

**THE LAMER COMMISSION OF INQUIRY  
PERTAINING TO THE CASES OF:**

**RONALD DALTON  
GREGORY PARSONS  
RANDY DRUKEN**

**REPORT AND ANNEXES**

**The Right Honourable Antonio Lamer,  
P.C., C.C., C.D., L.L.D., D.U.**

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## ACKNOWLEDGEMENTS

Holding these three inquiries plus making, as stated in the Terms of Reference "such recommendations as he considers advisable relating to the current administration of criminal justice in the province of Newfoundland and Labrador" would have been beyond my humble capacities were it not for the exceptional dedication and complete devotion of a wonderful, intelligent and very hard working Staff. I would be remiss in my duties if I did not, at the outset, make known to the people of Newfoundland and Labrador the identity of these people and the important role they played in carrying me through this task:

- George White, Chief Executive Officer, was in charge of the financial and administrative management of the Commission Office.
- Ronotta Thomas, Archivist, was responsible for the research and implementation of the electronic filing database as well as supervising the collection, organization, conversion and maintenance of Commission files both physically and electronically.
- Colleen Power, Commission Secretary and Administrative Officer, was responsible for secretarial and administrative support to the Commission Staff and was responsible for the logging and recording of Commission hearings.
- Lynne Comeau, Assistant Archivist and Records Manager, assisted in the collection and organization of the Commission files originating from outside sources, assisted in the conversion of hard copy files to electronic form and was responsible for the maintenance of the file database and system.
- Madonna Maidment, Researcher, was responsible for research of issues arising in the Systemic Phase.
- Bernadine Burke, Clerk Typist III, assisted the Archivist in the management of documents.
- Tony Fitzgerald, Computer Support Specialist, was responsible for providing support and co-ordination of information technology within the Commission Office and was responsible for audiovisual technology in the Hearing Room.
- Juan Burton, Computer Support Specialist, was responsible for providing support and co-ordination of information technology within the Commission Office and was responsible for audio visual technology in the Hearing Room.
- Patricia Jackson, Media Relations Liason, was responsible for being the liason between the media and Commission staff.
- The High Sheriff's Office was responsible for the security at the Commission Office and at the Hearings.

As was attested to by many members of the Bar and reported to me by all three of my counsel, three staff members in particular: Colleen Power, Lynne Comeau and Ronotta Thomas, worked very long hours, often well into the night and many weekends and holidays assisting my legal counsel, Nick Avis, Q.C., (Senior Counsel Hearings) and Rosellen Sullivan (Junior Counsel Hearings), prepare for the hearings. This involved amongst other things, sifting through thousands of pages of documents, analysing them, and, under my direction, selecting those that we find in the dozens of binders prepared for me, the lawyers of those who had standing, and the members of the press. These three staff members, along with George White, assisted as well in the compilation of the Court of Appeal statistics, which was a time consuming arduous task. Colleen Power and Lynne Comeau also "listened to" and compiled notes on all of the interceptions in the Druken case, in addition to transcribing many of them. Needless to say, this was a daunting task.

I must mention the frequent and helpful cooperation of Mr. Don Burrage, of the Department of Justice, who saw to it that the Commission received all the support it required from the government. The High Sheriff and his staff saw that hearings that were expected to be difficult went smoothly.

I must also mention the Journalists. They fulfilled their duties in a most professional manner and always respected the agreements we had come to as regards their presence in the Hearing Room and the treatment of people with dignity while fulfilling their responsibility to the public. On the basis of my previous dealings with "the Press", they have matched the highest standards I have experienced.

Needless to say, I appreciated very much the assistance and advice of my legal counsel, Nick Avis, Q.C. (Senior Counsel Hearings) and Rosellen Sullivan (Junior Counsel Hearings), who provided great service in organizing the evidence and hearings so that they flowed smoothly and efficiently. They too worked very long hours, often well into the night and most weekends and holidays. Professor Ed Ratushny, Q.C. (Senior Counsel Advisory) provided wise counsel and guidance. He also assisted in the preparation of this Report. I selected him for his intellectual honesty and sense of fairness. He is an outstanding lawyer and a good friend.

I am grateful for the support of my Ottawa law firm, Stikeman Elliott, which recognized the importance of this Commission from the outset. Our Managing Partner, Stuart McCormack, regularly offered and provided any assistance I might require. David Brown was instrumental in making the arrangements for the video hearings. My Executive Assistant, Jackie Chartrand was industrious, efficient and enthusiastic in taking on any task, no matter how great or small.

I cannot close these acknowledgements without mentioning the attachment I reinforced with the people of Newfoundland and Labrador, and the staff of the

Fairmont Hotel who made my stays away from my wife somewhat less unpleasant. Indeed my wife, Danièle, and I were often separated from each other because of her travels throughout Canada as a Federal Court Judge. She graciously accepted the additional absences due to the many weeks I had to be away for sittings in St. John's.

## CHAPTER 1: GENERAL INTRODUCTION

### 1. Background and Terms of Reference:

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

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

## PROCLAMATION

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

EDWARD ROBERTS  
Lieutenant Governor

KELVIN L. PARSONS  
Minister of Justice

TO ALL TO WHOM THESE PRESENTS SHALL COME,  
GREETING;

## A PROCLAMATION

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

Where the Lieutenant Governor in Council considers it expedient to make an enquiry into a matter connected with ...the administration of justice, ... or into other matters which he or she considers to be for the public good, the Lieutenant Governor in council may by commission under the Great Seal appoint the person or persons, called the commissioner or commissioners, that he or she may select to hold an enquiry.

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

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

Gregory Parsons

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



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

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

Randy Druken

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

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

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

Ronald Dalton

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

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

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

- (e) following a retrial before judge and jury, on 24 June 2000 Ronald Dalton was acquitted of the murder of Brenda Dalton; and
- (f) on 30 November 2001 Ronald Dalton commenced civil proceedings against Dr. Charles Hutton, alleging that Dr. Hutton was negligent in his opinion that Brenda Dalton had died of strangulation. Government is joined as Dr. Hutton's employer.

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

AND BE IT ORDERED that the Commissioner:

- (a) inquire into the conduct of the investigation into the death of Catherine Carroll, and the circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons for the murder of Catherine Carroll;
- (b) inquire into the conduct of the investigation in the death of Brenda Young, and the circumstances surrounding the resulting criminal proceedings commenced against Randy Druken for the murder of Brenda Young;
- (c) advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation from Government and if so, the appropriate amount of such compensation;
- (d) inquire into why Ronald Dalton's Appeal of his murder conviction in the death of Brenda Dalton took eight years before it was brought on for a hearing in the Newfoundland and Labrador Court of Appeal; and
- (e) advise on whether Ronald Dalton should receive financial compensation from Government for the eight years in which he awaited the perfection of his Appeal, and if so, the appropriate amount of such compensation.

AND IT IS FURTHER ORDERED THAT the Commissioner has the power to summon witnesses, and to require the witnesses to give evidence orally or in writing upon oath or affirmation, and to produce the documents and things that may be considered necessary to the full investigation of the matters referred to in the commission and have all the powers of an "investigating body" under the *Public Investigations Evidence Act*.

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

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

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

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

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

AND FURTHER THAT the Lieutenant Governor in Council may engage the services of the counsel, accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants that may be considered necessary to help the Commissioner in the inquiry.

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

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

BY COMMAND,

ROBERT F. SMART  
Deputy Registrar General

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

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

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

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

## **2. Nature of a Commission:**

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

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

powers between the federal and provincial levels of government in relation to the criminal law power and the administration of justice, respectively, but also as between the government and the judiciary.

The constitutional foundation for a public inquiry of this nature is section 92 (14) of the *Constitution Act, 1867*, which assigns responsibility for the administration of justice, including criminal justice, to the provinces. The Government of Newfoundland and Labrador considered issues arising from the murder convictions of Gregory Parsons, Randy Druken and Ronald Dalton to be of sufficient public importance to warrant establishing this Inquiry. Item 5 of the Terms of Reference provides that I am to perform my duties:

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

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

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

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

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

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

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

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

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

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

### 3. Video:

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

### 4. Chronology of Hearings and Standings:

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

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

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

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

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

**Those granted standing in relation to the delay in Dalton:**

Ronald Dalton represented by Robert Simmonds, Q.C.

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

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



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

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

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

Gregory Parsons represented by Jerome Kennedy, Q.C.

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

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

The Royal Newfoundland Constabulary represented by Paul Noble.

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

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

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

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

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

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

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

Randy Druken represented by William Collins, Q.C.

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

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

The Royal Newfoundland Constabulary represented by Paul Noble.

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

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

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

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

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

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

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

**Those granted standing at the Systemic Phase of the Hearings:**

Ronald Dalton represented by Robert Simmonds, Q.C.

Gregory Parsons represented by Jerome Kennedy, Q.C.

Randy Druken represented by William Collins, Q.C.

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

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

The Royal Newfoundland Constabulary represented by Paul Noble.

The Royal Newfoundland Constabulary Association represented by Brian Casey.

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

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

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

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

The Federal Department of Justice represented by Jake Harms.

AIDWYC represented by James Lockyer and Melvyn Green.

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

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

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

**Those permitted to make submissions in Druken:**

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

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

**5. Role of Counsel:**

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

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

## 6. The Systemic Phase:

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

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

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

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

## 7. This Report:

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

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

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

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

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

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

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

## CHAPTER 2: RONALD DALTON

### 1. Introduction:

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

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

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

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

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

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

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

### 2. Chronology of Events:

#### (a) Introduction:

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

#### (b) Initial Representation:

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

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

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

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

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

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

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

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

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

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

**(c) Unrepresented Period:**

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

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

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



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

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

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

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

**(d) Secondary Representation:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(e) Tertiary Representation:**

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **3. Analysis:**

#### **(a) Defence Counsel:**

##### **(i) David Eaton:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In my view:

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

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

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

(ii) **David Day:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Sandra Burke:

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Jerome Kennedy:

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

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

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

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

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

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

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

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

Mr. Day responded on April 21<sup>st</sup> expressing general agreement and support.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

(b) The Legal Aid Commission:

(i) General:

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

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

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

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

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

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

(ii) **Eaton Legal Aid:**

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

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

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

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

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

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

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

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

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

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

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

Applicants who have paid funds to a private lawyer prior to applying for legal aid are to be referred to the Legal Aid Taxing Officer (Provincial Director/Senior Staff Solicitor) in deciding the contribution required, if any.

The Taxing Officer shall consider the amount paid, the hours billed and the rates charged by the private lawyer. In establishing the reasonableness of the number of hours billed reference may be made to the Legal Aid Tariff and to staff lawyers experiences in similar cases. The Taxing Officer may also consider the going rate for private lawyers for the type of work billed considering the lawyer's experience and the complexity of the matter.

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

**(iii) Unrepresented Period:**

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

The Provincial Director responded by telling him that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(iv) Day Legal Aid:**

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

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

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

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

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

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

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

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

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

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

**(v) Kennedy Legal Aid:**

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



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

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

**(vi) Conclusion:**

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

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

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

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

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

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

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

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

When counsel on behalf of the defence or if unrepresented, the accused, has not filed its factum in accordance with the time period prescribed by the Rules, counsel on behalf of the Attorney General shall write to the other party inquiring whether it intends to file a factum.

If a period of 30 days passes with no response or if a response is received which indicates that a period greater than 30 days is required to file its factum then counsel on behalf of the Attorney General shall, in the absence of the other party requesting an extension by the Court; apply to the Court pursuant to s. 10(2) of the Rules for a remedy.

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

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

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

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

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

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

**(d) The Minister of Justice:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(e) The Law Society:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(f) The Court of Appeal:**

**(i) Madonna Morris:**

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



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

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

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

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

Obviously, this sentence was directed by the Chief Justice.

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

**(ii) The Court:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **(iii) Historical Context:**

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

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

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

**(iv) The Current Rule:**

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

10(2) Where a party to an appeal or counsel fails to perfect the appeal within a period of 6 months after the filing of the transcript or, where no transcript is filed, within a period of 12 months after the filing of the notice of appeal, or a party or their counsel otherwise fails to comply with these Rules, the Court, on application of any other party to the appeal or of its own motion, on giving to the parties such notice, if any, as the Registrar is able to effect, or without notice if reasonable notice cannot be effected, may:

- (a) strike out the appeal;
- (b) direct the appellant to perfect the appeal within a specified time;
- (c) fix a date for hearing of the appeal; or
- (d) make any other order as may be just.

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

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

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

(v) Transcripts:

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

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

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

Ordering a transcript for one appellant to be expedited has the effect of introducing a concomitant delay for all other transcripts that were on the list in priority to the one ordered expedited, criminal as well as civil.

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

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

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

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

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

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

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

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

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

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

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

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

I suggested to both groups that, for both civil and criminal appeals, we were prepared to consider requiring only that the trial court involved provide a disc or tape to counsel for the appellants and counsel for the respondents. The appellant would then arrange for transcription of only that portion of the record which the appellant considered necessary for determination of the issues in the appeal. The respondent would, of course, be entitled to arrange for transcription and filing of any additional portions that the respondent felt were necessary but had not been provided by the appellant.

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

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

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

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

However, I recommend that the Lieutenant Governor in Council make a reference under S. 13 of the *Judicature Act* to the Court of Appeal of Newfoundland and Labrador asking the Court's opinion as to whether a disc or tape would satisfy the requirements of S. 682(2) of the *Criminal Code* which requires that "a copy or transcript of... the evidence taken at the trial... shall be furnished to the Court of Appeal, except insofar as it is dispensed with by order of a judge of that Court."

#### 4. Conclusion:

##### (i) The System:

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

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

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



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

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

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

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

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

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

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

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

Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things... And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment they only see their own workshop.

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

**(ii) Ronald Dalton:**

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

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

Counsel for the Attorney General elaborated:

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

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

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

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

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

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

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

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

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

## CHAPTER 3: GREGORY PARSONS

### 1. Introduction:

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

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

In addition, Term 4 authorizes me to make:

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

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

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

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

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

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

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

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

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

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

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

Commissioner Kaufman described tunnel vision as:

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

Commissioner Cory elaborated:

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

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

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

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

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

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

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

## **2. Chronology of Events:**

### **(a) Background:**

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

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

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

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

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

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

Gregory Parsons' testimony provided insights into her behaviour:

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

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

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

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

He explained that she always welcomed his friends:

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

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

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

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



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

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

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

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

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

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

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

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

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

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

**(b) The Murder Investigation:**

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

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

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

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

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

He took her to the hospital to have it examined.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) **Judicial Interim Release:**

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

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

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

(ii) **Disclosure:**

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

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



(iii) **Conflict of Interest:**

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

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

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

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

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

The Court criticized the entire basis for the motion:

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

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

Ultimately, Jacob Parsons was never called as a witness.

(iv) Preliminary Inquiry:

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

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

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

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

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

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

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

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

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

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

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

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

**(v) The Trial:**

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

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

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

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

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

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

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

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

She was, therefore, at least capable of deceit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(vi) The Court of Appeal:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The conviction was quashed and a new trial ordered.

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

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

**(d) Awaiting A New Trial:**

**(i) Fulfilling Release Conditions:**

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

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



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

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

**(ii) The Assault Charge:**

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

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

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

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

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

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

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

### **(iii) Drug Charges:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(iv) Acquittal:**

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

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

**(e) The Second Investigation:**

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

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

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

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

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

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

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

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

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

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

**(f) Gregory Parsons:**

**(i) Personal Consequences:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He said of Harold Doyle's daughter:

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

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

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

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

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

**(ii) Catherine Carroll:**

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

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

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

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

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

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

He added that:

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

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

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

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

### **(iii) Compensation:**

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



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

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

The compensation of Gregory Parsons does not fall within my Terms of Reference and, therefore, I will not report on that issue. However, evidence did emerge during the Parsons' phase of this Inquiry touching on the circumstances of his compensation.

The evidence revealed that at the time he accepted a settlement, he was in such dire need that he probably instructed counsel (possibly against counsel's advice, a matter I am not privy to) to accept a compensation that may not have been adequate.

Since that matter falls outside of my Terms of Reference, I draw it to your attention in the event you may wish to revisit Mr. Parsons' compensation in order to correct a possible injustice, even though a final settlement may have been agreed upon.

Of course, I am not writing to you in my capacity as a Commissioner but simply to convey significant information, which has come to my attention.

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

**(iv) Conclusion:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **3. The Police Investigation: Analysis:**

#### **(a) Background:**

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

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

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

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

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

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

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

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

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

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

**(b) The Plan:**

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

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

The investigative team consisted of the following:

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

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

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

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

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

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

(c) **The Investigation:**

(i) **General:**

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

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

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

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

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

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

(ii) **The Murder Scene:**

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

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

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

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

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

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

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

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

**(iii) The Basement Window:**

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

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



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

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

There were many problems with the examination of this window:

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

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

(iv) **Interviewing Witnesses:**

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

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

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

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

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

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

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

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

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

**(v) Consequences:**

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

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

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

**(d) Tunnel Vision:**

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

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

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

**(i) Hearsay Statements of the Victim:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

...a tremendous amount of intensity and rage...One would have to hypothesize that there was a great deal of anger and hostility and perhaps panic...

It was this last description which became the preoccupation of the investigators since it fit their theory of the crime. The subsequent examination of Gregory Parsons by Dr. Ladha revealed no condition that would fit the expected profile.

Dr. Ladha was never consulted regarding Catherine Carroll. Her psychiatrist, Dr. Kashyap, was interviewed but the entire focus was on her alleged fear of Gregory Parsons, his violence, and her fear the he was going to hurt or kill her. When Dr. Kashyap disappeared, no attempt was made to engage another person with the appropriate expertise to conduct a thorough review of Catherine Carroll's condition and its likely effect on her conduct.

Indeed, the manner in which experts were consulted in relation to both the Parsons and Druken investigations lacked rigour. For example, no notes were made of the discussion with Dr. Ladha. No discrete material was presented for his review. No specific opinion was requested of him. Nor was any report requested.

The documentation presented by the RNC at the Systemic Phase, in relation to Major Case Management at the current time, is impressive. It contains the following component related to expert evidence which might be sought outside the force:

... all external professionals consulted should be provided with a written request outlining the scope of the requested involvement, including a notation that a written response is required. These recommendations will form part of a new policy on consultation with external professionals.

Such evidence can make an important contribution to investigations but requires attention to considerations such as: Identifying the need; Identifying the appropriate expertise required (and an expert); Defining the information to form the basis for the opinion; Properly framing the request. I recommend that the RNC establish a policy, and possibly a protocol, for assisting officers in acquiring outside expertise.

Throughout the investigation and the prosecution the police and Crown counsel made numerous inferences that affected their assessment of Catherine Carroll's reliability and credibility. Other inferences also affected their view of Gregory Parsons' guilt.

These inferences included the following: Catherine Carroll's substance abuse problems were in the past; she was not taking any or all the drugs or at least not to excess; a mother would not say such things about her son unless they were true; Gregory Parsons' demeanour was evidence of guilt; and Catherine Carroll's concern over the locks and the keys was due to her fear of him.

Senior Commission Counsel (Hearings) requested to call two experts to demonstrate the kind of insights they could contribute in relation to family dynamics and drugs and behaviour. There was considerable resistance from some of the parties and, I may say, I was also quite sceptical about the utility of such evidence. However, I ultimately agreed to hear these experts and do appreciate how such expertise might have been of some assistance in an investigation such as this by questioning the kinds of assumptions that are a part of tunnel vision.

Dr. Denis Kimberley is a social worker who studied, taught, lectured, wrote articles and contributed to text books, and had a clinical practice, all related to his areas of expertise. He was qualified by me to give opinion evidence in the areas of alcohol and addictions, mental health and addictions, child maltreatment, family dynamics and trauma.

Mr. Stephen Pinsent was a psychologist, with a master's degree, who had been a guidance counsellor, and educational therapist, and in practice for over 20 years. He had extensive training and experience with family counselling and dysfunctional family dynamics, which would include some knowledge of alcohol and addictions. He had testified many times and at all

court levels in Newfoundland and Labrador. He was qualified by me in the areas of alcohol and drug addiction, mental health and addiction, child maltreatment, obsessive-compulsive disorder, memory and trauma, and general psychology.

