminated. Specific criteria should be established.

## CHAPTER 5: SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations made throughout this Report. In addition, a number of potential recommendations were overtaken by initiatives taken as problems were identified during the hearings. In particular, the Royal Newfoundland Constabulary adopted a number of changes referred to in the Report, for which they are to be commended.

Some problems were identified in the investigation and prosecution of Randy Druken that were similar to those that arose in relation to Gregory Parsons. Where a recommendation was made in response to such a problem in the Parsons' chapter, it was not repeated in the Druken chapter.

The recommendations are presented under the headings of the chapters in which they were discussed. The page number related to each recommendation indicates where it appears in the text.

### Chapter Two: Ronald Dalton

1.(a) The Legal Aid Commission should establish an outreach program to assist prisoners in completing legal aid applications, particularly when they are incarcerated outside of Newfoundland and Labrador. (p. 45)

(b) A simple pamphlet should be made available to explain the legal aid program to laypersons. (p. 51)

2.(a) The Legal Aid Commission should monitor the progress of files and insist that legal services be provided in a timely fashion, particularly in criminal cases where the client is incarcerated. (p. 48)

(b) Whenever possible, communications from the Commission to counsel should be copied to the client. (p. 51)

(c) Directors and staff counsel should be conscious of perceiving injustice in the treatment of clients and proactively pursue resolution of any such injustice in an urgent and practical manner. (p. 51)

(d) The "claw-back" mechanism should only be invoked in extreme cases and upon a true exercise of discretion. (p. 47)

3.(a) The Government of Newfoundland and Labrador should commit sufficient resources to resolve the problem of transcript delay, and do so without withdrawing necessary resources from other components of the criminal justice system. (p. 64)

(b) Particularly where an appellant is incarcerated, transcription should commence almost immediately upon filing notice and continue on a dedicated basis until completion. (p. 64)

4.(a) Section 10(2) of the Rules of the Court of Appeal should be reconsidered with a view to authorizing the Court to intervene sooner than the existing time periods when a case obviously does not require that much time. (pp. 62-3)

(b) Consideration should be given to providing appellate counsel with electronic recording of trial proceedings and limiting transcription to selected, relevant portions as stated in the proposition of Wells, C.J. to the Bar. (p. 66)

(c) The Lieutenant Governor in Council should make a reference to the Court of Appeal under s. 13 of the *Judicature Act* to determine whether an electronic recording would satisfy the requirements of s. 682(2) of the *Criminal Code*. (p. 66)

**Chapter Three: Gregory Parsons**

5.(a) The Royal Newfoundland Constabulary should review the recommendations in the Morin Report regarding note-taking, interviewing and statement-taking with a view to incorporating such guidelines into its policies. (p. 109)

(b) In all major crime investigation, police station interviews should be videotaped and field interviews should be audiotaped. (p. 109)

6.(a) The RNC should establish a policy and protocol to assist officers in obtaining independent expertise. (p. 117)

(b) An expert should be available "on call" to assist in the interviewing of child witnesses. (p. 236)

7. The RNC Report submitted during the Systemic Phase should be made available in a public repository, such as selected public libraries in Newfoundland and Labrador, so that citizens may have access to this important information about their policing. (p. 131)

8. The excellent RNC Training Program with Memorial University should receive strong support and recruits should be encouraged to obtain the degree and diploma as well as the certificate of completion of training. (p. 132)

9.(a) The RNC should develop policing standards with respect to qualifications, initial and ongoing training and criminal investigation; (p. 132)

(b) The Government of Newfoundland and Labrador should adopt such standards by legislation. (p. 132)

10. Greater financial resources should be allocated to the development of the RNC through: acquiring and improving equipment; utilizing technology; arranging secondments for experience and training; increasing manpower; bringing salary scales into line with other comparable police forces. (p. 133)

11.(a) The Director of Public Prosecutions should establish a failsafe system to ensure the evidence in every major case is critically assessed by a Crown attorney, at the latest, upon completion of the preliminary inquiry. (p. 139)

(b) The *Crown Policy Manual* should clarify that it is an appropriate exercise of Crown discretion not to call evidence which is inherently unreliable and to invite the trier of fact not to rely upon such evidence. (pp. 140-1)

(c) The *Crown Policy Manual* should provide clear guidelines as to the appropriate limits of Crown advocacy. (pp. 154-5)

(d) The *Crown Policy Manual* should also provide clear guidelines for interviewing child witnesses. (p. 274)

(e) The DPP should encourage mentoring by senior and experienced Crown attorneys of their younger colleagues in relation to the critical analysis of evidence and the appropriate limits of Crown advocacy. (p. 155)

(f) The DPP should strive to establish and maintain a Crown culture that is sensitive to the opportunities to avoid injustice as well as to obtain convictions. (p. 155)

12. The DPP should establish a policy to allow adequate time for preparation and the assignment of junior counsel to assist senior counsel in long and complex trials. (p. 155)

13. The Government of Newfoundland and Labrador should provide adequate resources to pursue these initiatives, including a comprehensive review and revision of the *Crown Policy Manual*. (p. 170)

14. The Legal Aid Commission should adopt a policy of providing junior counsel to assist senior counsel in long and complex trials and the Government should provide adequate resources to support such a policy. (p. 162)

15.(a) When vacancies occur in the superior courts, the Chief Justices and the Minister of Justice should be vigilant in identifying the need for criminal law

experience and expertise and such needs should be drawn to the attention of the Federal Minister of Justice. (p. 164)