Dr. Kimberley and Mr. Pinsent were two of the few independent objective witnesses called at the Inquiry. They were engaged independently. Without seeing each other's reports they came to most of the same conclusions and there were no significant differences in their opinions. Neither of them was challenged in cross-examination by counsel nor were their conclusions weakened.

Their evidence was to the effect that based on their review of the statements, Catherine Carroll's background, her mental health and addiction issues, and the complex family dynamic involved, that **they would be very concerned about the reliability and credibility of Catherine Carroll's hearsay statements.**

Dr. Kimberley felt that further investigation was warranted. He would like to have known more about the circumstances of the mother-son relationship at the time the statements were made, details of the drugs actually taken, and a more elaborate history of the relationship derived from interviews with Gregory Parsons and other family members.

At the outset of this section, reference was made to the opinion of Dr. Kashyap with respect to Catherine Carroll's manipulative, deceitful and histrionic personality as well as her alcohol and drug problems. The police and Crown comfortably ignored this diagnosis on the assumption that since it was made six years prior to the murder, it was no longer relevant.

Dr. Kimberley and Mr. Pinsent's evidence was that when a person gives up drinking their personality and behaviour may not change and often does not, especially without treatment. Moreover, in Catherine Carroll's case she simply changed addictions and **they felt that what Dr. Kashyap said in 1984 would have been true in 1990.**

The quantity of the pills Catherine Carroll hoarded was so extraordinary that it demanded an explanation beyond the simplistic inference that she was not consuming them. Dr. Kimberley's evidence about the significance of whether or not she took the drugs was very important. He testified that it was not especially relevant whether she was taking them as prescribed, not taking them as prescribed, or not taking them at all. Each scenario would present its own difficulties with someone who had a mental illness and/or an addiction problem. His opinion on her credibility and

reliability did not depend on the quantity she did or did not take. He did however suggest that she probably did take some, would take some then stop taking them, and would go on binges from time to time.

Common sense may tell us that a mother would not tell people her son assaulted her and threatened to kill her, unless it was true. The difficulty is that our "common sense" is informed by our personal experiences which seldom include people with the personal difficulties and complexities of Catherine Carroll. Very few people other than professionals such as Dr. Kimberley and Mr. Pinsent are likely to have encountered a person with Catherine Carroll's tortuous life history and related demons. Dr. Kimberley and Mr. Pinsent did not see any of her behaviour, what she said or the possibility that it was untrue, as that unusual in view of her mental health. This information alone would have been useful for the police and Crown to know.

**(ii) Interviewing Key Witnesses:**

Gregory Parsons could verify his presence with others on New Year's Eve and until 4:00 a.m. the following morning. At that time, he was dropped off at his apartment by his then girlfriend's father, Harold Doyle. When he was alone, he put his dog out then went to bed, rising early that afternoon.

The police, therefore, sought to establish that the murder was committed at approximately 5:00 a.m. and that Gregory Parsons was not at his apartment at that time. The evidence of the time of the murder came from a neighbour, Tina Chafe, who claimed she heard a noise in Ms. Carroll's home at that time. The evidence he was not at his apartment derived from his light being on. When he was away from his apartment, he would leave his light on to comfort his dog. When he returned at night, he would turn the light off. Therefore, if the light was on, he was not home.

In his testimony before me, Mr. Parsons made it clear that, shortly after 4:00 a.m. that morning, he was in bed and the light was out. Information obtained years later from Brian Doyle also establishes that the murder occurred after midnight but much earlier than 5:00 a.m.

The interviews with Rose Marshall in relation to the light being on or off were conducted by the team of Staff Sergeant Eli Hewitt (now retired) and Constable Jason Sheppard (now Acting Sergeant). Staff Sergeant Hewitt was an experienced officer at the time, who took no notes and who had no recollection of any of the events, when testifying before me.

Rose Marshall lived in the same house as Gregory Parsons and, over the holidays, had Keith Kenney staying with her. They arrived home at approximately 5:00 a.m. on New Year's Day. Mr. Kenney had very little to drink earlier, while Ms. Marshall was frank in testifying that she was "drunk". They were both interviewed on January 3<sup>rd</sup>, and asked whether Gregory Parsons was at home when they arrived.

Rose Marshall responded: "I don't know. I guess so, his light was off". However, Keith Kenney said the light was on, which would mean Gregory Parsons was not at home at the time. On January 8<sup>th</sup>, Mr. Kenney attended at the police station for a second interview, in which he again stated the light was on. He embellished his earlier statement by adding:

The dog was in the bedroom whining. When Greg is home the dog settles down and is quiet...

He added:

The dog was whining and I think restless.

The 45-minute statement was recorded in approximately 1-½ pages.

Earlier the same day, Rose Marshall was contacted at the Burger King where she worked, was picked up by Staff Sergeant Hewitt and Constable Sheppard and escorted to the police station. She was questioned from 12:30 p.m. to 2:40 p.m. In the 7 ½ pages typewritten statement, she qualified her earlier statement by saying:

I think the light was on but I'm [not] sure.

When she testified at the trial, she expressed resentment at being "pressured" by the police and by being asked the same questions over and over. She said:

When I was first questioned that was my clearest memory right there.

She felt pressured by Staff Sergeant Hewitt and Constable Sheppard to change her recollection. I believe her feelings were justified. It is apparent that these officers were using heavy-handed tactics to influence a witness to provide evidence more favourable to the police theory.

Anne Marie Johnson is Rose Marshall's sister and lived in an adjoining house at the time. She was also interviewed by Staff Sergeant Hewitt and Constable Sheppard, on January 6<sup>th</sup>. No statement was taken from her but Constable Sheppard's report of the interview states:

...she never noticed if any lights were on...

Ms. Johnson was not called as a witness at the preliminary inquiry. Based on Constable Sheppard's notes, that appeared reasonable since it did not seem she would be able to cast any "light" on this issue. However, after learning what her sister had experienced, she agreed to be interviewed by Mr. Parsons' counsel. This was some 1 ½ years after the murder, following the preliminary inquiry.

Anne Marie Johnson was adamant that when she returned home at 5:00 a.m., she looked to the upstairs of her sister's home and it was "black". There was no light on. When Constable Sheppard's note was put to her, she had no explanation. The rest of the report appeared to be accurate but the comment that she did not notice whether the lights were on was incongruous. Nor did she hear the dog "whining". She had very little to drink that night because she knew she would have to care for her young children when she returned home. Her last drink was around midnight; some five hours earlier.

In the course of preparation for the hearings before me, my staff discovered Constable Sheppard's original handwritten notes of the interview with Anne Marie Johnson. They state, unequivocally: "no lights on 5:00 a.m." Constable Sheppard testified that this really meant that she never noticed whether the lights were on. I have three problems with his interpretation: That is not what the words say; That is not what she so forcefully testified to at the trial; Her testimony was accurate because we know from Gregory Parsons that the light was off.

Staff Sergeant Hewitt took no notes. Constable Sheppard's report of the interview is contradicted by his original handwritten notes. Once again, the absence of rigorous investigative techniques, in this case note-taking, can lead to the mishandling of important evidence.

Tina Chafe was the witness who claimed to hear noises near 5:00 a.m., suggesting that was the time of the murder or, at least, Catherine Carroll was still alive at the time. The documentation of her interviews was confused. Her testimony at trial was much different from the statements she gave to the police. Senior Commission Counsel (Hearings) described the transformation as follows:

A casual observation of something that was not that unusual and took a matter of moments, becomes much more than it was. The length of time it took goes from seconds to minutes. What was not that unusual becomes "really strange." Initially she did nothing other than listen. At trial she has a glass against the wall and tries to wake

up her boyfriend. Her description of the sound is different.

She indicated that she heard a sound like furniture moving on the stairs. In view of her initial statement that there was nothing unusual about Catherine Carroll being up all hours of the night, it is likely she simply confused the dates. That conclusion is reinforced by the actual time of the murder established by Brian Doyle.

Tina Chafe's evidence is an example of why it is important to take signed statements from all persons interviewed. Her first statement was critical. She appears to be a witness who wanted to please or was interested in being the focus of some attention. She certainly was not subjected to the "probing interviews" and "detailed documentation" mandated in the operational plan originally established by Lieutenant Power.

Staff Sergeant Hewitt and Constable Sheppard were also assigned to interview Isabel Crane. They did so on January 5<sup>th</sup>, when her son, John Crane, was present but "had nothing to offer" according to Constable Sheppard's notes. The next day she was re-interviewed with respect to the alleged threats related to her by Catherine Carroll as being triggered by Gregory Parsons seeing his father in a Mall on New Year's Eve. Ms. Crane could not remember and no statement was taken.

On January 9<sup>th</sup>, she was again interviewed and her attention was again focused on the telephone conversation she had with Catherine Carroll on New Year's Eve. The one-page statement includes the following:

- Q. Is this conversation with Cathy the same time she told you that Greg had said he seen his dad at the Mall and that he would get her?
- A. Yeah, yeah.
- Q. What did Cathy Carroll say that Greg told her?
- A. He said, he seen his father and his wife at the Mall and I'm going to get you and get you real good this time.
- Q. What time did you receive this phone call from Cathy on New Year's Eve?
- A. It was around 5:00 - 6:00 o'clock. It was before she called me when the guns were going off.

These leading questions obviously were meant to confirm the threat and the timing of the evening before the murder. On January 21<sup>st</sup>, her son, John Crane, was interviewed to establish that he had answered the telephone call in question on New Year's Eve.



The interviewing of Isabel Crane has some similarities to the interviewing of Rose Marshall. The police simply kept going back to potential witnesses to obtain evidence that supported their theory.

There is another concern with respect to the statements of Isabel Crane. Both the 3 ½ page first statement and the one-page second statement have starting times but not ending times. Her inability to recollect on the second attempt and leading questions on the third raise concerns about her reliability. The judge who heard her testimony at the preliminary inquiry expressed concerns about her ability to perceive or recollect accurately, *supra*, at p. 85.

At the trial, she was examined in her hospital room and much of her testimony was read to her simply for her confirmation. The questionable foundation of her evidence at the investigation stage ultimately found expression in her trial testimony in spite of all of its frailties.

**(iii) Aggrandizing Worthless and Trivial Evidence:**

A common feature of tunnel vision is to treat innocuous evidence as incriminating and to exaggerate the significance of marginally suspicious evidence. Reference was made earlier to the significance given to Gregory Parsons' comment that the autopsy would show it was not murder and the "finality" of his mother ending their last conversation with "Goodbye", *supra*, at p. 79. A few more examples (but not all of those available) are provided here to emphasize how unreasonable they are when assessed objectively.

Much was made of Mr. Parsons' "suspicious" demeanour during the period after he found his mother's mutilated body. His alleged lack of emotional response was treated as circumstantial evidence of his guilt. At the same time, his 911-telephone call, which was highly emotional and suggestive of panic was interpreted as an attempt to set up an alibi. The record of the call indicates he said:

My mother she's dead...Come to 16 James Place, I was trying to get in touch with my mother for two days. She's up on the bathroom floor, oh my God.

The logic appeared to be that the reference to trying to get in touch with her for two days was gratuitous. It was unnecessary to mention this when calling for help. Therefore, it must have been included deliberately to reinforce his (presumed false) version of events after the murder.

In fact the 911 call was evidence of a strong emotional response. The actual evidence demonstrated that he reacted in a variety of ways, at times emotional and at times subdued, as though in a state of shock.

Constable Roger Kennedy (now retired at rank of Sergeant) was one of the first police officers to attend at the scene of the murder. He testified before me that Mr. Parsons was "visibly upset" when he spoke briefly with him, emotional at times then quiet, with his head down. In his testimony at the trial, Constable Kennedy said:

He seemed as if there was no expression on his face when he did look up on this one or two occasions on his face. Someone that was a little upset, it appeared he was upset over something at that point.

It probably had something to do with just having discovered his dead mother lying on the bathroom floor, with 53 knife wounds on her body and covered in blood.

When Mr. Parsons used the telephone to contact his relatives and inform them of the death, he appeared "normal" to Constable Kennedy:

Like there was no indication of emotion at that time as of crying or, he spoke clearly as it would seem over the phone.

The officer had attended the scenes of many sudden deaths, including some as horrific as this one. On cross-examination he said:

...different persons react differently in conditions like this and over the course of my several years operating the van I had done several and some persons are just not talkative or empty looks...

In my view, this observation, informed by his practical experience is accurate and is also informed by common sense. Different people react in different ways.

Indeed, the same person may react in different ways. A priest who attended at the scene, but did not know Gregory Parsons, described him as "emotionless". Tina Doyle testified that when he first came out of the house after he discovered his mother, he was white, shaken and screaming. A number of police officers added that he was not crying or emotional. In other words, a variety of reactions or "demeanours" were observed by various people at various times.

However, even if they had all agreed that no emotion was demonstrated, this is not relevant to whether or not he was profoundly shaken by his mother's death, let alone that he had killed her. We know that people react differently. We also know that reactions are sometimes immediate and sometimes constrained, only to erupt much later. To interpret meaningless "demeanour" as proof of guilt is, rather, proof of tunnel vision.

There was evidence from independent witnesses that Gregory Parsons had been in a fight on Christmas Day with Paul Marshall and gave him a bloody nose. The blood on Mr. Parsons' sock and shoes could only be identified as being human and could not be matched to Catherine Carroll. Mr. Marshall's blood was not tested and compared to the spots on the sock and shoes. Despite the absence of any evidentiary basis, the blood was assumed throughout to be that of Catherine Carroll. A very obvious explanation corroborated by several witnesses, was simply ignored.

The fight occurred because Mr. Marshall insulted Mr. Parsons' fiancée. The evidence indicates that Mr. Marshall was more than willing to fight. The police theory was that the attack on Catherine Carroll was the result of extreme anger and the police were constantly searching for evidence that Mr. Parsons exhibited such anger. The view that this assault was an example of such anger is not borne out by the facts. This was a typical teenage fight but was seen to be much more than it was.

Other "junk" evidence relied upon was related to the installation of new locks and the possession of keys by Gregory Parsons. It merely contributed to the raising of additional "suspicion" with very little coherent probative foundation in the context of inherent contradictions and alternative explanations.

**(iv) Contradictory Evidence Ignored:**

There was no evidence that the shoes had been cleaned. Having regard to the amount of blood on the bathroom floor, it is reasonable to assume that Mr. Parsons' shoes would have been covered in blood, especially the soles. This was ignored. There was no blood found outside the bathroom on the carpet or anywhere else on the floor. This was never explained at the time.

The police, essentially Sergeant Singleton, theorized that Gregory Parsons had taken a knife from his house when he left to kill his mother. The police were instructed to search the residences of Gregory Parsons and Tina Doyle for serrated edge knives. Sergeant Singleton testified before me that he

felt Mr. Parsons would want to be armed on entry into the home. This would also enhance the "planned and deliberate" nature of the attack.

Constable Piercey testified that during his search of Catherine Carroll's residence there was a single serrated edge knife missing from a set of 14 still in the original box, in drawers, in her kitchen. Yet the police maintained their theory that he brought a knife from his home in spite of the single missing knife, from the victim's collection. In fact, Brian Doyle said he used the missing knife from her home to kill her and that was the knife found during the second investigation one-half kilometre from her home in the opposite direction from Gregory Parsons' residence, and in the direction of Brian Doyle's residence.

The peace bond incident warrants closer examination to illustrate how evidence obviously favourable to Gregory Parsons was ignored. On October 15, 1990, Catherine Carroll swore an Information alleging on October 13<sup>th</sup>, her son:

...did grab me and knock me to the floor and did destroy household possessions...

She also told the Justice of the Peace who received the Information that he stormed out of her home, leaving her lying on the floor, without regard for her physical wellbeing.

The police were able to confirm that she was lying because hospital records established that Mr. Parsons had taken her to the hospital to examine a bruise on her back. That lie on her part also lent credibility to the version of events given by him in his detailed letter responding to her peace bond allegations. This also was the same version given in his first statement to the police. The police were aware that she had sworn numerous other informations over the years against neighbours, a boarder, her other son, Todd, and her former husband. Many of these were abandoned. When she failed to appear in court for the peace bond hearing, the police assumed she was manipulated or coerced by her son not to proceed.

The letter written by Gregory Parsons in response to his mother's allegations is heart-rending. It honestly and openly tells the story of the abused children of an alcoholic and drug-addicted parent. It tells of the pain and anger that he has experienced because of his mother but the police saw only the anger and interpreted it as hatred for his mother. They did not see or believe his closing comments which were:

I have no intention of trying to hurt this woman, just to help her if I can...I am planning to see her doctor and

psychiatrist to tell them my side of the problem and as a result I hope they can deal with her problems in a more constructive way than in the past.

The letter demonstrates unusual maturity for a person who had just turned nineteen. He was entitled to be angry with his mother but there is no evidence of hatred towards her.

Even if the police were not perceptive when reading this letter, they had further evidence of the kind of person Gregory Parsons was when they took the statement of the Justice of the Peace. After confirming that his letter had been received, Gregory Parsons arranged to meet with him and this was the reaction of Earl McDougall J.P. in his statement to Sergeant Singleton:

Let me say here and now that when Gregory Parsons came to see me that afternoon, I was pleasantly surprised to say the least. I was more or less prepared to meet a tough young man or in other words, a real delinquent young man. I was very much mistaken. He was aware that I had known his mother for a number of years through my position with the court, and he appeared to be a level headed young man who showed a deep concern for his mother. The main thrust of his visit was to try and make sure that the Judge who would hear the application for a peace bond by his mother would read his letter and hopefully recommend some type of help for his mother.

It is interesting to observe that a judicial officer, outside of the "tunnel" had no trouble making an objective and accurate assessment while the police could not. Flags of caution were also waved by other judicial officers.

At the first bail hearing, Justice Halley asked whether it was possible that such an "unremarkable" young man who had never been "in trouble" could commit such a horrendous crime against his mother, *supra*, at p. 82. In his decision following the preliminary inquiry, Judge Kennedy referred to the testimony of McDougall J.P., which was similar to his statement to Sergeant Singleton. He also commented on the weakness of a key Crown witness, Isabel Crane, *supra*, at p. 85. Finally, he observed, with respect to the forensic pathologist:

Dr. Ladha stated that the literature on matricide indicated that people who commit such an offence often **if not pretty well all the time** suffer from a serious mental disorder. [Emphasis added].

He added that Dr. Ladha's examination of Gregory Parsons revealed no evidence of a mental disorder and no evidence of a social personality disorder. All of this evidence, favourable to Gregory Parsons was simply ignored.

A critical juncture in focussing exclusive attention on Gregory Parsons as the murderer was the elimination of both robbery and sexual assault as the motive for the attack.

The elimination of the basement window as the point of entry was discussed *supra*, at pp. 77 and 106. The house was "very tidy" and valuables such as the VCR and the typewriter were not disturbed so robbery was eliminated as a motive. The damage to the basement window had to be explained so Sergeant Singleton theorized that Gregory Parsons had done the damage to "stage" a break-in. There was no evidence to support this theory.

The elimination of sexual assault as a motive may not have been a reflection of tunnel vision as much as a superficial approach to this possibility. The forensic pathologist who conducted the autopsy found no physical evidence of sexual assault *i.e.* no semen, foreign pubic hair or trauma to the vagina. Sergeant Singleton interpreted this as meaning there was no evidence of a sexual assault. This might be a logical inference if one thinks of sexual assault as being restricted to vaginal intercourse. Even then, there are other possible explanations. The attacker may not have ejaculated and entry might have occurred without bruising or leaving pubic hair. There may have been an attempt that was thwarted, resulting in rage.

What is more important than whether there was such a sexual assault was whether there was a sexual motivation for the attack. This broader consideration would equally distance the crime from a matricide. There was considerable evidence to suggest sexual motivation for the attack.

Rather than reflecting a sudden rage, the attack was extended over 53 slash and stab wounds, many of them superficial. In other words, the attacker appeared to derive some perverse pleasure out of watching his victim suffer and then die. Such perversion may well be sexually motivated. The victim was scantily clad. The nature and location of some of the wounds may have been indicative of a sexual motive. Finally, the body was left "posed" with the legs spread in a sexually suggestive manner.

This is not to say that the police had proof of a sexual motivation for the attack. Rather, there was some evidence of a sexual motivation that was simply ignored. The evidence was more subtle than the presence of semen or vaginal bruising but it was present and warranted further investigation.

(e) **The Police and Crown Theory:**

I have used the word "police" frequently, rather than referring to the lead investigator, Sergeant Singleton. That is because the responsibility for tunnel vision in this case must be shared by all of those involved in the investigation. The manner in which the operational plan broke down was referred to *supra*, at p. 104. Sergeant Singleton took central control of the investigation but his superiors, Superintendent Power and Lieutenant Alex Kielly were directly involved with him on an ongoing basis.

The investigation into the murder of Catherine Carroll culminated in a lengthy and detailed report prepared by Sergeant Singleton which includes a section entitled; "Investigator's Findings" and another entitled, "Singleton's Theory". At the time, he was proud of the hard work he had devoted to this investigation and his perceived success. It was his first homicide case as the lead investigator. The report is subjective and speculative in many areas and lacks rigour. In assessing conduct and events, it uses words like "strange" and "suspicious".

The following are some examples of the "reasoning" in the report:

- The murder was "planned and deliberate" because New Year's morning was selected as the time i.e. when it would not be strange to see a person walking at 5:00 or 6:00 a.m.
- In his first statement, Gregory Parsons did not say that he actually went to bed at 4:00 a.m., only that he was dropped off at that time and woke up early that afternoon.
- He must have taken Tina with him in order to have a witness present on the occasion of finding the body.
- It was "ironic" that in their last telephone conversation that his mother mentioned having a smoke, when an unsmoked cigarette was found in the bathroom garbage can.

In addition to such "suspicious" circumstances, the report also refers to the other examples of tunnel vision discussed earlier. When testifying before me Sergeant Singleton acknowledged many of the errors documented in this chapter, agreed that his treatment of Gregory Parsons was improper, accepted responsibility and expressed his regret.

In contrast, the Assistant DPP, Bernard Coffey, who appeared to be unusually close to the actual investigation, did not recognize his tunnel vision. Constable Piercey testified that this was the first investigation he experienced when a Crown attorney actually participated and attended at the police station (for 4-5 days). On January 4<sup>th</sup>, Mr. Coffey was designated as the contact person for the police in obtaining legal advice and drafting warrants. He attended the meeting on January

9<sup>th</sup>, with the DPP and senior police officers, to discuss the strength of the Crown's case against Mr. Parsons and, particularly, the admissibility of the hearsay statements of the deceased. However, his role went further. He attended at the police station on the night of the arrest and advised the police that they were entitled to continue their interrogation after Mr. Parsons had asserted his Charter right to remain silent.

On January 14<sup>th</sup>, Mr. Coffey attended a meeting with Sergeant Singleton, his partner, Constable Hierlihy, and the two pathologists, Dr. Avis and Dr. Hutton. The next day, he visited the home of the deceased with the same officers and Constable Piercey as they checked the refrigerator, freezer and other areas. On January 16<sup>th</sup>, he accompanied Sergeant Singleton in visiting Dr. Ladha, partly to prepare for the imminent bail hearing. Sergeant Singleton also testified as to various meetings with Mr. Coffey.

It is difficult to imagine they were not having on-going discussions about the course of the investigation or that Mr. Coffey's conversations were restricted to questions of law. This conclusion is reinforced by Mr. Coffey's handwritten notes which indicate that he "bought in" completely to the police theory, and contributed to it, including some of its most far-fetched features.

What this investigation and Sergeant Singleton desperately needed was an objective, critical, contrarian view. It did not emerge within the police force. The failure of Bernard Coffey to provide it may suggest he got too close to the investigation.

Shortly before drafting this segment of my report, I received a letter from Mr. Paul Noble, Legal Counsel to the Royal Newfoundland Constabulary, dated November 4, 2005. He advised me that a new policy had been drafted to address the police-Crown relationship that had been endorsed by the current Chief of Police and the DPP. This Police-Crown Relationship Policy emphasizes that, while cooperation and effective communication between the police and the Crown is essential, the policing function is "fundamentally distinct" from the prosecution function. Accordingly:

In the investigative stage the Crown will only be in an advisory role. In these circumstances the advice provided by a Crown Attorney will be limited to legal advice on specific legal issues only. The Crown Attorney will not provide advice on investigative strategy or any other such issues.

In complex or challenging investigation the RNC may call upon the Crown to identify a Crown Attorney to provide ongoing legal advice in an investigation. However, that person:



...will not be involved in the prosecution once a charge has been laid.

The full policy, which also addresses other issues in the police-Crown relationship, is attached as Annex 9 to this Report. It provides another commendable example of parties to this Inquiry taking initiatives to address identified issues even before my own findings and recommendations were made public.

**(f) Conclusion:**

The good news for the public of Newfoundland and Labrador is that the Royal Newfoundland Constabulary, the RNC Association and many individual police officers approached this Inquiry in an honest and professional manner. Many have gained a great deal of insight and wisdom from this tragedy. Mistakes have been acknowledged and there is strong motivation to establish and maintain a police force whose standard is excellence. The second investigation indicates that is a realistic goal.

At the Systemic Phase of this Inquiry, the RNC submitted a comprehensive, detailed and impressive Report in relation to:

- History, Expansion and Future Planning;
- Investigations, Methodology and Major Case Management;
- Training;
- Human Resources;
- Financial Resources;

and a number of other issues related to policing in Newfoundland and Labrador. I recommend that this document be placed in a public repository such as public libraries in centres throughout Newfoundland and Labrador so that citizens may have ready access to this important information about their policing.

In the words of RNC Chief Deering, when he testified before me:

This report reflects the progress we have made in the past 12 to 14 years and represents the blueprint for progress we hope and need to make in the future. From the wholesale adoption of the Major Case Management Model to the modernization of our Forensic Identification Section to our exciting new training partnership with Memorial University of Newfoundland and in many other ways ... we are doing everything within our means to move the RNC forward.

Energy has been focused on both recruit and in-service training. The bar for entry into the RNC has been raised substantially. A regular training day has been worked

into each nine-week shift schedule rotation. Specific training initiatives have been implemented regarding interviewing techniques and forensic investigation.

I am impressed by the education program established with Memorial University with its combination of academic and practical training. Every effort should be made to encourage officers to obtain the degree and diploma, following the preliminary certificate of completion. The personal performance development plan (PPDP) with its mentoring, coaching and counselling features, will pay valuable dividends in continuing to improve the quality of policing in Newfoundland and Labrador.

This momentum should be carried one step further. Policing standards should be developed respecting qualifications, initial and ongoing training and criminal investigation. These should be adopted by legislation.

This Report provides encouraging information to confirm that the RNC is on the right track. But it also demonstrates that it is only at the start of its journey towards excellence. I wish to comment on one specific aspect of this Report, related to the Parsons' investigation experience, and one more general observation in support of this Report.

Under the heading of Major Case Management, there is a section entitled, *Contrarian View* where an analogy is drawn between the "scientific method" and police work. The observation is made that:

Scientists know that the best way to have their research findings accepted is to do everything possible to disprove their own hypothesis.

The absence of such a "contrarian" or "truth-scrutinizing" role was the fatal flaw in this investigation. Everyone simply "jumped on the bandwagon" or "looked the other way". The Report states that this role should be assigned to the leadership role of the case manager. It is by no means a weakness, but is a strength, of leadership to ask: "Are you sure we are not mistaken"?

My more general observation is in relation to the allocation of financial resources. Some important increases have occurred in the allocation of resources to policing over the course of this Inquiry. However, much more is required. The Report identifies many areas where the only thing holding back progress is financial resources. The Government should allocate greater financial resources to the development of the RNC through acquiring and improving equipment; utilizing technology; arranging secondments for experience and training; and increasing manpower.

A society that treats its administration of criminal justice as a low priority eventually pays the price. The personal cost of this tragedy to Gregory Parsons, his family and friends; The financial cost of a measure of compensation to him; The financial cost of this Inquiry; these are examples of the price to be paid for taking "shortcuts" in the administration of justice. On the other hand, the second investigation demonstrates that Newfoundland and Labrador has the capacity to create and sustain a police force that is second to none and every effort should be made to do so.

#### **4. Judicial and Related Proceedings: Analysis:**

##### **(a) Introduction:**

Item 5 of my Terms of Reference provides that I am to perform my duties:

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

As I stated in my Ruling on the Terms of Reference, these words express constitutional limitations, which apply to every provincial commission of inquiry that is reviewing criminal proceedings. I may review the same subject matter as that of a criminal investigation or trial but I do so for a different and legitimate provincial purpose.

That purpose is to examine the factors that have led to the results in question. Such a commission tells the Government and the public what happened and why. It makes recommendations to avoid adverse results occurring in future. In doing so:

It may review the conduct of police officers, prosecutors and defence counsel, but it does not do so as a disciplinary body. It may review the findings of a trial judge, but it does not do so as an appellate court. As one of the parties stated, a court of appeal does not ask, "what went wrong"? It may do these things for the public purpose described above. It must avoid efforts by any of the parties to "retry" the case in an adversary manner and it must scrupulously avoid making findings which express an opinion as to criminal or civil responsibility in law.

As with the police investigation, I will not review the judicial and related proceedings exhaustively but will highlight some of the salient aspects which likely contributed to the wrongful conviction of Gregory Parsons.

(b) **Role of the Crown:**

(i) **General:**

Any discussion of the Role of the Crown counsel in Canada almost inevitably begins with this passage from the Supreme Court of Canada decision in *R. v. Boucher*, [1955] S.C.R. 16, at para 26:

It cannot be over-emphasized that the purpose of criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it also must be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

In her written submissions, counsel for the Public Prosecutions Division of the Department of Justice (DPP's Office) also quoted from the decision of the same Court in *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 21, which illustrates that the Crown also must participate as an advocate in an adversarial process:

It is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability.

The dual responsibility of acting as an advocate in an adversarial process and yet never "winning or losing" appears to be inherently contradictory.

In a paper prepared by the Deputy Attorney General of Manitoba, Bruce MacFarlane, he elaborates on the appropriate "boundaries" for Crown counsel:

Prosecuting counsel are entitled to press fully and firmly every legitimate argument tending to establish guilt, but must be accurate, fair and dispassionate in the conduct of the case. Tempered advocacy, not unbridled partisanship,

must guide the prosecutor's actions and words. Moreover, a criminal trial is not a personal contest of skill or professional pre-eminence: prosecuting counsel must resist any notion that the object of the prosecution is to secure a conviction or, put simply "win".

Mr. MacFarlane testified before me and stressed the importance of modifying Crown "culture" or "attitudes". I was impressed by a number of the initiatives taken by his department in this respect.

The emphasis on attitudinal change is well placed and the reference to "culture" properly emphasizes a more systemic approach. The reality is that Crown attorneys are human beings and many criminal trials have stressful and emotional features. Human nature often makes it difficult for professionals working in an adversarial system under such conditions to avoid being "competitive".

James Lockyer, one of the founding members of AIDWYC, also testified before me and elaborated on some of his experiences and observations in relation to "Crown culture". AIDWYC also provided a written brief which referred to some of the literature and pointed to two institutional concerns that can encourage Crown attorneys to depart from their responsibility for achieving justice in favour of the goal of "winning".

The first is the emphasis given to successful prosecutions as a standard for measuring professional performance. Although the study cited for these concerns is American, my own practical experience in a variety of roles within the Canadian criminal justice system affirms that proposition. A prosecutor who is not "winning" a significant number of cases will be viewed as lacking in advocacy skills or exercising poor judgment in proceeding with charges. It is also counter-intuitive to suggest that after all of the time and effort devoted to the preparation and presentation of a case, an attorney would normally be indifferent to the outcome.

The second concern relates to "psychological and personal barriers" that it is suggested are shared by many prosecutors:

...a commitment to public service and protection; personal morality; a certain "gung ho", "macho" or crime fighter *persona*; and ideological identification with law enforcement.

Reference is made to a number of factors which have been identified as reinforcing these characteristics. The most prominent is probably the

relationship and reliance upon the police and the teamwork that is necessary for a successful prosecution in major cases.

I am not endorsing the accuracy or prevalence of this description of Crown culture. It does, however, suggest the kind of pressure that Crown attorneys may have to be vigilant to resist. As a practical matter, a Crown attorney may be perceived as “letting down the team” in refusing to proceed with a charge laid in a horrific crime after a lengthy investigation when the police are absolutely confident they have the right person. Potential pressure may be felt not only from the police and Crown colleagues but also from the media and the public.

In other words, a Crown attorney may be susceptible to many of the same systemic factors which lead to tunnel vision on the part of the police. These were canvassed in the Introduction to this chapter, *supra*, at pp. 71-2. As the AIDWYC brief stated:

...Crown counsel fall prey to similar temptations in order to shore-up a weak case. Too often, as here, they uncritically inherit the police brief. Rather than scrutinize it carefully because of its evidentiary infirmities, they compensate by pushing the limits, thereby risking what, too often, is a wrongful conviction...The weaker the case, the greater the incentive to overreach.

This danger is compounded by the unique role of the Crown in the criminal justice system. The following passage is from an article by one of the Crown Attorneys in the Parsons’ case, Wayne Gorman, written when he was the Director of Public Prosecutions:

...Crown prosecutors exercise immense power by the use of discretion throughout the entire trial process. It is one of the hallmarks of our quasi-judicial status and the distinguishing factor that separates them from the judiciary and defence counsel. No other participant in the Canadian criminal trial process wields such immense power.

In addition to this power, the stature of a Crown attorney must be considered. Unlike defence counsel, the Crown is able to say in its opening address to a jury, that the Crown neither wins nor loses but is there to present all of the relevant evidence in a fair manner.

The role of a Crown Attorney requires not only professional skills and judgment but also courage. Often the working conditions include difficult

time pressures and limited resources. It may be particularly difficult for less experienced Crown attorneys to exercise contrarian thinking. Experienced Crown attorneys, in leadership roles must foster critical thinking and independence in their younger counterparts. A Crown attorney, like a judge, must not only exercise good judgment but must also be willing to make unpopular decisions.

**(ii) Advising the Police:**

Reference was made to the role of Bernard Coffey in advising the police from the first days of the investigation, *supra*, at p. 129. This culminated in a meeting with the police on January 9<sup>th</sup>, 1991, also attended by Mr. Coffey's superior, Colin Flynn, then Director of Public Prosecutions. The exact role played by each of these lawyers is not clear. What Sergeant Singleton and the other officers took away from this meeting was that:

- the hearsay statements might well be admissible under recent case law, and, particularly, the *Khan* case; and,
- if admitted, there would be a good possibility of a successful prosecution.

The next day, Gregory Parsons was charged with the first-degree murder of his mother.

The recent Police-Crown Relationship Policy, *supra*, at p. 130, and Annex 9, makes clear that, "All charging decisions rest with the police", and that, prior to a charge being laid:

...the advice provided by a Crown Attorney will be limited to legal advice on specific legal issues only.

The policy also establishes a protocol for obtaining such advice. All requests must be made in writing except in "exigent circumstances". Where that is necessary, a written request must still be made at the first available opportunity.

In my view, this policy is most welcome and would have resulted in a more stringent analysis had it been in effect at the time of the Parsons investigation. The criterion for the police to lay a charge is whether, on the available evidence, there are reasonable grounds to believe that the person has committed an offence. This is a low threshold.

The *Crown Policy Manual* states that, in providing legal advice to the police:

...if there is concern about the strength of the evidence available, then the Crown should express that opinion to the police. This involves a higher standard than one of the reasonable grounds to believe. It involves a question of the success of the prosecution based on the sufficiency of the evidence, the credibility of the various witnesses, the capacity of the witnesses...

If the Crown is in a position to assess the strength of the evidence, even before a charge is laid, the Crown must also advise the police about the probability of a conviction. It is obvious that Messrs. Coffey and Flynn were not in a position to assess the strength of the evidence and particularly the statements during the January 9<sup>th</sup> meeting. It would not have been possible to do so since there was no police analysis of the statements that could have been presented to them.

The *Crown Policy Manual* recognizes that:

...it would be an unusual case where the Crown will know the strength or weakness of the evidence at first instance. Rather, the usual practice is for the Crown to assess these factors prior to the preliminary inquiry or trial. In such circumstances, the same question must be answered – the probability of a conviction.

In the case of Gregory Parsons, then, this responsibility became that of the Crown attorney who would conduct the preliminary inquiry or trial.

### (iii) Deciding to Prosecute:

The policy recognizes that the roles of the police and the Crown, respectively, are very different once a charge has been laid:

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

Under the policy, if a Crown attorney has been assigned to provide ongoing legal advice in a major investigation, that attorney "will not be involved" in a subsequent prosecution. Again, this is a sound approach since it provides a



second opportunity for a lawyer to assess the strength of the case put together by the police, but in much greater detail.

However, at the time of the Gregory Parsons prosecution, no such policy existed and it was expected that Mr. Coffey would conduct the preliminary inquiry as well as the trial.

Other responsibilities prevented Mr. Coffey from doing so and the conduct of the preliminary inquiry was contracted to a private lawyer, Mark Pike. It still was expected that Mr. Coffey would take the trial but another commitment resulted in the trial being assigned to another Crown Attorney about a month before it was to commence. As a result, there never was a critical assessment of the Crown evidence, within the DPP's Office, prior to the Parsons trial, to determine whether there was a reasonable probability of conviction.

As we have seen, the trial itself, was no assurance of quality control. In *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, then Madam Justice Berverley McLachlin, writing for the majority stated:

...Our colleague relies greatly on the facts that the preliminary inquiry judge concluded there was sufficient evidence to send the appellant to trial; that the trial judge did not direct a verdict of acquittal; and that the jury convicted. However, these events post-dated the prosecutor's decision, and were in each instance decisions governed by different considerations. More importantly, the trial was, as found by the unanimous Court of Appeal in the criminal case, deeply flawed. In our opinion, the prosecutor cannot bootstrap his own position on the basis of flawed court decisions that were swept away by the acquittal directed by the Court of Appeal.

These comments are equally applicable to the Crown's failure to critically assess the evidence against Gregory Parsons. It is essential that the DPP have a failsafe system in place to ensure that the evidence in every major case be critically assessed at the latest, upon completion of the preliminary inquiry.

#### **(iv) Potentially Unreliable Evidence:**

Assuming the Crown has assessed the evidence and concluded that there is a reasonable probability of conviction, what is the responsibility of the Crown in relation to potentially unreliable evidence? Leaving aside the situation where it is probable the witness will commit perjury, may a Crown attorney call a witness she does not believe? What if the evidence is simply

perceived to be highly improbable or unreliable because of the mental condition of the witness? This issue was raised before me but also was addressed in the Report of the Guy Paul Morin Inquiry.

Commissioner Kaufman articulated the opposing views:

...Various parties suggested that Crown counsel be mandated not to call evidence which they subjectively regard to be unreliable...Other parties suggest that reliability is an assessment to be made by the trier of fact and is not to be usurped by Crown counsel.

He basically concluded that there should be no rigid rules governing the exercise of such discretion but that it should be encouraged in appropriate circumstances.

He made the following recommendation:

...The Ministry of the Attorney General should amend its policy guidelines to strongly reinforce that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely untrue. Similarly, it is an appropriate exercise of prosecutorial discretion to advise the trier of fact that evidence ought not to be relied upon by the trier of fact, in whole or in part, due to its inherent unreliability.

I agree. There is no virtue in cluttering up the Crown case with "everything but the kitchen sink". The exercise of such discretion falls within the *quasi-judicial* dimension of the Crown role and is not usurpation but is a service to the trier of fact. It also enhances the expectation that the Crown will scrutinize the intrinsic value of the evidence to be presented.

Indeed, the classic statement of the purpose of a criminal prosecution in the *Boucher* case states that the Crown is:

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

Moreover, the *Crown Policy Manual* includes "the credibility of the various witnesses" as a factor to consider in determining whether there is a probability of conviction.

In spite of this clear direction in the *Crown Policy Manual*, there also was a failure to assess reliability in the Druken prosecution, *infra*, at p. 277. In these circumstances, the *Crown Policy Manual* should clarify that it is an

appropriate exercise of Crown discretion not to call evidence that is inherently unreliable. Similarly, it is appropriate to invite the trier of fact not to rely upon such evidence when it has been called.

Of course, in exercising such a discretion, the Crown will take into account a variety of factors. For example, evidence which might at first appear to be unreliable, may have the potential to be enhanced by the context of the other evidence in the case. Also, a witness statement might be enhanced by the witness' elaboration or ability to withstand rigorous cross-examination at the trial.