(b) Attention also should be drawn to the experience and expertise often available in the provincially appointed courts that do exclusively criminal work. (p. 164)

(c) Chief justices must be cautious in the assignment of judges to complex criminal trials. (p. 164)

16. The Minister of Justice should also pursue with his Federal and provincial counterparts, an amendment to the *Criminal Code* to permit jurors to be interviewed, subject to stringent conditions, by commissioners conducting inquiries into wrongful convictions. (p. 166)

17. The Minister of Justice should also pursue with his Federal and provincial counterparts, an amendment to the *Criminal Code* to raise the threshold criterion for directing a verdict of acquittal. (p. 169)

18.(a) The Minister of Justice should establish an independent review of the Office of the Director of Public Prosecutions, with a view to ensuring that steps have been taken or will be taken to eliminate the "Crown culture" that contributed to the wrongful conviction of Gregory Parsons, and was also evident in the prosecution of Randy Druken. (p. 170)

(b) Such a review should also identify ongoing needs such as adequate personnel (including administrative staff and articling students) continuing education for Crown attorneys, electronic access to statutes, legal precedents and other resources. (p. 170)

(c) The Government should allocate adequate resources to modernize the DPP's Office according to such identified needs. (p. 170)

19. A Criminal Justice Committee should be established with representatives of the Chief Justice, Minister of Justice, Defence Bar, DPP, Legal Aid Commission, RNC and RCMP, to identify problems, engage in dialogue and seek improvements to the administration of justice on an ongoing basis. (p. 171)

**Chapter Four: Randy Druken**

20. The following should be reflected in the policies, procedures and training programs of the RNC with respect to polygraph testing (p. 215):

(a) The polygraph is merely another investigative tool and is no substitute for a full and complete investigation.

(b) Caution must be exercised in placing reliance on polygraph results so that they do not misdirect an investigation.

(c) Polygraph testing must always be videotaped.

(d) Polygraph testing must not be conducted after an interview with an investigator.

(e) An investigator, who is also trained as a polygraph examiner, must not fulfill both roles in the same investigation.

21.(a) A task force should be established to assess current technological needs of the RNC, with reference to other Canadian police forces and to recommend both what is required and an implementation plan. (p. 218)

(b) Integrated and complementary modern systems should be adopted to replace current analog systems for electronic surveillance. (p. 218)

(c) Related needs should be addressed such as high-resolution digital camera equipment, adequate computer workstations and laptops and portable audio recording equipment. (p. 218)

22. The recommendations with respect to jailhouse informants, contained in the Sophonow Report (reproduced in Annex 14), should be incorporated into the *Crown Policy Manual* for Newfoundland and Labrador. (p. 271)

23. The *Crown Policy Manual* should be amended to replace current "Topics" 455 and 360 with the following (p. 324):

**Termination of Proceedings**

It is the prerogative of the Crown Attorney to withdraw charges, to enter a stay of proceedings or to call no (further) evidence and request an acquittal. This broad prosecutorial discretion is not ordinarily subject to judicial review, which imposes an event greater obligation on the Crown Attorney to ensure that it is exercised in a fair and principled manner. The following are guidelines to assist in achieving that goal:

1.(a) A **Withdrawal of the Charge** is appropriate where the Crown Attorney decides that;

(i) Reasonable and probable grounds did not exist to

lay the charge;

(ii) There is no probability of a conviction; or,

(iii) It is not in the public interest to proceed with the charge.

(b) A **Stay of Proceedings** is appropriate where there is a reasonable likelihood of recommencement of the proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. It is not a basis to stay proceedings merely because a judge has made a ruling unfavourable to the Crown.

(c) It is appropriate for the Crown to commence the trial but to elect **To Call No Evidence**, and request an acquittal, where there is no probability of a conviction nor a reasonable likelihood of recommencement of the proceedings.

(d) Where the Crown has called evidence it is appropriate **To Call No Further Evidence**, and request an acquittal, where the Crown Attorney determines that the evidence is so manifestly unreliable that it would be dangerous to convict. This follows even though there may be some evidence on which the trial judge likely would deny a motion for a directed verdict.

2.(a) The Crown Attorney is encouraged to consult with the Senior Crown Attorney, when circumstances permit, in any case which raises a doubt about the proper course to follow.

(b) Such consultation is particularly desirable in relation to a major charge or where special circumstances exist. Such circumstances might include the prosecution of a public official such as a police officer.

(c) The Director of Public Prosecutions may issue further directions, from time to time, as to when such consultation is required.

3.(a) Wherever a Crown Attorney terminates a prosecution under this Policy, a written report shall be provided to

the Senior Crown Attorney that summarizes the circumstances and reasons for the decision that was taken.

(b) Such reports shall be filed in the DPP's Office and made available to all Crown Attorneys to provide assistance in dealing with similar cases. They are not binding but are merely to provide guidance. They may also form the basis for developing more specific policies in future.

4.(a) As a general practice, the basic reasons for exercising the discretion addressed in this policy, should be expressed in open court. Where a stay of proceedings is entered, the basic reasons should be provided to the accused, the police and the victim, in most cases.

(b) The public reasons provided for a stay of proceedings may be limited by the confidentiality of an ongoing investigation. Still, they should be articulated in the reasons provided to the Senior Crown Attorney.