(c) **Crown Counsel at Trial:**

(i) **The Challenge Function:**

According to the *Report on the Prevention of Miscarriages of Justice*, (2004), prepared by the Federal-Provincial-Territorial Heads of Prosecutions Committee Working Group:

...Crown counsel must always act as a challenge function to the police and must bring critical eyes to bear on the evidence presented to them. They must always be prepared to consider alternate theories and explanations...

It was apparent that the Assistant DPP, Bernard Coffey, did not fulfill this function. He not only "bought in" to the police theory, he also embellished it. The counsel in private practice, Mark Pike, who was retained specifically to conduct the preliminary inquiry, could not be expected to challenge the Crown's decision to proceed. In any event, many of the problems with the Crown case were articulated by Judge Kennedy in his reasons for committal, *supra*, at pp. 84-5.

The responsibility to assess the evidence presented by the police is ongoing, even after the trial commences. As Crown counsel for the trial, Catherine Knox inherited this challenge function. She was placed in a very difficult position. The trial commenced on September 23<sup>rd</sup>, and she was not able to begin preparation until some time between late July and mid-August. The decision that the trial would proceed was made by her immediate supervisor, Bernard Coffey. In his discussion with her about the case, he obviously would not provide much in the way of critical analysis of the police/Crown theory. The police officer assigned to assist her in preparation and throughout the trial was Sergeant Singleton, who had already shared his tunnel vision with Mr. Coffey.

Ms. Knox would have been pressed to prepare for trial and would not have had the time to allow for proper reflection on all the evidence prior to the trial starting. This was not a straightforward case. There was a substantial amount of material, there were 119 witnesses called at trial, and the admissibility of the hearsay statements was a unique and complex issue. This was a first-degree murder trial that lasted 76 days over five months. She had no junior counsel to assist her.

This was her first murder trial although she had conducted a number of jury trials for the Crown. She was called to the Bar in 1985 (Mr. Coffey in 1979). In spite of a bitterly contested trial, and his criticism of Ms. Knox's conduct of that trial, defence counsel, Robert Simmonds had strong praise for her skill as an advocate. It is necessary to assess how Ms. Knox conducted the trial to determine how that may have affected the wrongful conviction of Gregory Parsons. In doing so, I am conscious of the circumstances under which she was assigned the trial, the imprimatur of her immediate supervisor on the Crown theory, and the necessity for her to place heavy reliance on Sergeant Singleton.

**(ii) The Hearsay Statements:**

I have already expressed the view that all of the statements made by Catherine Carroll should have been excluded under the test in the *Smith* case. The problem facing Ms. Knox was that the police investigation did not have a comprehensive report analyzing the complex personality of the maker or the inherent inconsistencies and contradictions within and amongst those statements. They were argued by Mr. Simmonds on the *voir dire* but those arguments were overwhelmed by their strong (superficial) probative value. Even the Court of Appeal did not assert unequivocally that Catherine Carroll, herself, was totally unreliable in making those statements.

The evidence of Stephen Roy, in particular, was powerful. He testified that on one of her visits to his law office she said that their son held a knife to her and he said he would kill her and cut her up in small pieces. When she was found slashed to death by 53 knife wounds, this was striking corroboration of the reliability of the hearsay statement (setting aside her personal unreliability). The law in 1993, based on the *Khan* case did not clearly rule out such corroborating evidence in determining reliability. Then Justice McLachlin stated that the hearsay of the child should be admitted at trial because, "...her statement was corroborated by real evidence", among other factors. It should be noted that the corroboration in the *Khan* case was closely related to the making of the statement itself.

It was not until *R. v. Starr*, [2000] 2 S.C.R. 144, that the Supreme Court clarified and emphasized that the circumstantial guarantees of reliability must be found in "the circumstances surrounding the statement itself". Speaking for the majority of the Court, Justice Iacobucci offered these general remarks for the guidance of lower courts:

At the stage of hearsay admissibility, the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C.(B)*...see also *Idaho v. Wright*, 497 U.S. 805 (1990).

This American case refers to the danger of permitting:

...the admission of presumptively unreliable statements...by bootstrapping on the trustworthiness of other evidence at trial...

Although I did not participate in formulating the judgment in the *Starr* case, I am in complete agreement with it.

The statement reported by Mr. Roy demonstrates how dangerous and unreliable such corroborating evidence can be. The circumstances of the actual crime were extraordinary yet the hearsay statement predicted them with "striking similarity". However, we know (with hindsight) that the statement was completely false. There is no explanation for this extraordinary coincidence. Mr. Roy was vague on details of when the statement was made and most lawyers would record such a statement, which he did not. Was his recollection of the statement coloured by the description of the crime he received from his police officer friend? If his recollection was accurate, did Brian Doyle somehow learn about the statement prior to committing the crime?

We do not know the explanation. But we do know that the Supreme Court was right in forbidding "after-the-statement" corroboration to validate the hearsay. Recent decisions of provincial appellate courts have applied the principle emphasized in the *Starr* case. For example in *R. v. Czibulka*, (2004), 189 C.C.C. (3d) 199 (Ont. C.A.), Justice Rosenberg rejected a hearsay statement in the form of a letter from the deceased, even though:

The circumstances described in the letter resemble the circumstances of the deceased's death...

The letter was rejected even though it was "powerful evidence of an *animus*" on the part of the accused and strongly supported the Crown's case on identity and intention.

In my view, when rejecting the use of general reputation evidence or prior statements, Justice Iacobucci was merely distinguishing between determining "reliability" and "credibility". In *Starr*, he also stated:

Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.

In other words, "threshold reliability" is the test of reliability under the principled approach to the admissibility of hearsay evidence. The reference to "ultimate reliability" is really the assessment of credibility, which is for the trier of fact, only after the test for admissibility has been met.

The reference to "the declarant's general reputation for truthfulness" evokes a very narrow avenue for assessing credibility, which has fallen into some disfavour, but is still available. It permits an opinion to be given in the form of character evidence of the witness's reputation in the community for lack of credibility. In the *Parsons* case, evidence was not called of Mrs. Carroll's general reputation in the community for truthfulness. Rather, evidence of specific conduct, such as her hoarding of pills and other bizarre behaviour demonstrated her unreliability. Similarly, in *Khan*, Justice McLachlin referred to "the personality of the child" as being relevant on the issue of reliability. In *Czibulka*, the Court took into account that the declarant was a heavy drinker, yet there was no evidence of her sobriety at the time of writing the letter.

Similarly, there are specific rules governing the use of "prior or subsequent statements" in relation to the assessment of credibility. For example, a prior inconsistent statement may be used to contradict specific testimony given by a witness. This may cast doubt on the specific testimony as well as on the witness's general credibility. In the case of Mrs. Carroll, the cumulative effect of her contradictory, ridiculous and deceitful statements, again, demonstrated the general unreliability of the maker of all of the statements. The mental condition of the declarant surely falls within "the circumstances surrounding the statement itself".

But Ms. Knox did not have the guidance of the *Starr* case, only the reference to corroboration in *Khan*. More significantly, she was not, initially, familiar with the inherent unreliability of Catherine Carroll as the maker of all of the statements.

In addition, Catherine Knox also received from the police, evidence of bruises to the victim's arms, a black eye and bruising to her hip. In his testimony before me, Gregory Parsons provided a credible explanation for these alleged bruises. However, he did not testify at the *voir dire* in relation to the admissibility of these statements. Ms. Knox was also faced with other, apparently, corroborating evidence (damage to the door frame, a hole in the wall, no sign of forced entry).

In these circumstances, and particularly in the manner in which she inherited the case from her more experienced supervisor, Bernard Coffey, I do not consider her position in relation to the admissibility of the hearsay statements to be unreasonable. She was entitled to depend, to a considerable extent, on his judgment, experience and detailed knowledge of the case. It was probably not until the completion of the *voir dire* that she would have begun to realize the extent of Catherine Carroll's problems. Indeed, that was when she decided to consult a pharmacologist to obtain an objective assessment of Catherine Carroll's behaviour in relation to the pills.

### (iii) General Advocacy:

It appears that, at some point, Catherine Knox also became convinced of the guilt of Gregory Parsons for the murder of his mother. This likely was a significant factor in her "over-reaching" in advocacy. The introduction of the "kill tape" is one discrete example that is straightforward. It is true that the trial judge (erroneously) admitted it into evidence. But it proved nothing and was extremely prejudicial. At trial, she examined a forensic psychiatrist, Dr. Ladha, repetitively, on the significance of this tape, in an attempt to establish some relevance. She did not succeed, but nevertheless said in her closing address:

... is not just trash music, it is as Dr. Ladha said "a threat to that woman."

He said no such thing.

Counsel for Gregory Parsons documented a number of additional examples of inaccurate and misleading advocacy on the part of the Crown related to the time of death, improper (and aggressive) cross-examination of her own witnesses, non-disclosure of relevant information about a Crown

expert witness, reliance on worthless evidence and others. Counsel for the DPP's Office stated before me that:

The trial prosecutor acknowledges mistakes. She acknowledges misstatements and overstatements in her Jury Address. These mistakes, made in the course advocating the Crown's theory to the jury, were inadvertent in our submission and made after a long trial which she did on very short notice and entirely on her own.

While they may have been inadvertent they were fuelled by the sense of noble cause that permeated the police investigation. They crossed the line of acceptable Crown conduct. I propose to review four areas in support of that contention: the Crown Theory of Exclusivity; the Cross-Examination of a Defence Expert; Post-Offence Conduct; Other Aspects of the Crown Address.

**(iv) Exclusivity:**

In her oral argument seeking to tender the hearsay statements for their truth, Ms. Knox stated that:

Some of it in part will go to the issue of motive to have caused the death of Catherine Carroll, and some of it, in part or in total, goes to the elimination of any other person as a likely person to have cause the death of Mrs. Carroll in the circumstances in which she died. [Emphasis added].

In his response, Mr. Simmonds did not object. Ms. Knox referred in her opening address to Gregory Parsons being the only one about whom the accused expressed "repeated concerns for her safety". At the trial, ten witnesses testified that the deceased had no complaint about fearing anyone other than her son. There was no apparent objection to this testimony by the defence. In her closing address to the jury, Ms. Knox repeatedly stated that only Gregory Parsons had a motive to kill his mother.

It is clear that the Crown may adduce evidence of threats and *animus* by an accused to the victim to establish motive and identify. However, such evidence cannot establish that **only** the accused had a motive to kill the complainant and, therefore, the accused was the killer.

This approach is not logical. Catherine Carroll may have feared other persons and not told anyone. In fact, she did express fear of others, *supra*, at p. 113. Another person may have had a motive to kill her and she did not know it. Or, her killer may have been a psychopath with no apparent motive



or a sexual psychopath. It is ironic that Ms. Knox stated in her closing address:

There was no unknown persons...And no flaming psychopath who got to that house that night and killed her in [sic] disappeared into the blue.

This was exactly what happened and the entire approach, including testimony about the extensive investigation which allegedly left no avenue unexplored, was highly prejudicial and unfair. She also said to the jury:

The police went through her life with a fine tooth comb, couldn't find anybody who would have or could have assaulted her at least not that anybody could identify.

This absence of any resistance from defence counsel made it easy for the Crown to push this theme to an extreme, although there may have been a tactical reason for the Defence not objecting in the context of the "footprint" defence.

The theory of exclusivity culminated in Crown counsel's closing address comment:

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

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

**(v) Cross-Examination of Defence Expert:**

A central feature of the defence presented on behalf of Gregory Parsons was to establish the presence of a footprint in the dried blood in the bathroom that did not belong to him. Expert witnesses were called on behalf of both the Crown and the defence. The defence expert was Robert Hallett, a long-time employee of the F.B.I. in Washington D.C. He was the last witness in the trial and testified on a Friday afternoon but was to resume the following Monday. Defence counsel had attempted to derive a tactical advantage by withholding this evidence until the very end of its case, in effect, to catch the Crown by surprise.

Late that Friday afternoon there was a casual conversation, outside of the courtroom, involving a Crown witness, Mr. Hallett and Ms. Knox. Ms. Knox understood Mr. Hallett to tell them that Mr. William Bodziac, also an employee of the F.B.I., had concurred with his opinion. Mr. Bodziac was the author of a leading text in the area of footwear examination. Although Mr.

Hallett had made no such reference to Mr. Bodziac in his testimony, Ms. Knox called Mr. Bodziac by telephone and then sent a fax to him, at 6:00 p.m. that evening, stating:

Could you please confirm in writing or by affidavit whether you were consulted by Mr. Robert Hallett and asked to offer an opinion on footwear impression evidence being presented by him at a trial currently going on in this jurisdiction. In particular, could you advise whether you confirmed to him that his conclusions are correct?

Mr. Bodziac responded in a letter, also by fax that he had not done so. Ms. Knox, who obtained the letter from Mr. Bodziac by relating to him her own version of a casual conversation she had with Mr. Hallett, was determined to use this letter to destroy Mr. Hallett's credibility in the eyes of the jury. The letter was not disclosed to defence counsel.

Towards the end of her cross-examination of Mr. Hallett she asked him if he had verified his research with anyone else and he said he had not. However, she pressed him until he said he "just ran it by Mr. Bodziac". Then in spite of objections from defence counsel and admonitions from the judge she insisted on referring to their conversation the previous Friday and the letter from Mr. Bodziac.

This was totally improper. The issue was a collateral matter on which contradictory evidence is not permissible. The evidence was, in effect, "created" by Ms. Knox, herself. It was extremely prejudicial in encouraging the jury to believe that a key expert witness for the defence was lying. Ms. Knox was on a mission and refused to be deterred, even by the strong reaction of the trial judge. This was not merely "overreaching" but "overzealous overreaching".

The "crowning" insult was to direct a police investigation into Mr. Hallett for perjury. Of course, this was groundless.

**(vi) Post-Offence Conduct:**

Reference was made earlier to the manner in which the police interpreted Mr. Parsons' behaviour after finding his mother's mutilated body, *supra*, at p. 123. In fact, he displayed a variety of reactions which were meaningless in relation to establishing guilt. Such meaningless behaviour may take on a highly prejudicial and dangerous character when a sinister "spin" is placed on it by the Crown either when examining witnesses or addressing the jury.

It is important to distinguish evidence which may have some probative value as to guilt from that which is worthless. As Major J. stated in *R. v. White*, [1998] 2 S.C.R. 72:

Under certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability for that crime. For example, an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial. Such an inference may also arise from acts of concealment, for instance where the accused has lied, assumed a false name, changed his or her appearance, or attempted to hide or dispose of incriminating evidence.

These are circumstances which, based on human experience and logic, may be consistent with guilt and inconsistent with innocence. As with other circumstantial evidence, such acts may be subject to competing interpretations. He added:

...When evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error.

The danger is even worse where the conduct is completely innocuous, perhaps merely part of the narrative or context of what occurred, yet the jury is invited to treat it as demonstrating guilt.

Mr. Lockyer testified before me that the experience of AIDWYC has been that Crown attorneys have been increasingly relying on such "evidence" to bolster weak cases. He referred to the testimony before the Morin Inquiry of the Crown attorney who prosecuted the second trial. At the trial, he argued that the accused did not join in the search for the victim after she disappeared because he was a practical man. He knew the search would be fruitless because he had left the body far from the search areas after raping and murdering her. The Crown attorney conceded that if the accused had joined in the search, he would have argued he was attempting to cover up his knowledge of where the body was and to demonstrate his genuine concern about the disappearance of the girl. Of course, the more innocuous the conduct, the more difficult it is to "explain".

Counsel for Mr. Parsons highlighted examples of Ms. Knox placing a sinister "spin" on worthless evidence in her closing address to the jury, including the following:

- "...it's a very horrible death but the statement [to the police] is my mother used to nag me, she was a real nag. Ladies and gentlemen, that may not strike you as peculiar, but I suggest to you it's very peculiar."
- "He's very unemotional just like Father Davis said he was back at the scene. You remember Father Davis, he was a priest and has been a priest for a long time and he remembered that there was something about Mr. Parsons at the scene that wasn't quite consistent with what had gone on. And when my learned friend suggested to him well people react in different ways when they're in shock, he...no, it wasn't like being in shock like he was talking to the girl who was there and stuff like that, he was doing things, just didn't seem right."
- "...he's on the phone and on the phone he's giving the ambulance attendant an alibi, I've been looking for my mother for two days. Who cares? Why not say, 'get an ambulance here get an ambulance here, now my mother is hurt', or 'my mother is dead'. He's on the 911 line giving an alibi for himself. Like he's been setting it up I suggest to you for two days being very concerned about his mother in the presence of others..."
- "...there's another really funny thing about those two days when you assess objectively the action of Mr. Parsons. Or two things that are funny...All he does is talk about how he can't reach his mother. No effort to get in touch with his father."
- "The second really funny thing that happened was on January 1<sup>st</sup>...[he called the SPCA to take his dog after having previously asked her to take it]...Coincidentally he gives up on her just a few hours after she died."
- "Greg Parsons knew that Elizabeth Parrell was his mother's friend. He didn't tell the police that. You got to wonder why."

In her submission, counsel for the DPP's Office stated:

Although Gregory Parsons' post offence demeanour was not, in our view, a significant component of the Crown's case, it may have influenced the jury to return a verdict of guilty. To that extent, it would be preferable had it not been admitted, or if admitted, qualified by judicial caution.

In my view, the problem of overreaching advocacy by the Crown was even more dangerous than the admissibility of this evidence or the absence of judicial comment to the jury. For example, the 911 call had to be admitted but the interpretation placed on it was greatly strained.

Commissioner Kaufman made the following recommendation with respect to “demeanour” evidence:

Purported evidence of the accused’s ‘demeanour’ as circumstantial evidence of guilt can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel should be educated as to the merits of this cautionary approach and the dangers in too readily accepting and tendering such evidence...

He made a similar recommendation with respect to evidence of “consciousness of guilt”, more generally. The dangers of such evidence were addressed by the Supreme Court of Canada in *R. v. White, supra*, at p. 149.

However, the problem must also be understood in the context of the Crown attorney succumbing to a “culture” which encourages over-reaching advocacy to support a weak case. The broader context was discussed under heading (b) above. It is illustrated not only in relation to Post Offence Conduct but also in other aspects of the Crown’s address to the jury in this case.

**(vii) Other Aspects of Crown Address:**

A closing address can have a powerful and persuasive effect on a jury. At the end of a lengthy jury trial, counsel’s addresses and the Trial Judge’s charge take on a heightened significance because the facts are not fresh in the jury’s mind. In this case, the Crown had the advantage of addressing the jury last.

Errors of fact by counsel are tempered by three things: the opportunity of opposing counsel to object, the trial judge’s charge on this issue which emphasizes that the jury alone determines the facts, and the trial judge’s duty to correct any significant errors made. Similarly, if there is unfair comment, counsel can object and the trial judge can attempt to rectify the situation.

It is not always possible to rectify every error or unfair comment, and our law reflects this. Counsel prepared their addresses from trial notes taken while they were examining a witness or during opposing counsel’s questioning. This is not an easy task. They do not have the benefit of a transcript. The addresses are usually prepared at the end of a lengthy trial such as this one. Errors by opposing counsel can be missed. These are

practical considerations to be taken into account when considering errors of fact and misstatements of the evidence, and failure to object.

Certainly, Ms. Knox faced a difficult task in preparing her closing address to the jury. She had no junior counsel to take notes over the lengthy trial. Indeed, she acknowledges misstatements and overstatements in her address. In *Criminal Pleading and Practice in Canada*, Justice Ewaschuk comments specifically on the latitude to which Crown counsel are entitled in making a closing address to the jury:

It must be kept in mind that a closing address is an exercise in advocacy culminating a hard fought adversarial proceeding. Crown counsel, like defence counsel, is entitled to advance his or her position forcefully and effectively with a degree of rhetorical passion in the presentation of the address.

The following are simply some further examples of over-reaching advocacy.

Within a few minutes of commencing her closing address, Ms. Knox stated [emphasis added]:

He doesn't look like a **monster**, there's nothing about him to suggest that he is a **monster** but...

She referred to the Justice of the Peace who received the peace bond information:

...as she described it to Mr. McDougal, when he was good he was really good but sometimes he could turn and be a real **animal**...when he was bad he was **evil**.

And a little later:

when she was telling Mr. McDougal what he was like she said he was like an **animal** effectively.

Towards the end of her address she stated:

He was seventeen or eighteen years old. Riding his motorcycle with his leather jacket, and the neighbours were afraid to say anything to him about what he was doing because they didn't want any trouble...He was out of control.

In my view, this "demonizing" of Mr. Parsons was improper. It was not only inflammatory but also an impermissible attack on the character of the accused.

In his closing address defence counsel commented that no one heard screaming or cries for help at 5:00 a.m. That suggestion has some logic since such noises would be less likely heard at the height of the revelry, shortly after midnight. (We do now know from Brian Doyle that the murder did occur much closer to midnight). Her response to this suggestion was highly speculative and inflammatory:

Maybe nobody heard her because she was saying Greg no don't, please don't. She was a mother begging her son not to hurt her. She wasn't screaming out terrified of a stranger. She was a mother begging her son please don't, oh my God no. Maybe that's what happened.

She stated that the logic of expecting screams at the time the murder was committed leads to the conclusion that there was no murder.

With respect to the police not finding evidence of a footprint in the bathroom:

...are they all **lying** to you when they say there was no apparent evidence of footwear impression visible...Ladies and gentlemen the possibilities that all these police officers are **lying** to you are pretty remote.

In effect she was telling the jury that if the police were mistaken, they must have committed perjury.

Rather than recognizing the lack of relevance and highly prejudicial nature of the "kill tape", she emphasized that it was a direct threat to the victim and, as mentioned previously, misstated the evidence of Dr. Ladha in support of that proposition.

She placed great emphasis on the peace bond application and, particularly, on his letter in response. She expressed her personal opinion that he had lied:

This letter confirms an act of violence between Greg Parsons and his mother...this letter contains lots of lies.

His letter expressed concern that a record in relation to the peace bond would shatter his dream of becoming a police officer. Ms. Knox mocked that suggestion:

This kid wouldn't get up and go to school. Despite his mother's nagging. He wouldn't go to school, look at his school records, looks at his attendance. **Some dream to be a police officer.** (Emphasis added.)

She continued:

Earlier in the letter he talked about how he was an honor student in school, his marks are in, he was no honor student. He wasn't attending. He had no dreams to be a police officer. He was doing a con job on Mr. McDougal...**This is riddled with lies, but it is also riddled with hatred. It's riddled with the kind of hatred, the kind of feeling that Dr. Ladha testified that you'd find in relationships where children kill their mother.** A very strong, very intense turbulent relationship. A feeling that she's powerful, that she's in control. That's what he said here. [Emphasis added.]

The language is not only inflammatory but is also an attempt to contradict a collateral matter, which was irrelevant to whether he murdered his mother.

**(viii) Summary:**

Ms. Knox did not set out to convict an innocent person. She testified that she has suffered anguish over this case since learning of Mr. Parsons' innocence and has thought of it frequently. However, she was caught in the same vortex as the police investigation and her Crown colleagues, under very difficult circumstances. In some respects, it is unfortunate she is no longer a Crown attorney since she was very competent in that role. In the words of Mr. Simmonds, when testifying:

Ms. Knox was the best prosecutor the Crown had up there. There was no doubt about that. She was well prepared, she was tenacious...

Her personal experience in this case would be valuable in guiding her conduct in future cases and, more importantly, would be a valuable resource to share with younger Crown counsel to assist them in avoiding similar pitfalls.

In the Morin Inquiry Report, Commissioner Kaufman made the following recommendation:

Educational programming for Crown counsel should contain, as an essential component, clear guidance as to the limits of Crown advocacy, consistent with the role of



Crown counsel. These issues may also be the subject of specific guidelines in the Crown policy manual or a Code of Conduct.

I agree with this recommendation but I am also of the view that mentoring by experienced colleagues is even more important. The example set by more senior Crown counsel and the opportunity to receive advice on such issues could help to avoid some of these problems. What must be encouraged is a Crown culture that is sensitive to the opportunities to avoid injustice as well as to obtain convictions.

It is important that Crown counsel not be placed in the position that Ms. Knox was in this case. Crown counsel must be given adequate time for preparation and in lengthy and complex trials, junior counsel should be assigned. I recommend that the DPP develop a policy to address this problem and that the Government allocate sufficient resources to support such a policy.

**(d) Crown Pattern of Conduct:**

Four members of the DPP's Office were involved in the prosecution of Mr. Parsons. Bernard Coffey worked with the police during the investigation, subscribed completely to the police theory and did not conduct any significant analysis of the hearsay statements. Catherine Knox relied upon Mr. Coffey's decision to proceed with the prosecution and conducted the trial when he became unavailable. Wayne Gorman conducted the appeal and an application for leave to appeal further to the Supreme Court of Canada. He also acted on many of the bail hearings and the appeal of the conflict of interest application. Colin Flynn, as DPP, had a more general and supervisory role but did become directly involved, for example, in the January 9, 1991 meeting with the police which culminated in the police laying the charge against Mr. Parsons the next day.

An overview of the judicial proceedings in relation to Mr. Parsons was provided in the Chronology and the specific stages need not be analyzed in detail. What is disturbing is the picture that emerges from their cumulative effect. It reflects a Crown "culture" that is not objective but over-reaches to pursue every possible legal avenue that will make life difficult for the accused. In reaching this conclusion, I have considered the following:

- The extraordinary conditions initially imposed on the disclosure of documents to defence counsel, *supra*, at p. 82;
- The attempts to remove defence counsel through conflict of interest applications including *certiorari* proceedings and an appeal to the Court of Appeal, *supra*, at p. 83;

- The position taken on the appeal of the conviction in the face of obvious fatal errors, *supra*, at p. 88-90;
- The application for leave to appeal the Court of Appeal decision to the Supreme Court of Canada, *supra*, at p. 90;
- The decision to initiate a perjury investigation against a defence expert witness, *supra*, at p. 148.

In addition, the Crown was relentless every step of the way, in attempting to have Mr. Parsons incarcerated or to have stricter bail conditions imposed pending trial. When bail was granted pending the appeal, the “lengthy and well-reasoned decision” of Marshall J.A. was challenged under S. 680 of the *Criminal Code*, *supra*, at p. 88. Green, J.A. was critical of the Crown advocacy in seeking incarceration following the drug charges, *supra*, at p. 93.

I also have concerns about the Crown’s use of the stay of proceedings procedure in this case. Reference was made earlier to the Corey Evans assault charge which proved to be totally without merit. Rather than withdraw the charge or present no evidence, the Crown entered a stay of proceedings. This denied Mr. Parsons an opportunity to be exonerated publicly, *supra*, at pp. 91-2. I have further comment on Crown use of the stay of proceedings. However, it also was a significant issue in relation to Randy Druken, so these further comments are found in the next chapter, *infra*, at p. 317.

As mentioned previously, there were observations made in the decision of Judge Kennedy, following the preliminary inquiry, which should have given pause to the Crown, *supra*, at pp. 84-5. He offered the correct interpretation that should have been given to Mr. Parsons’ peace bond letter. He pointed out the correct and significant interpretation for Dr. Ladha’s evidence. He also commented on the weakness of parts of the Crown case. This did not cause the Crown to reassess its case prior to the first trial. Nor did it do so following the Court of Appeal decision as the Crown had every intention of proceeding with a new trial.

**(e) Defence Counsel:**

**(i) General:**

The defence counsel, Mr. Simmonds, was frank in his testimony before me in stating he was not happy when he learned Justice Lang had been assigned to the case. He felt that this judge tended to favour the Crown. He felt his submissions and objections were not treated fairly and there was mutual acrimony between them. It is difficult to know how such an atmosphere might affect a jury but I doubt it was a significant factor in Mr. Parsons’ conviction.

Counsel are reluctant to raise objections frequently before a jury because they do not want to be perceived as being difficult or trying to hide something. Mr. Simmonds testified that he decided at one point that further objections, particularly since they would be consistently unsuccessful, would be futile. This was a reasonable position, especially in light of the judge's reaction to the Crown's "who did?" statement. However, there were other objections that could and should have been made in the absence of the jury, particularly in relation to the Crown's closing address. Even if unsuccessful, objections may be relevant on a subsequent appeal.

**(ii) The Hearsay Statements:**

Counsel for Ms. Knox submitted that Mr. Simmonds put too much emphasis on the expert evidence of a foreign footprint in the bathroom. He also suggested much more effort should have been made to call evidence to demonstrate the unreliability of the deceased:

...what about the failure to call other witnesses from her family i.e. her other son to assert she was the crazy lying woman the [Crown] wanted the jury to believe.

Indeed, he could have called Gregory Parsons on the *voir dire*. In addition to providing direct evidence of the unreliability of the declarant, he could have provided direct evidence of the untruthfulness of the statements and an explanation of the alleged corroborating evidence. Mr. Simmonds testified that in retrospect, he would have called an expert witness such as Dr. Kimberley, who was called at this Inquiry.

**(iii) Messrs. X and Y:**

Two individuals were referred to as Mr. X and Mr. Y at the Inquiry in order to protect their identities. Mr. Y had been interviewed in the police investigation and a statement taken containing an alibi. During the trial, Mr. Simmonds expressed suspicions to Ms. Knox about the validity of that alibi. She arranged for the police to re-interview him and two independent witnesses, establishing to Mr. Simmonds' satisfaction that his suspicions were unfounded.

Mr. X was a viable suspect who lived three doors away from Catherine Carroll's home. The police were aware of his propensity for violence towards Ms. B, with whom he lived. Mr. Simmonds learned about Mr. X during the course of the trial but did not have sufficient information to raise him at the trial as the possible perpetrator. However, he did not draw his name to the police for further investigation. In my view, in the circumstances at that time, he should have done so.

He testified that his reason for not doing so was that he had no confidence the police would treat the information seriously as an avenue to explore. Nor would he have had confidence in bringing it to the attention of Ms. Knox or any of the other Crown attorneys. I agree with the following submissions from counsel for Ms. Knox on this issue:

How and why he chose to treat his suspicions about Mr. X differently than he treated information he received about another suspect, Mr. Y is inexplicable. He does not dispute that he asked Ms. Knox to have the police investigate his other suspect, Mr. Y, and that she did so promptly and to his satisfaction.

Of course, this begs the question of the failure of the police to pursue Mr. X in the first place. However, the failure of Mr. Simmonds to raise Mr. X with the Crown for police investigation was an error on his part, even though it would have had no practical consequences.

**(iv) Footprint Tactic:**

Once all of the hearsay evidence had been ruled admissible, Mr. Simmonds had a difficult hurdle to overcome. The statement alleged by Stephen Roy was particularly damning in view of the actual manner in which the victim was killed. He sought to establish that the police investigation was completely bungled at the scene and that they failed to discover a footprint, not belonging to Gregory Parsons, in the dried blood on the bathroom floor.

The investigative team and the forensic experts saw no footprints and testified that there were none. No elimination was done. The two young medical attendants claim to have seen a footprint, one drew a diagram, and this had been overlooked by the Crown and the police. The jury saw what they believed to be a footprint. The forensic experts then agreed that a footprint was there. On this basis alone it would appear that the defence was at least reasonable.

Mr. Simmonds' strategy not to cross-examine on this issue during the Crown's case and to recall the Crown witnesses was unusual and he took the risk of being caught by rebuttal evidence. Counsel for Ms. Knox was highly critical of this approach and also criticized Mr. Simmonds for what was alleged to be an inadequate foundation for presenting the expert opinion:

- An experiment conducted on the wrong side of a tile.
- Not providing the original negatives for analysis.
- Not providing a firefighter's boot for elimination, since a firefighter had stepped into the bathroom.

Ms. Knox claimed that her cross-examination on these matters greatly weakened the defence expert testimony and, therefore, also diminished any adverse consequences of her improper cross-examination, *supra*, at p. 148.

My Terms of Reference, as well as constitutional imperatives, preclude me from re-trying the case. I find nothing improper in the footprint evidence strategy of defence counsel.

**(v) Failure of the Accused to Testify:**

Counsel for Ms. Knox examined Mr. Simmonds at great length on the decision not to call Gregory Parsons as a witness in his defence. There is little question in my mind that this was a significant factor in the minds of the jurors. The allegation of such a vicious murder against one's own mother together with an alleged relationship of hostility cried out for a denial from her son. It is possible that if he had taken the stand to testify, Gregory Parsons' true character would have emerged. The jury might have seen for themselves that he was not a "monster" or an "animal" but a caring son. But he also might have created the opposite impression.

The decision whether or not an accused should testify can be one of the most difficult for defence counsel to address. Occasionally, an accused will insist on doing so and, unless he is likely to commit perjury, defence counsel normally will not attempt to stand in his way. In this case, there was no criminal record that could unfairly prejudice the jury if it came out in his testimony. Mr. Simmonds consulted with other senior counsel, with the father and with the accused and it was agreed that he should not testify.

Some of the evidence he would have given was available through his statements. He was vulnerable to cross-examination on the letter he wrote with respect to the peace bond application but most of all, in the words of Mr. Simmonds:

...he wouldn't have been a match for the Crown...

Her ability to attack, and probably destroy, the unfavourable evidence of her own witness was demonstrated in relation to Rose Marshall. Her cross-examination of Anne Marie Johnson, was also aggressive and effective. This happened even though both were telling the truth.

Moreover, I understand that Mr. Parsons was not the same man at the time of the trial that he is today. When testifying before me recently, he said he was still working to cope with his anger, even though he was mature, articulate and convincing. Mr. Simmonds testified that, at the time of the trial:

...Greg was a very young man, a very angry man, as a result of the treatment, he had absolutely no trust in the system starting from his arrest, the conflict, right up to the events in the trial.

I can understand that defence counsel would not want to risk him being provoked in cross-examination to burst out with a hostile or even threatening reaction towards Ms. Knox. Indeed, even at the outset of this Inquiry, he expressed such anger toward her.

Mr. Simmonds also testified that one of the reasons he did not call Mr. Parsons was that he felt he had no "case to meet". I may observe, in passing that it was my decision in *Dubois v. the Queen* [1985] 2 S.C.R. 350, that elevated this concept from Professor Ratushny's book on Self-Incrimination, to a constitutional principle! The difficulty is that in a jury trial, the point at which that standard has been met, can be very difficult to gauge.

In such circumstances, there is always the danger that if an accused testifies and is convicted, it is open to the appeal court to find that there was no miscarriage of justice based on the view that the jury simply did not believe the accused. By putting the accused on the stand, the defence can lose its grounds for appeal. The decision not to call the accused as a witness may be safer to make when it is apparent that error has already occurred requiring a new trial.

In my view, the decision not to call Mr. Parsons as a witness is certainly understandable.

**(vi) The Basement Window:**

At trial five Crown witnesses testified with great confidence that the basement window had been properly examined and was not a point of entry. At the Inquiry we learned a completely different story. Also the confessed murderer, Brian Doyle, confirmed that he entered through this window.

Mr. Simmonds testified that he accepted and believed that the basement window was not the point of entry because the officers' evidence was so conclusive and persuasive at the time. He did question the officers at trial and viewed the scene. His view was that whoever got in that night was either let in, had a key, or found some other way to get in.

What I find surprising, on reflection, is that Mr. Simmonds does not have appeared to discuss the basement window with his client, Gregory Parsons. Counsel for the DPP's questioned Mr. Simmonds specifically on this issue and he responded:

...obviously, that how the person that entered the house was an issue. Myself and Mr. Parsons discussed all of those things, but a specific conversation related to just that, no...

Counsel referred to Mr. Parsons' statement to the police which said the window was always covered by a curtain, contrary to the state in which it was found and Mr. Simmonds added:

Certainly the fact that was this a break in, how the person got in was canvassed with Mr. Parsons.

Counsel persisted in pursuing this discrepancy and Mr. Simmonds responded:

...At the time I spoke to Mr. Parsons that obviously would have been discussed in a general sense. I don't have a specific recollection...

This probing on the part of Ms. Hoegg was helpful since I have already alluded to the central significance of the police investigation ruling out the basement window as the point of entrance for the murderer, *supra*, at p. 94.

It would be unfair to place on Mr. Simmonds' shoulders the burden of conducting his own investigation to challenge the resolute findings of the police that the basement window was not the point of entry. But Mr. Simmonds had one crucial resource that the police did not. Their tunnel vision deprived the police of the benefit of Gregory Parsons' assistance in determining the significance of the basement window, *supra*, at p. 95. Mr. Simmonds was in a position to discuss all aspects of the case with Mr. Parsons.

It appears that Mr. Parsons did not tell his counsel that he and his friends including Brian Doyle, had frequently used the window as a point of entry and exit, *supra*, at p. 95. Demonstrative evidence of an adult being able to enter through the window would have been a strong challenge to the Crown's case.

#### **(vii) Summary:**

Mr. Simmonds faced the same challenges as Ms. Knox in acting without junior counsel. He testified:

...I'm never doing a trial again longer than four weeks by myself...you start to get fatigued, you start to lose

objectivity, you start to lose focus and you just will miss things...

In order to cope, it was necessary for both of them to work long hours:

...once we got into the trial, it was seven days a week, five nights a week. I took off Friday and Saturday night...And to be fair, I expect it was the same on the other side.

I have already recommended that the Crown adopt a policy of providing junior counsel for long and complex trials. I recommend the Legal Aid Commission adopt a similar policy for defence counsel and that adequate resources be allocated by the Government to support such a policy.

The observations with respect to the basement window are not a criticism of defence counsel. They are more in the realm of *ex post facto* speculation. In fact most of my observations with respect to defence counsel fall within this rubric. Counsel for Mr. Parsons at this Inquiry filed a complete and unequivocal waiver of solicitor client privilege in relation to Mr. Simmonds. This exposed Mr. Simmonds to a searching exploration of every aspect of his conduct of the defence.

Mr. Simmonds testified that it was incorrect to suggest he **believed** in Mr. Parsons' innocence. Rather, he **knew** he was innocent. This knowledge imposed an even greater personal burden than defence counsel experience in many cases. There were things that possibly should have been done differently, in retrospect, but Mr. Simmonds did everything he could to assist his client, and Mr. Parsons was fortunate to have him as his lawyer.

#### (viii) Trial Judge:

It is obvious from reading the judgment of the Court of Appeal ordering a new trial, that the errors made by the trial judge contributed to the conviction of Gregory Parsons, *supra*, at pp. 88-90. The Court of Appeal did not express its opinion on the admissibility of any or all of the hearsay statements. I have already said that, in my view, since the maker of all of them was demonstrably unreliable, all of them should have been excluded, *supra*, at pp. 86-7.

In this respect, I wish to emphasize that the test in *Smith* requires rigor in its application to the requirement of "reliability". The starting point must be that hearsay is inherently unreliable, dangerous and inadmissible. Such a statement is only admissible where it:



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

The gist of the trial judge's ruling was as follows:

So that was basically all I can say to you on my analysis which I spent hours going over it, I'm satisfied that looking at the cases that you've given me and the Smith and the Khan that there is the circumstantial of reliability there when you look at all the evidence and I'm ruling that the hearsay evidence is admissible.

Nowhere does the ruling address the inherent unreliability of the declarant.

The trial, in general, was not conducted with the rigor warranted for such a serious charge. The Crown was permitted to cross-examine her own unfavourable witnesses without the proper procedure being followed. Contradictory evidence was permitted on a collateral issue. Post-offence conduct of no probative value was permitted. The trial judge was unable to control Crown counsel in her improper cross-examination of the defence expert. The judge said he would give a direction to the jury in relation to this matter but failed to do so.

He also failed to give a proper direction on the use of post-offence conduct as required by the recent Supreme Court of Canada decision in *R. v. White, supra*, at p. 149. Although the White case was decided a few years after the Parsons trial, the requirement that the jury be properly instructed was also established 75 years ago in *Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C.). Quite apart from specific precedent, the basic principle of relevance and common sense warrant at least some comment to the jury when it is faced with such ambiguous evidence magnified by the Crown advocacy alone.

It is true that defence counsel did not object on many of these occasions but he testified that his objections were not taken seriously. He was concerned that further objections would anger the judge. Counsel for Mr. Parsons at this Inquiry submitted a series of comments made by the judge over the trial that support that conclusion. The judge referred to defence counsel's arguments as "poppycock", "bull", "hogwash" and "foolishness". In addition, he stated:

- "...an awful lot of objections about nothing it seems to me. You make mountains out of mole hills."

- "I would tell you that you're objections a lot of them are of no substance."
- "I said on your objections throughout the trial they were not substantial."
- "And I've watched and watched the way you have been acting in this case. And I tell you I'm surprised at some of the objections you have made..."
- "So the more confusion now I can add to this the better right?"
- "It would be more to your benefit to have them confused."
- "There must be something awful bad in that letter that you don't want to come out."
- "...I don't really see why you always have to repeat things to me all the time, you know. You always repeat things. I've heard you once, I don't need to hear them two or three times..."

Mr. Simmonds was frank in testifying that there was acrimony between him and the trial judge and accepted his share of responsibility for that. He accepted that on occasion he deserved to be rebuked.

The judge's conduct towards defence counsel, in contrast to the Crown, was petulant and unfortunate. But I do not agree that it prevented Mr. Simmonds from continuing to object. Every erroneous ruling on an objection enhances the prospect of a successful appeal. But the judge's conduct did contribute to Mr. Parsons' perception that he did not receive a fair trial. His perception is understandable. Judges are human but must exercise restraint.

I have not inquired into the experience and expertise of the judges of the superior courts of Newfoundland and Labrador. However, as a general proposition, I would encourage the Chief Justices and the Minister of Justice to be vigilant in identifying the need for criminal law experience and expertise when vacancies occur. When such need exists, it should be drawn to the attention of the Federal Minister of Justice.

There is a rich source which has largely gone untapped, in my experience, in the provincially appointed courts of this country which do exclusively criminal work. Judicial training for superior court judges has improved greatly with the creation of the National Judicial Institute. However, when that is combined with years of practical judicial experience and expertise, our superior courts will have the best of both worlds. At the same time chief justices must be cautious in assigning judges to complex criminal trials.

(f) **Juries:**(i) **Jury Secrecy:**

Section 649 of the *Criminal Code* provides that:

Every member of a jury...who...discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence...

This protection of juror secrecy was established under Common Law to encourage uninhibited jury deliberation as well as to protect jurors. Unfortunately, it imposes a formidable hurdle for an Inquiry such as this one. My task is to determine what went wrong, why it did and how such an injustice can be avoided in future.

It is possible to isolate a number of specific factors and to draw some general conclusions. However, the picture will always be incomplete without at least some insight into what happened in the jury room.

Commissioner Kaufman made the following recommendation, without any elaboration:

The Criminal Code should be amended to permit research into the jury's deliberative process, with a view to improving the administration of justice.

The report documents how the Commissioner there declined to summon the jurors in the Morin case to appear as witnesses at the Inquiry. Judicial review was sought but his decision was upheld.

There have been some studies done in the United States on jury behaviour as well as some Canadian studies on "simulated" juries. But much of our knowledge of juries is based on assumptions. My role as Chairperson of the Law Reform Commission of Canada as well as my experience as a criminal lawyer, as a trial judge and as an appellate judge have taught me that the legal system makes many assumptions which prove to be precarious when scrutinized. However, I also recognize the frequent need for "balancing" when recommending legislative changes or making judicial changes to the law. Here, the challenge is to maintain the benefits that section 649 affords while obtaining the benefits of better insights into jury deliberations. That would be especially valuable where a serious injustice has occurred.

I recommend that a specific exception be added to section 649 which would take into account the unique problem and recently identified frequency of wrongful convictions. This “wrongful conviction” exception would allow a juror to be interviewed where a Commission such as this one has been established. Conditions could be established such as the following:

- The juror must consent to be interviewed alone or with other jurors who also consent.
- The interview is conducted by the Commissioner in private but in the presence of others on the recommendation of the Commissioner, with the consent of the juror(s).
- The interview may be recorded for accuracy but the recording is subsequently archived with the Federal Minister of Justice.
- Any use of the information is to be without attribution to a specific juror but is treated like an “off-the-record” journalistic interview for background.

Further development of this concept is required. However, the Burns and Refay decision of the Supreme Court of Canada has specifically taken into account the danger of wrongful convictions in rendering an important judicial decision. In recent years “wrongful conviction” commissions have been established in Nova Scotia, Ontario, Manitoba and Saskatchewan as well as by Newfoundland and Labrador.

It would be ideal if the experience of these commissions could lead to the elimination of wrongful convictions immediately. The reality that there have been five commissions into wrongful convictions and their systemic nature suggest that is not likely to occur. The next such commission should have access to the missing link of jury deliberations.

I recommend that the Minister of Justice of Newfoundland and Labrador pursue such an amendment with his federal and provincial counterparts.

**(ii) Directed Verdicts:**

In response to a question from me. Mr. Simmonds stated he did not move for a directed verdict because he thought there was no point. He elaborated:

I don't mean to sound flippant, Mr. Commissioner, but I think if you were there at the end of the crown's case, you would have understood why it was no point. It would have been, I think, a move that would have clearly agitated Judge Lang more, not something I wanted to do directly

before I started my case. I think he would have phrased it as poppycock or nonsense, and you know it is, and just using it to look for some delay or something like that, as he accused me of at one point.

In my view, and on the basis of the hearsay statements being admitted, such an application would not have been successful. On the basis of the current test, also applicable at that time, there was some evidence on which, if believed, a reasonable jury, properly instructed, could convict. The test had been firmly established by the Supreme Court of Canada and confirmed in recent cases such as *R. v. Charemski*, [1998] 1 S.C.R. 679 and *R. v. Arcuri*, [2001] 2 S.C.R. 828.

In applying the test, a trial judge is not allowed to weigh the evidence, for example, by assessing the credibility of witnesses. Where the case depends on circumstantial evidence, the trial judge must weigh those circumstances in the sense of determining whether, when taken together, they are capable of an inference of guilt beyond a reasonable doubt. It is still the function of the jury whether or not to draw that inference.

All of the cases of wrongful conviction referred to by the Supreme Court of Canada in the *Burns and Rafay* case, involved reliance upon circumstantial evidence for the identification of the accused: Marshall, Milgaard, Morin, Sophonow and Parsons. Evidence merely of motive and opportunity will often be a weak foundation on which to base a criminal conviction. It was only with the Report of the Marshall Royal Commission in 1989, that the potential ineptitude of our criminal justice system was laid bare. **This was the first time in Canadian legal history, that a wrongful criminal conviction was ever formally acknowledged by a public institution.** The weaknesses of our system were amply demonstrated in subsequent public inquiries such as this one.

Prior to the matter being resolved in *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, there was some support for the proposition that a trial judge could engage in a limited weighing of the evidence on a Directed Verdict application. I hasten to declare my perceived conflict of interest since I dissented in that case, on this issue. I will indulge further in anecdotal experience of my practicing criminal law in Montreal almost 50 years ago. At that time and place, at least, experienced criminal law trial judges would not hesitate to withdraw a case from the jury when it rested upon flimsy evidence supported mainly by suspicion.

In my view, the recent spate of demonstrated convictions of innocent persons is proof that juries are not always reliable. It is no longer acceptable

for the criminal justice system to place blind faith in the perceived, innate good sense of juries. Increasingly complicated jury instructions are not the answer. Some of the “model” charges have already become counter-productive in their complexity. An important response to this problem would be to raise the threshold for permitting cases to be considered by the jury. The test for a Directed Verdict should be modified to allow trial judges to throw out cases where the evidence can colloquially be characterized as “garbage”.

The earlier cases refer to criteria such as “manifestly unreliable” and “of such a dubious nature” when assessing evidence in relation to a Directed Verdict. In my view, the test for the “sufficiency” of evidence to be met before a case goes to a jury should be articulated in the *Criminal Code* to require a judge to enter a verdict of acquittal where there is:

...no evidence or the evidence is so **manifestly unreliable** on any essential element of the offence, that it would be dangerous to convict ...

Moreover, in such circumstances, where defence counsel does not make an application, the trial judge should be required to act *ex proprio motu* (i.e. on the initiative of the judge).

A common situation for the consideration of such a motion would be where the identity of the accused is sought to be established solely on the basis of circumstantial evidence of motive and opportunity. It is often dangerous to conclude that identity has been established beyond a reasonable doubt merely on such circumstances, as some of the wrongful conviction cases demonstrate.

There is another reason why such a provision is now justified. Counsel for the Royal Newfoundland Constabulary Association, in his Submissions, include the following observation:

...In the early days of forensic science, the direct evidence left at a crime scene was difficult to interpret. If too much was required for a conviction in a circumstantial evidence case, many guilty would go free. In the days when science was rudimentary, the bar for circumstantial evidence had to be low. The change in science means much more useful direct evidence is found at a crime scene. The old justification for convicting on circumstantial evidence alone has much less force. The change in science means a much higher threshold for conviction should be used now, not a lower one.

This is an astute observation and it places the emphasis where it should be. Convictions must be based on thorough and skilful investigation and presentation of evidence rather than on suspicious circumstances and over-reaching Crown advocacy.

I recommend that the Minister of Justice of Newfoundland and Labrador invite his federal and provincial counterparts to work with him in developing and achieving an amendment to the *Criminal Code*, along these lines. I recognize that "law and order" themes are often more attractive to voters. However, the agony and cost of convicting innocent persons warrant a legislative response. By "cost" I refer not only to compensation of the victims and the cost of the inevitable Royal Commissions that follow, but also to the far greater cost to the reputation and integrity of our criminal justice system.

**(g) Conclusion:**

In his oral submissions, Silas Halyk, counsel for Ms. Knox, observed:

In an overview, my suggestion is that there is no evidence of any intentional misconduct on the part of anyone with respect to the Parsons issue. On the other side of the coin, the bad news is that almost everyone made some mistakes in the course of the process and I have in my Brief made the point of these things that as in aviation, incidents tend to have sequences, - it's not any one factor that by itself causes the unfortunate and tragic result. It is a combination of factors and usually sequential factors that, that lead to this.

I am in general agreement with this characterization except that we have seen limited examples of intentional conduct, albeit driven by a perceived "noble cause", that contributed significantly to the tragic result.

The Crown failed in its responsibility to exercise a "challenge" function to the police theory. Mr. Coffey "bought in" to this theory very early and contributed to it. Ms. Knox was thrown into the trial in difficult circumstances and followed the Crown path that had been established while adding personal and aggressive advocacy in support. Aggressive legal advocacy was also contributed by Mr. Gorman whose positions often demonstrated lack of objectivity. Mr. Flynn showed no leadership in altering the path, or the vehicles selected along the way. In sum, the DPP's Office demonstrated a Crown culture that accepted and supported the police tunnel vision.

All of these people have now left that Office but there was no evidence before me that this culture has changed since the prosecution of Gregory Parsons. Over the

course of the second investigation and throughout this Inquiry, the RNC actively pursued reforms in response to identified problems. There was little indication of improved training, mentoring, review of decisions or encouragement of contrarian thinking amongst the law officers of the Crown.

In fairness, the current DPP testified that he simply did not have sufficient resources to dedicate personnel to monitor this Inquiry. The DPP's Office appears to be engaged in an ongoing struggle to meet daily demands let alone engage in policy review. Mr. Mills is certainly aware of the dangers of "tunnel vision" in relation to the Crown as well as to the police. However, any initiatives to provide education for Crown attorneys in this sphere have been sporadic because of budgetary limitations.

At the time he testified, in June of 2005, the DPP's Office had been living with a government-wide 5% decrease in all budget headings for over three years. The program for articling students had to be abandoned and this deprived senior Crown attorneys of research assistance, as well as requiring them to prosecute summary conviction offences. This leaves less time to concentrate on more serious matters. There is little replenishing of senior staff from the junior level and work pressures will increase significantly with the recent expansion in police hiring.

It is still necessary to assign only one Crown attorney to complex cases such as the Parsons prosecution and support personnel are also over-extended. Basic requirements such as legal textbooks and electronic access to case law through lap top computers are inadequate. There are no dedicated resources for ongoing education and sharing of experience amongst Crown attorneys. Opportunities have to be cobbled together by constantly re-priorizing resource allocation.

My earlier observations with respect to the funding of the RNC, *supra*, at pp. 132-3, are equally applicable to the DPP's Office. The first step should be an objective assessment of budgetary requirements and practices in comparison to selected prosecution services in other provinces. Then the Government should allocate adequate resources to ensure that the people of Newfoundland and Labrador are equally well served.

The Minister of Justice of Newfoundland and Labrador should establish an independent review of the DPP's Office. This review should ensure that steps have been taken and identify further steps that should be taken to eliminate the Crown culture that contributed to the wrongful conviction of Gregory Parsons and was evident in the prosecution of Randy Druken. This review should also conduct the assessment referred to in the previous paragraph so that the Government may allocate adequate resources to modernize the DPP's Office. This also requires a comprehensive review and revision of the *Crown Policy Manual*.



I believe it would be helpful to have a forum where representatives of the Crown and of defence counsel could meet to discuss matters of common concern on an ongoing basis. Indeed, I would suggest that other components of the criminal justice system should also participate. I recommend that a Criminal Justice Committee be established consisting of the following members:

1. A judge or retired judge appointed by the Chief Justice of Newfoundland and Labrador.
2. A representative of the Minister of Justice.
3. A representative of the Defence Bar.
4. A representative of the DPP.
5. A representative of the Legal Aid Commission.
6. A representative of the RNC.
7. A representative of the RCMP.

While the details could be worked out "on the ground", the Committee might be chaired by the judge or retired judge and provided the services of an Assistant in the Justice Department on a part-time basis. The latter could canvass the members for agenda items and arrange meetings, perhaps three times a year. The "constituents" of the members could refer issues or problems to their representatives for discussion and, hopefully, resolution.

We have seen the dangers that can arise where components of a "system" go their separate ways. The sharing of information, dialogue and understanding other points of view are always valuable pursuits.

## 5. Conclusion:

The investigation and prosecution of Gregory Parsons became a "runaway train", fuelled by tunnel vision and picking up many passengers along the way. It had many of the recurring features of wrongful conviction cases that were described at the outset of this chapter, *supra*, at p. 71. As counsel for Ms. Knox said, "almost everyone made some mistakes".

In the Reference to the Nova Scotia Court of Appeal which resulted in the acquittal of Donald Marshall, Jr., the Crown urged the Court not to cast blame on the criminal justice system for his wrongful conviction. Otherwise, it was argued, the public would lose confidence in the administration of justice. The Court accepted this argument resulting in the unfortunate words that any miscarriage of justice was "more apparent than real" and the conclusion that Mr. Marshall was the author of his own misfortune. The subsequent Royal Commission and an Inquiry Committee of the Canadian Judicial Council eventually set the record straight. But the attitude that the criminal justice system had to be "protected" from criticism was fairly widespread at the time. It was reflected in the contempt power for "scandalizing the

court” and rather smug assumptions about the protection of accused persons in our system that went unchallenged.

The Marshall Royal Commission, and others that followed, have taken the approach that it is far better for the system, itself, to identify its mistakes and weaknesses and to try to correct them. Admitting mistakes and trying to improve, does more good for public confidence than denial. Otherwise, the public, ultimately, is faced not only with the mistakes, but also the exposed false denial.

In his testimony before me, Mr. Lockyer expanded on the inevitability of mistakes in the criminal justice system:

It's really never ceased to surprise me and, indeed to amaze me over the years how surprised people are that there are wrongful convictions in our systems and, indeed, in other systems as well because the criminal justice process is as human a system... as there is in the modern day. If you think about and think about a serious criminal case, a homicide for example, the number of people you're depending on to get it right can run into hundreds in some cases and they all come from different parts of the case. You start with the witnesses themselves...all the inherent problems in witnesses as to whether or not their evidence should be accepted or not. You then have, of course, the police involvement and police come in naturally with their bias, their determination to solve cases as best they can, accompanying problems that come with that...and then after the police you then have the Crown, who's job it's always seemed to me above all, especially at the outset, should be one of a supervisory role and crowns don't always get it right. Then you have a defence counsel and defence counsel come in with degrees of competence and, indeed, in some cases, let's face it, incompetence. You have a trial judge. The trial judge who may come in, will come in with his own bias, who may get it wrong in the process and then, of course, 12 jurors who come from anywhere who we rely on to apply their common sense but they can only apply it in the context of what they hear in the course of the trial and even then they can get it wrong. So it's, it's an extraordinary human system our criminal justice system...

Any system that depends on human beings is, by virtue of that very feature, fallible. This helps to explain why tunnel vision is seldom the result of personal malice, *supra*, at p. 71, and why wrongful convictions are not aberrations but are rooted in systemic problems, *supra*, at p. 72.

I have already given my opinion that Gregory Parsons is and was a good person to whom bad things happened. I do not find that those who contributed to

those bad things happening were evil or malicious. They were caught up in systemic forces and only saw "their own workshop", *supra*, at p. 68.

## 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 8<sup>th</sup>, 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 17<sup>th</sup>, 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 6<sup>th</sup>.

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 5<sup>th</sup> 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 1<sup>st</sup>, and began working at the cemetery, with Brenda Young's grandfather, Edmund Dyke.

On May 23<sup>rd</sup>, 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 9<sup>th</sup>.

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 22<sup>nd</sup> 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 15<sup>th</sup>. On the weekend of June 4<sup>th</sup>, 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 9<sup>th</sup>, he attended the first meeting in the family violence program.

However, the next day, on Thursday, June 10<sup>th</sup>, 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 11<sup>th</sup>, 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 11<sup>th</sup>, 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 went 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 20<sup>th</sup>, 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.

Cindy was obviously upset at the time. I too was upset by his approach to the child.

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 it 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 13<sup>th</sup>, 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 16<sup>th</sup>, 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 14<sup>th</sup>. 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 12<sup>th</sup>.

### **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 22<sup>nd</sup>, 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".

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 13<sup>th</sup>, 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 14<sup>th</sup>, 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.

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 16<sup>th</sup>, 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 22<sup>nd</sup>, 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 16<sup>th</sup>, 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 31<sup>st</sup>, 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 13<sup>th</sup>, 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 23<sup>rd</sup>, in which she described a telephone call she received, also on June 13<sup>th</sup>, 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 12<sup>th</sup>, 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 19<sup>th</sup> Lieutenant Peddle requested funding and human resources to conduct electronic surveillance. This was granted and on July 7<sup>th</sup>, 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 17<sup>th</sup>, 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 31<sup>st</sup>, 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 29<sup>th</sup>, 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 5<sup>th</sup>, 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 11<sup>th</sup>, when the driver spoke to Brenda Young. This was quite extraordinary since on June 12<sup>th</sup>, he had told the police it was a small, grey import car. In a statement on June 19<sup>th</sup>, 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 12<sup>th</sup>, 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 10<sup>th</sup>. 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 11<sup>th</sup>, 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 11<sup>th</sup>, 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 19<sup>th</sup>,

Phyllis Duke gave the videotaped statement, and on August 20<sup>th</sup>, 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 26<sup>th</sup>, 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 5<sup>th</sup>. 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 9<sup>th</sup>, 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 20<sup>th</sup>, 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 4<sup>th</sup>, 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 23<sup>rd</sup>, 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 rifle 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 23<sup>rd</sup> 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 occurred 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 is [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.<br>(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 16<sup>th</sup> 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 16 <sup>th</sup> , 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:   | <b>I thought it could have been someone else's, cause lots of people sounds the same.</b>                                                                          |
| Cst. R. Baggs: | <b>Why would you think that? Why did you think it was Randy's?</b>                                                                                                 |
| 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:  
[Emphasis added]

Yes.

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 16<sup>th</sup> 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 31<sup>st</sup>, 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 not 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 12<sup>th</sup> in effect, said the voice she heard was not Randy Druken's. By September 1<sup>st</sup>, 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 13<sup>th</sup>, 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 12<sup>th</sup> or 13<sup>th</sup>.
  - 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 13<sup>th</sup> 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 13<sup>th</sup>, 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 23<sup>rd</sup>, refers to a telephone call she received from Randy Druken on June 13<sup>th</sup>, 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 5<sup>th</sup>, 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 car 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 10<sup>th</sup>, 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 13<sup>th</sup>. 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 19<sup>th</sup>. 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 13<sup>th</sup> 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 23<sup>rd</sup> 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 14<sup>th</sup>, she was re-interviewed, and this time asked about the evening of June 11<sup>th</sup>, 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 18<sup>th</sup>, 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 thereabouts. 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 13<sup>th</sup> 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 23<sup>rd</sup>, 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 at 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 9<sup>th</sup>, 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 10<sup>th</sup>, 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 26<sup>th</sup> 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 10<sup>th</sup>, 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 26<sup>th</sup>, 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 20<sup>th</sup>, 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 9<sup>th</sup>, 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 26<sup>th</sup>, 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 4<sup>th</sup>, 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 5<sup>th</sup>, 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 9<sup>th</sup>, 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 10<sup>th</sup>, the day of the arrests, when the matter was adjourned to August 26<sup>th</sup>. Meanwhile, Randy Druken was charged with murder on August 20<sup>th</sup>. The obstruction charges were set over again to September 7<sup>th</sup> 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 25<sup>th</sup>. On September 21<sup>st</sup>, 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 marshal 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 reconsider, 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 Piercy 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. Piercy 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 1<sup>st</sup>, 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 7<sup>th</sup>, 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 31<sup>st</sup>, 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 31<sup>st</sup>, 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 18<sup>th</sup>, 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 than 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 Lieutenant 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 1<sup>st</sup> was four months prior to Mrs. Druken's cross-examination on the following February 27<sup>th</sup>. 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 31<sup>st</sup>, 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 its 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 17<sup>th</sup>, 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<br>(now Sergeant)              | - | Investigator                        |
| Sergeant Geoff Walsh                              | - | Investigator                        |
| Constable Jason Sheppard<br>(now Acting Sergeant) | - | Investigator                        |
| Constable Dave Gray<br>(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 16<sup>th</sup>, 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 19<sup>th</sup>, 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 1<sup>st</sup>.

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 11<sup>th</sup>.

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 30<sup>th</sup>. 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 20<sup>th</sup>, 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 10<sup>th</sup>, Mr. Mills, wrote to the Chief of Police, Richard Deering, and stated that, "at the conclusion of the June 11<sup>th</sup> 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-handly "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.

# ANNEXES



RSNL1990 CHAPTER P - 38

## PUBLIC INQUIRIES ACT

Amended:

### CHAPTER P-38

#### AN ACT RESPECTING PUBLIC INQUIRIES

##### *Analysis*

- |                            |                                |
|----------------------------|--------------------------------|
| 1. Short title             | 4. Assistance to commissioners |
| 2. Commissions of inquiry  | 5. Delegation by commissioners |
| 3. Powers of commissioners |                                |

Short title

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

RSN1970 c314 s1

Commissions of  
inquiry

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

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

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Public Inquiries Act

Chapter P-38

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

RSN1970 c314 s2

Powers of commis-  
sioners

3. (1) The commissioner or commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence that is vested in a court of law in civil cases; and a false statement made by the witness on oath or affirmation shall be an offence punishable in the same manner as perjury.

(2) A witness shall not be excused from answering a question upon the ground that the answer to the question may tend to criminate the witness, or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of a person.

(3) Where a witness objects to answer upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of a person, and where but for this Act or the *Canada Evidence Act* the witness would have been excused from answering the question and although the witness is because of this Act or the *Canada Evidence Act* compelled to answer the answer so given shall not be used or receivable in evidence against the witness in a criminal proceeding taking place later, other than a prosecution for perjury in the giving of the evidence.

RSN1970 c314 s3

Assistance to  
commissioners

4. The Lieutenant-Governor in Council may engage the services of the counsel, accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants that may be considered necessary to help the commissioner or commissioners in the inquiry.

RSN1970 c314 s4

Delegation by  
commissioners

5. (1) The commissioner or commissioners may with the consent of the Lieutenant-Governor in Council authorize and appoint the accountants, engineers, technical advisers, or other experts, or other qualified persons, to inquire into a matter within the scope of the commission that may be directed by the commissioner or commissioners.

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*Public Inquiries Act**Chapter P-38*

(2) A person so appointed shall have the same powers which a commissioner has to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(3) A person so appointed shall report the evidence and their findings to the commissioner or commissioners.

RSN1970 c314 s5

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Executive  
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Newfoundland  
and Labrador

*Certified to be a true copy of a Minute of a Meeting  
of the Committee of the Executive Council of Newfoundland and  
Labrador approved by His Honour the Administrator on  
2005/10/03*

OC2005-507

MC2004-0376. JUS2004-026.

JUS/DM  
TW/DM  
TB/DM  
AG  
Deputy Clerk  
File

Under the authority of section 2 of the Public Inquiries Act, the Lieutenant Governor in Council is pleased to revise the time frame for Commissioner Antonio Lamer to complete the Inquiry and deliver his final report containing his findings, conclusions and recommendations to the Attorney General on or before December 31, 2005.

A handwritten signature in cursive script, reading "Robert C. Thompson".

Clerk of the Executive Council



COMMISSION OF INQUIRY

THE RIGHT HONOURABLE ANTONIO LAMER, P.C., C.C., C.D.

NICK AVIS, Q.C.  
SENIOR INQUIRY COUNSEL (HEARINGS)

ED RATUSHNY, Q.C.  
SENIOR INQUIRY COUNSEL (ADVISORY)

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**RULING ON THE TERMS OF REFERENCE**

**1. BACKGROUND:**

As I have stated previously, when I accepted appointment to this Commission, I had advised the Government of Newfoundland and Labrador that other professional commitments precluded me from commencing public hearings until September of this year. That did not pose a problem since substantial preparation by the staff over the spring and summer was required in any event, to be ready for the hearings.

The status of each of the three individuals who were subjected to the criminal proceedings in question is distinct. Mr. Parsons not only was acquitted but his factual innocence was acknowledged and he was compensated. Mr. Dalton was acquitted but it has not been acknowledged that he is factually innocent. Mr. Druken was not even given the opportunity to be acquitted, let alone acknowledged to be factually innocent.

The public hearings did commence on September 23 and we were able to complete one of the five subject areas described in the Terms of Reference. This term related to the delay in the Dalton appeal of his murder conviction.

However, it was apparent to me and to many of the counsel with standing, that the remaining items in the Terms of Reference raised a number of questions that should be resolved if we are to proceed expeditiously and effectively. Therefore, the week of October 28 was scheduled for the purpose of hearing the views of all parties in relation to the meaning and scope of the Terms of Reference.

As I have emphasized on a number of occasions, a Commission of Inquiry is a captive of its Terms of Reference, subject to additional constraints imposed by the law, including the law of the Constitution. It follows that the scope of a Commission's mandate is determined not by the Commissioner, but by the Government. The constitutional limitations arise, not only from the separation of powers between the federal and provincial levels of government in relation to the



criminal law power and the administration of justice, respectively, but also as between government and the judiciary.

At the outset of the first phase involving delay in the Dalton appeal, both Mr. Dalton and his counsel urged me to inquire into his factual innocence. Mr. Dalton was acquitted by a jury and therefore, is entitled to an irrebuttable "presumption" of innocence. However, he seeks a finding of "actual" innocence, in other words, a finding that he did not commit the crime in question or, in this case, that no crime occurred. Otherwise, he asked, on what basis is this Commission to determine whether he should be compensated, and if so, in what amount?

A similar issue arises in relation to the items of the Terms of Reference related to Mr. Druken. However, it is even more complicated. Unlike Mr. Dalton, Mr. Druken has never been acquitted of the murder in question. The proceedings against him were discontinued by a "stay of proceedings". Mr. Druken is also entitled to be presumed innocent but, unlike Mr. Dalton, there is nothing in law to prevent Mr. Druken from being charged with the same offence. In this respect, his presumption of innocence is not irrebuttable but is similar to that of all other members of the public. His status, again, raises serious difficulties in determining whether he should be compensated, and if so, the basis on which such compensation should be determined.

These and other issues related to the Terms of Reference are addressed under the headings which follow.

## 2. SCOPE OF TERMS 1(a) and 1(b):

Term 1(a) requires the Commissioner:

To inquire into the conduct of the investigation into the death of Catherine Carroll, and the circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons for the murder of Catherine Carroll.

Term 1(b) is identical except the names of the victim and the accused are replaced by the names "Brenda Young" and "Randy Druken" respectively.

The aspect of these terms referring to the "investigation" does not appear to raise concerns. However, the aspect of the "criminal proceedings" does. In this respect, I had asked Mr. Avis to ensure the exploration of the concerns that may arise when a Commission engages in a consideration of similar issues to those that have already been the subject of criminal trials and appeals. With that consideration in mind, how is the phrase "criminal proceedings" to be interpreted?

The first question to be addressed is the meaning of the phrase "circumstances surrounding". It is of interest that the Terms of Reference in the Morin inquiry simply use the phrase "into the criminal proceedings" while those in Sophonow also include the preface "circumstances surrounding". It has been suggested that this phrase qualifies the scope of the examination of the criminal proceedings and precludes an examination of what occurred "in the face of the Court". This view is reinforced by the ordinary meaning of the word "surround", which implies being "outside".

The Report of the Morin Inquiry clearly indicates that the Commissioner had no hesitation in reviewing matters that had occurred in a trial even though they may have been ruled upon by the trial judge. Nor is there any suggestion in the Sophonow Report that the phrase "circumstances surrounding" limited the examination of the criminal proceedings in question. Indeed the Commissioner there appeared quite willing to address the role of a trial judge. However, it was "not necessary" for him to do so since that had been done by the Manitoba Court Appeal. The Commission did "...agree with and endorse their findings pertaining to the conduct of those trials".

This approach is reinforced by the breadth of the phrase "criminal proceedings". It does not commence with the trial but with the laying of a charge. Restricting this inquiry to matters outside of the criminal proceedings would leave very little to be examined. Potentially important issues such as the relationship of the prosecution to the police, and the prosecution disclosure to the defence, would be precluded.

Term 7 of the Terms of Reference authorizes the Commissioner to rely upon "...any transcript or record of pre-trial, trial or appeal proceedings before any Court...". This also supports an interpretation that is not limited to matters "outside" of the actual criminal proceedings.

Finally, to interpret the phrase "criminal proceedings" so restrictively would undermine the very purpose of this inquiry. Its basic task is to determine "what happened" in these two cases and "why", in order to inform the public and to identify areas where improvements might be made to the administration of justice in Newfoundland and Labrador. To carve out significant areas of "what happened" as being "out-of-bounds" would undermine that basic purpose.

As a result, the phrase "circumstances surrounding" must be interpreted as expanding rather than limiting the examination of the criminal proceedings in question. This permits an examination of both the actual criminal proceedings and any additional matters which may have affected those proceedings.

It follows that all aspects of the criminal proceedings may be examined provided such examination is required by the purpose for which this Commission has been created. More is said about this under the heading, Constitutional Issues. However, this limitation with respect to "purpose" is important. This inquiry cannot be a "fishing expedition" to re-open every potentially contentious issue that might arise. The issues to be explored must be relevant to the central purpose. In this respect, I adopt, as a guideline in assessing relevance, the standard proposed by Mr. Avis, namely, is the conduct or issue in question "serious enough to have potentially affected the investigations or the verdicts"?

Item 5 of the Terms of Reference also imposes limits on the scope of the inquiry under Items 1(a) and 1(b). It precludes a "retrial" or findings related to "civil or criminal responsibility". Since these reflect constitutional limitations, they are also addressed under the heading, Constitutional Issues.

### 3. COMPENSATION IN TERMS 1(c) and 1(e):

Term 1(c) requires the Commissioner:

To advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation from Government and if so, the appropriate amount of such compensation?

Term 1(e) relates to whether compensation should be given to Ronald Dalton and if so the appropriate amount, but is restricted to being "for the eight years in which he awaited the perfection of his Appeal". It should be noted that in the case of Gregory Parsons, the Government has acknowledged his factual innocence and has already awarded compensation.

The Terms of Reference for this Inquiry are unique in placing the issue of compensation before a Commission without an acknowledgement by the Government of factual innocence. It was submitted by some of the parties that this was an implicit mandate to embark upon an inquiry into factual innocence in the two cases where the issue of compensation has been raised. I am of the view that the current Terms of Reference do not permit an inquiry into the factual innocence of Mr. Druken or Mr. Dalton. For reasons discussed under the heading Constitutional Issues, I believe that a provincial commission of inquiry could be given such a mandate. However, such a mandate has not been given to this Commission.

In the event that this commission of inquiry should be given such a mandate, the Government should recognize that this would entail considerable additional time and resources. While I have not reviewed the evidence relevant to the cases in

question, there is also, always the possibility that, ultimately, such an inquiry could be inconclusive on the issue of factual innocence.

Compensation in cases of factual innocence or wrongful conviction normally is based upon an acknowledgement by the Executive branch of government that a miscarriage of justice has occurred. Factual innocence may be apparent from the evidence and result following a criminal trial. Even in such cases, compensation is not always granted by the Government. Indeed, a factually innocent person may be convicted even where all procedural safeguards have been respected.

The decision to award compensation to a wrongfully convicted person is an Executive decision. It is not made because of any legal obligation. It is an *ex gratia* payment made because it is the view of the Government that it is in the public interest to do so. Attempts have been made to establish guidelines as to when such payments should be made, but ultimately, the decision tends to involve an acknowledgement that the factually innocent person has suffered unacceptable consequences because the criminal justice system did not operate the way it should have.

Counsel for the Attorney General submitted that it still would be possible for this Commission to award compensation to Mr. Dalton for the delay in his appeal, even without a determination of factual innocence. However, as Mr. Dalton himself suggested, there may be a significant difference between awarding compensation for delay to one who is factually innocent and to one who is potentially guilty. Quite frankly, I have great difficulty in determining how compensation can be calculated for Mr. Dalton in these circumstances. Is one or the other status to be assumed? If so, which one? However, I will hear specific submissions related to Term 1(e) when we reach that phase.

Similar concerns arise with respect to potential compensation for Mr. Druken with the added factor that he has not even been acquitted. There appear to be a number of aspects of the criminal proceedings in relation to Mr. Druken, which warrant examination pursuant to Term 1(b). Perhaps the issue of compensation will be clarified after that phase has been completed. However, I presently have the same difficulty with respect to potential compensation for Mr. Druken as I have for Mr. Dalton.

#### 4. CONSTITUTIONAL ISSUES:

The constitutional foundation for a public inquiry of this nature is section 92 (14) of the Constitution Act, 1867, which assigns responsibility for the administration of justice, including criminal justice, to the provinces. The Government of Newfoundland and Labrador considered issues arising from the murder convictions

of Gregory Parsons, Randy Druken and Ronald Dalton to be of sufficient public importance to warrant establishing this Inquiry. Item 5 of the Terms of Reference provides that I am to perform my duties:

...without expressing any conclusions or recommendations regarding the civil or criminal responsibility of any person or organization and without permitting the enquiry to become a retrial....

These words express constitutional limitations, which apply to every provincial commission of inquiry that is reviewing criminal proceedings.

Such a commission may review the same subject matter as that of a criminal investigation and trial, but it must do so for a different and legitimate provincial purpose. It examines what mistakes or congruence of circumstances may have led to the results in question. It tells the Government what happened and why and it may make recommendations to avoid pitfalls in future cases. It may review the conduct of police officers, prosecutors and defence counsel, but it does not do so as a disciplinary body. It may review the findings of a trial judge, but it does not do so as an appellate court. As one of the parties stated, a court of appeal does not ask, "what went wrong"? It may do these things for the public purpose described above. It must avoid efforts by any of the parties to "retry" the case in an adversary manner and it must scrupulously avoid making findings which express an opinion as to criminal or civil responsibility in law.

This leads to a further constitutional issue, which was alluded to above, namely: May a provincially constituted commission of inquiry, (indeed even a federally constituted one), be authorized by its terms of reference to inquire into and report on whether a person who has been tried in a criminal court, is factually innocent? The constitutional hurdle for an inquiry, in such circumstances would appear to be far more difficult to overcome. Presumably such a commission would have to examine the same evidence as well as many of the identical issues as those at the criminal trial.

However, there are important differences. The most fundamental is that a criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.

In contrast, a commission has a very different purpose. It is to provide advice to the provincial Government as to whether all of the circumstances, including a previous wrongful conviction, warrant an official response. This might include the granting of compensation or the making of an apology. This would not involve the

exercise of the criminal law power under section 91(27) of the Constitution Act, 1867. Rather, it would flow from section 92 (14) with respect to the administration of criminal justice.

Moreover, the report of a commission has no legal consequences. It does not make a binding decision and does not affect legal rights. It is merely the advice of a commission to better enable a provincial Government to carry out its responsibilities in a legitimate sphere of its jurisdiction.

This result may be viewed from another perspective. There is no question that a provincial government may decide to make an *ex gratia* payment to a person who has been wrongfully convicted of a crime. In making such a decision, the Government must rely on advice from someone who has thoroughly reviewed the criminal proceedings in question and all other relevant factors. Why then can the Government not rely on a commission, which has legal status and powers, as the vehicle to inquire into the matter and provide such advice?

Thus, while such proceedings before a commission might have the appearance of a "re-trial", they would be for a completely different purpose. They would not be bound by criminal rules of procedure or evidence and could take into account matters inadmissible at the criminal trial as well as additional facts or developments which became known subsequent to the criminal trial.

It must be emphasized that it would not be permissible for such a commission to determine that the person in question was "factually guilty". Such a finding would be attempting to do exactly what only a criminal court may do. Rather, if factual innocence cannot be determined, that is all that should be reported. This may be a fine distinction, but so also may be the distinction between a finding of misconduct and one of criminal responsibility. That distinction was ably articulated by my former colleague, Cory. J in *A.G. Canada v. Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440. Similar care and appropriate language would be necessary where a commission declines to make a determination of factual innocence.

There are, of course, other constitutional limitations upon such an inquiry. For example, the judge who presided at the criminal trial (or any other judge) may not be called to testify before such a commission. There are other legal restrictions imposed by the law of privilege and the Criminal Code provisions related to jurors.

## 5. CONCLUSION:

I am grateful to all counsel for their submissions in relation to these issues. The parties will observe that I have not adopted some of the submissions made by Commission Senior Counsel (Hearings). That should not be viewed as surprising

but rather as a reflection of the division of responsibilities I have established. Commission Counsel (Hearings) makes submissions in the hearing room, together with counsel for all of the parties and there may be strong disagreement reflected in those submissions. However, once those submissions have been made, I rely only on Commission Counsel (Advisory) to provide legal and constitutional advice and to assist in formulating my reasons.

To summarize my conclusions with respect to the Terms of Reference:

- The next phase of this Inquiry relating to Term 1(a) (investigation and criminal proceedings in Parsons) may proceed on the basis indicated in these reasons;
- The phase relating to Term 1(b) (investigation and criminal proceedings in Druken) may proceed on the same basis;
- The compensation phases in Terms 1(c) and 1(e) may not be possible to address in the absence of determinations of factual innocence.

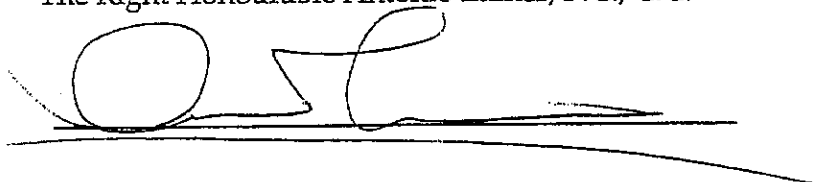
The current situation with respect to the compensation issues raises serious concerns. There has been no determination by the Government of factual innocence. For this Commission to embark on such a determination would require an amendment to the Terms of Reference as well as substantial additional time and resources. Another possible option might be an amendment to direct this Commission to address compensation on the basis of an assumption of factual innocence.

Finally, I wish to observe that, on the eve of the hearings in relation to these Terms of Reference, a press release was issued by the Premier-elect of Newfoundland and Labrador. It suggested that the Government would be pleased to hear any recommendations I might want to make by way of amendments to the Terms of Reference. I do not consider it to be appropriate for me to make any such recommendations at this time.

The nature and scope of the Terms of Reference are a matter of public policy for the Government, which also involve a consideration of their financial implications. Counsel for the Attorney General participated in the hearings related to the Terms of Reference and I assume the Attorney General has received a copy of the transcript of those proceedings, as I requested. In the event any changes to those Terms are proposed, I trust I will have an opportunity to comment on any such proposals.

The Right Honourable Antonio Lamer, P.C., C.C.

Signature:

A handwritten signature in dark ink, consisting of a large, stylized 'A' followed by a series of loops and a long horizontal stroke extending to the right.



Executive  
Council



Newfoundland  
and Labrador

*Certified to be a true copy of a Minute of a Meeting  
of the Committee of the Executive Council of Newfoundland and  
Labrador approved by His Honour the Lieutenant-Governor on*

2005/04/28

OC2005-151

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TB/DM  
AG  
Deputy Clerk  
File

Under the authority of section 2 of the Public Inquiries Act, the Lieutenant Governor in Council is pleased to defer for six months following receipt of Commissioner Lamer's report on the administration of justice, the following phases of the Terms of Reference of the Lamer Commission of Inquiry:

- i) for the Commissioner to advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation from Government and if so, the appropriate amount of such compensation; and
- ii) for the Commissioner to advise on whether Ronald Dalton should receive financial compensation from Government for the eight years in which he awaited the perfection of his Appeal, and if so, the appropriate amount of such compensation.

A handwritten signature in black ink, reading "Robert C. Thompson".

Clerk of the Executive Council

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NLIS 3  
May 5, 2005  
(Justice)

Government to await Commissioner Lamer's report  
before proceeding with compensation phase of inquiry

Minister of Justice and Attorney General Tom Marshall today announced that government will await Commissioner Lamer's report on the administration of justice before proceeding with the compensation phase of the Lamer Inquiry. There will be a period of not more than six months following receipt of Commissioner Lamer's report during which government will review the commissioner's findings.

"Commissioner Lamer's report will be focused on the administration of justice and provide insight and information to help strengthen our criminal justice system in the province. At the same time, Commissioner Lamer has expressed concern over his ability to recommend compensation without some direction from government on factual innocence. In the case of Mr. Druken, we would like to have the benefit of Commissioner Lamer's report before deciding how to proceed," stated Minister Marshall.

With respect to Ronald Dalton, Minister Marshall stated, "Government will await Commissioner Lamer's findings of why Mr. Dalton spent eight years in prison awaiting an appeal. This report will provide an answer to what role, if any, government played in this delay, and provide insight to the possibility of compensation for Mr. Dalton. In addition, having given the matter careful consideration, we are satisfied, as was the previous administration, that the circumstances of Mr. Dalton's arrest and prosecution do not call for a public inquiry. As such, there will be no change in the original terms of reference."

"Commissioner Lamer has expressed concerns regarding the circumstances under which Gregory Parsons accepted compensation. Government will assess Commissioner Lamer's report before deciding whether or not further compensation should be provided to Mr. Parsons," added Minister Marshall.

The Lamer Inquiry, announced in March 2003, is a public inquiry into alleged miscarriages of justice in the cases of Gregory Parsons, Randy Druken and Ronald Dalton. Specifically, the inquiry has a mandate to review the investigations and circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons and Randy Druken. The inquiry was also asked to review why Ronald Dalton's appeal of his murder conviction, took eight years before his appeal was heard by the Court of Appeal. The inquiry is scheduled to conclude in June 2005. The report is expected on or before December 31, 2005.

"We look forward to the final submission by Commissioner Lamer, and have the utmost confidence that the recommendations will improve the administration of justice in the province," added Minister Marshall.

Media contact: Heather MacLean, Communications, (709) 729-6985, 690-2498

2005 05 05

3:30 p.m.

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Commission of Inquiry into the conduct of the investigations into the deaths of Catherine Carroll and Brenda Young and the circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons and Randy Druken, the delay in the appeal of Ronald Dalton, issues of compensation with respect to Randy Druken and Ronald Dalton, and any related systemic issues.

## RULES OF PRACTICE AND PROCEDURE

### 1. Definitions

1. *The Commissioner* means The Right Honourable Antonio Lamer, P.C., C.C., C.D.
2. *Inquiry Counsel (Advisory)* means Ed Ratushny, Q.C.
3. *Inquiry Counsel (Hearings)* means Nick Avis, Q.C. or, if he so designates in writing, Ed Ratushny, Q.C. or Rosellen Sullivan.
4. *Inquiry counsel* means any one of Ed Ratushny, Q.C., Nick Avis, Q.C. or Rosellen Sullivan.
5. *Counsel* means counsel for any person, organization or office with standing for a particular phase of the Inquiry.
6. *A person, organization or office with standing* means any person, organization or office granted standing by the Commissioner for a particular phase of the Inquiry.
7. *Documents* mean every kind of printed or hand-written matter regardless of the means of creation, storage or reproduction, electronic images, tape recordings, videotapes and photographs. Documents include, without limiting their definition, affidavits, witness statements, correspondence, notes, transcripts, legislation, regulations, books, reports, pleadings, diagrams, plans, decisions or orders of any court, board, tribunal, commission or inquiry, and images or descriptions of exhibits.
8. *The list of documents* is a list of documents potentially relevant to a particular phase of the Inquiry and is subject to ongoing revision by the Commission.
9. *The public record* means any document that is already generally available to the public, any exhibit filed at the hearings or at the hearing of an application, and includes any document on the list of documents that the Commissioner directs to become part of the public record.

## 2. General

1. The Commissioner may depart from these rules when he considers it appropriate to do so.
2. These rules may be amended by the Commissioner and all counsel will be notified of any such amendments.
3. Directions may be provided by the Commissioner to supplement these rules and all counsel will be notified of any such directions.
4. All proceedings of the Inquiry will be dealt with as informally and expeditiously as possible but in accordance with the principle of fairness.
5. The Commissioner may postpone any date set for any hearings or application or the doing of any thing. Inquiry counsel shall notify all counsel and any person, organization or office affected by the postponement, of the new date.

## 3. Notice and Service

1. Notice shall always be in writing.
2. A subpoena issued pursuant to these rules and the *Public Investigations Evidence Act* shall be served personally.
3. Unless otherwise specified, anything that has to be served, except a subpoena, must be served on all counsel and Inquiry Counsel (Hearings).
4. Unless otherwise specified and except for a subpoena, service or notice may be personal, by registered mail or facsimile or e-mail. Service or notice after 5 p.m. shall be deemed to be the next business day.

## 4. Terms of Reference and Phases of the Inquiry

The Inquiry will be divided into 6 distinct phases dealing with the 6 terms of reference in the Order in Council. The 6 phases will be heard in the following order:

|           |            |                                                         |
|-----------|------------|---------------------------------------------------------|
| Phase I   | Term 1(d): | Delay in the Dalton appeal.                             |
| Phase II  | Term 1(a): | Carroll investigation and Parsons criminal proceedings. |
| Phase III | Term 1(b): | Young investigation and Druken criminal proceedings.    |
| Phase IV  | Term 1(e): | Dalton compensation issues.                             |
| Phase V   | Term 1(c): | Druken compensation issues.                             |
| Phase VI  | Term 4:    | Systemic issues.                                        |

## 5. Hearings

1. The Commission will hold public hearings at:

**PO Box 8700, Atlantic Place  
3d Floor, 215 Water Street,  
St. John's, NL, A1B 4J6**

or such other place as the Commissioner directs on dates to be determined by the Commissioner including the following dates in 2003 and 2004:

23 September to 26 September. (Dalton 1(d))  
1 October (Submissions Dalton 1(d))  
28 October to 29 October (Submissions/Applications)  
9 December to 12 December (Parsons 1(a))  
15 December to 16 December (Parsons 1(a))  
20 January to 23 January (Parsons 1(a))  
26 January to 30 January (Parsons 1(a))  
3 February to 5 February (Parsons 1(a))  
4 May 2004 - 7 May 2004 (Parsons 1(a))  
10 May 2004 - 14 May 2004 (Parsons 1(a))

**Parsons 1(a) will resume on 26 October 2004 until finished.  
Druken 1(b) will then commence the first sitting day of the  
next scheduled week.**

26 October 2004 to 29 October 2004 (Parsons 1(a))  
1 November 2004 - 2 November 2004 (Parsons 1(a))  
16 November 2004 - 19 November 2004 (Druken 1(b))  
22 November 2004 - 25 November 2004 (Druken 1(b))  
6 December 2004 - 10 December 2004 (Druken 1(b))  
13 December 2004 (Druken 1(b))  
17 January - 21 January 2005 (Druken 1(b))  
24 January - 25 January 2005 (Druken 1(b))  
27 January 2005 (Druken 1(b))

**Oral Submission in Parsons 1(a) and Druken 1(b) will  
commence**

27 April 2005 - 28 April 2005

### **Systemic Phase**

6 June 2005 - 7 June 2005  
9 June 2005 - 10 June 2005  
[Amended 5 June 2005]

2. Notice of dates of subsequent hearings will be provided in a timely manner.
3. Unless otherwise directed by the Commissioner hearings will commence at 10:00 a.m. and conclude at 5:00 p.m. or later, if required, except Fridays in which case hearings will commence at 9:30 a.m. and conclude at 12:30 p.m. sharp. There will be a mid-morning break of approximately 15 minutes, a lunch break from 1:00 p.m. to 2:00 p.m., and an afternoon break of approximately 15 minutes. [Amended 26 April 2005]
4. The dates set for hearings are intended for the evidence of witnesses only.
5. Due to the scope of the Inquiry, the number of witnesses involved, the anticipated number of counsel and the deadline for completion of the Inquiry, it will not be possible to accommodate the schedules of counsel. Inquiry Counsel (Hearings) will however make every effort to accommodate witnesses.
6. The hearings shall be recorded and transcriptions created electronically (the Inquiry transcript) which shall be added to the list of documents.
7. The Commission is committed to a process of public hearings but may conduct proceedings *in camera*, direct who may be present and what conditions will be imposed on anyone in attendance. The Commissioner may also refuse permission to televise certain portions of the proceedings. Counsel or Inquiry counsel may apply to have any portion of the proceedings *in camera* or not televised.
8. Any applications, replies, documents, exhibits or transcripts pertaining to *in camera* proceedings shall be marked with the letters IC and shall not form part of the public record unless otherwise directed by the Commissioner.

## 6. Standing

1. Applications for standing in respect of any given phase of the Inquiry must be served on Inquiry Counsel (Hearings) on the dates specified in any Notice of Hearings published by the Commission or on any date set by the Commissioner of which the applicant has been notified.
2. Dates for the hearing of applications for standing shall be specified in the Notice of Hearings.

3. The Commissioner may deal summarily with any application for standing without a hearing and may direct Inquiry counsel to respond on his behalf.
4. An application for standing must indicate the phases for which standing is sought and the reasons why standing should be granted. The test to be applied is whether or not the applicant has a direct and substantial interest in a given phase of the Inquiry. The application should also address what contribution the applicant can make to the Inquiry.
5. Any applicant for standing may be granted full or limited standing at the discretion of the Commissioner.
6. Any person, organization or office added to an application by Inquiry Counsel (Hearings) or the Commissioner shall have limited standing for the purpose of participating in the application.
7. Any witness not a person with standing and not belonging to an organization or office with standing shall have limited standing for the duration of their testimony and for the purpose of serving an application or a reply in respect of their testimony.
8. Any person, organization or office given notice under rule 13 shall have limited standing for the purpose of exercising their rights under rule 13.
9. An application for standing may be made through Inquiry counsel (Hearings) at any time due to unforeseeable circumstances.

## 7. Applications

1. Counsel who wish to be heard by the Commissioner on any matter except those arising during the actual hearings, must serve an application. The right to serve an application is not limited to those rules that make specific reference to applications.
2. The Commissioner relies primarily on Inquiry Counsel (Hearings) to marshal, present and test the evidence and expects the co-operation of all counsel to ensure that this is done as fairly and expeditiously as possible. However, as a last resort, if counsel are unable to resolve issues by agreement, any decision of Inquiry Counsel (Hearings) may be the subject of an application to the Commissioner.
3. Inquiry counsel may serve an application and shall be governed by the same rules as apply to other counsel.

4. Inquiry Counsel (Hearings) may direct that any counsel must file an application on any issue by a specified date.
5. Inquiry Counsel (Hearings) may notify counsel that certain evidence is not relevant or certain facts are to be admitted in a particular phase of the Inquiry. The notice shall specify a date by which an application to object must be served. Anyone who fails to bring an application as required is deemed to have accepted that the specified evidence is not relevant or admitted the specified facts in the phase(s) of the Inquiry specified in the notice.
6. The rules regarding applications are intended to ensure that any issues that might affect the evidence to be introduced in a particular phase of the Inquiry are resolved as far in advance of the hearings as possible to allow all counsel to properly prepare and to make optimum use of the times set aside for the hearing of witnesses. It is imperative therefore that applications be brought as soon as an issue is known and cannot be resolved.
7. Applications shall be heard by telephone or video-conferencing on days the Commission is not sitting. The scheduled hearing of evidence will not be modified to accommodate applications except in extreme circumstances. It is imperative, therefore, that applications be served as soon as an issue is known and cannot be resolved.
8. An application must be in writing and may be in the form of a letter. It must concisely state the facts upon which the application is based, the relief sought and include a brief argument. Any supporting documentation or affidavits and any authorities or legislation to be relied upon shall be included and served with the application.
9. The Commissioner or Inquiry Counsel (Hearings) may add any person, organization or office to an application who shall be served with all replies and other documents by counsel serving those replies or other documents, and shall have standing for the limited purpose of participating in the application.
10. All counsel must serve a reply to any application by midday on the 3<sup>rd</sup> business day after service. A reply shall be in similar form to an application. Failure to reply in accordance with these rules may result in the application proceeding without further notice.
11. Inquiry Counsel (Hearings) may request further information, documents or affidavits, authorities or written argument from any applicant or respondent. The Commissioner may direct that such further information, documents or affidavits, authorities or written argument be provided and



served. Failure to follow the Commissioner's directions may result in the application being dismissed or a given reply not being considered or heard.

12. The Commissioner may deal with any application summarily and without a hearing and may direct Inquiry counsel to respond on his behalf.
13. The Commissioner may direct that an application be set down for a hearing and Inquiry Counsel (Hearings) shall notify the applicant and all respondents of the time, date and place for the application to be heard.
14. If an applicant or respondent wishes to call a witness or witnesses at the hearing of an application they must state this in the application or reply and give reasons. If an applicant or a respondent wishes to cross-examine any deponent of any affidavit filed in an application, they must forthwith notify all counsel and Inquiry Counsel (Hearings). The Commissioner shall decide if any witnesses are to be called and upon what terms.
15. Unless otherwise directed by the Commissioner, in an application the order of examination and argument shall be as follows:
  - (1<sup>st</sup>) The applicant.
  - (2<sup>nd</sup>) Respondents in an order to be determined by Inquiry Counsel (Hearings).
  - (3<sup>rd</sup>) Inquiry counsel.
  - (4<sup>th</sup>) The applicant.
16. Applications that are heard shall be recorded and transcriptions created electronically (the Inquiry transcript) which shall be added to the list of documents.
17. All applications and supporting documents, and any written submissions of counsel directed to be filed by the Commissioner shall be treated as confidential and shall not form part of the public record until they are dealt with by the Commission or the Commissioner directs that they become part of the public record. **[Amended 1 October 2003]**

**8. Documents, Materials and Exhibits**

1. Images of all exhibits that are real evidence intended to be introduced at the hearings will be created with some verbal description and shall be deemed to be documents.
2. Some documents in the list of documents will list exhibits collected or used in earlier investigations or proceedings together with visual reproductions and/or verbal descriptions of the exhibit. The exhibit itself is deemed to be a document.
3. There shall be full and complete disclosure of all relevant documents by Inquiry Counsel (Hearings) and counsel subject to any restrictions the Commissioner deems necessary and fair.
4. Counsel who wish to have access to the original of any document or exhibit should explain their request in writing to Inquiry Counsel (Hearings).
5. Inquiry counsel may receive or examine documents subject to such confidentiality as they may determine is consistent with the Terms of Reference and the principle of fairness. Documents received from any person, witness, counsel, organization or office shall be treated as confidential by the Commission unless or until they become part of the public record or the Commissioner declares otherwise. This does not preclude Inquiry counsel from using such documents as part of the investigation, including showing them to witnesses, and providing copies subject to the undertaking referred to in rule 8.13.
6. At the commencement of the hearings into a particular phase of the Inquiry a list of documents, which the Commission may rely on or refer to at any time without further notice, will be filed. In the event of additional disclosure or the discovery of additional documents the list of documents may be revised. All documents in the list of documents that are already part of the public record shall be clearly identified as such. The Inquiry transcript shall be added to the list of documents as it becomes available.
7. The documents contained in the list will be electronically stored and one paper copy will be produced and kept by the Commission.
8. Full disclosure by means of computer disc of all documents contained in the list of documents shall be made to all counsel at the earliest opportunity and, with the exception of the Inquiry transcript, no later than the commencement of the phase of the Inquiry in which the materials may be relied upon or referred to.

9. Counsel who wish to have access to or be provided with a paper copy of any document should make a written request to Inquiry Counsel (Hearings). The Commissioner may direct that access be granted or paper copies be made available upon such terms and conditions as he sees fit, including the cost of reproducing the documents.
10. Counsel must at the earliest opportunity provide Inquiry Counsel (Hearings) with a list of any documents and exhibits they believe are relevant to the Inquiry. Originals or copies of any document or any exhibit so listed are to be provided to Inquiry counsel upon request. Inquiry Counsel (Hearings) may add any of these documents or exhibits to the list of documents and tender them as exhibits at the hearings.
11. Inquiry Counsel (Hearings) shall prepare a list and book of exhibits for each phase of the Inquiry and at the earliest opportunity, and no later than the commencement of the hearings of that particular phase, shall provide all counsel with the list of exhibits. The book of exhibits, or the necessary volume of it, shall be provided no later than the commencement of the witness's testimony during which the exhibits are relevant.
12. Counsel who intend to make use of or refer to any document at the hearings that is not in the book of exhibits shall ensure there are a sufficient number of copies of the document for the witness, counsel, all 3 Inquiry counsel and the Commissioner.
13. Anyone who receives disclosure from Inquiry Counsel (Hearings) shall sign an undertaking that the disclosure will be used solely for the purposes of the Inquiry. This undertaking ceases with respect to any particular document once that document is filed as an exhibit. Any document that is part of the public record is not intended to be subject to this undertaking. Documents on the list of documents are not exhibits unless filed at the hearings as exhibits. The Commissioner may direct that any document be released from the provisions of this undertaking and that any document on the list of documents become part of the public record.

## 9. Interviews and Statements

1. Anyone interviewed by or on behalf of Inquiry counsel may, but need not, have counsel present. All interviews will be recorded unless the witness declines.
2. Anyone may decline to be interviewed and may provide a written statement in lieu of or in addition to being interviewed.

3. Subject to rules 9.4 and 9.5, all statements taken by Inquiry counsel shall be added to the list of documents.
4. Statements on the list of documents may be edited or portions may be selected for use as exhibits.
5. Any statement taken by Inquiry counsel from someone who will not be called as a witness need not be disclosed to counsel or placed on the list of documents.
6. All witnesses shall be provided with a transcribed copy of their statement(s) as soon as possible. Witnesses shall also be provided with a copy of the recording of their statement(s) if requested

#### 10. Calling Witnesses

1. Inquiry Counsel (Hearings) shall at the earliest opportunity provide all counsel with a list of witnesses intended to be called during a particular phase of the Inquiry and in the case of any additional witness, except with leave of the Commissioner, no later than 48 hours before that witness is called.
2. Counsel must provide Inquiry Counsel (Hearings) at the earliest opportunity with the names and addresses of any witnesses they feel ought to be heard. Inquiry Counsel (Hearings) may decline to call any witness whose evidence does not appear to be relevant or will be covered by other witnesses.
3. Witness may be called only with leave of the Commissioner.
4. If at the end of any phase of the Inquiry there are persons who any counsel believes must be heard that counsel may apply for leave to have that person called. The Commissioner may direct that such applications be made orally and forthwith, and upon such other terms and conditions as he deems just and appropriate.
5. Inquiry counsel may subpoena any witness and shall do so when requested by a witness.
6. Witnesses may be called more than once.

## 11. Testimony

1. All witnesses called to testify are witnesses of the Commissioner and shall be treated with the same courtesy and respect as the Commissioner.
2. Inquiry Counsel (Hearings) shall provide at the earliest opportunity to any witness or their counsel a copy of all documents to be referred to during that witness's testimony.
3. No witness shall be examined or cross-examined on any document that is not in the book of exhibits that has not been disclosed at least 24 hours in advance of that witness's testimony unless the witness consents or the Commissioner directs otherwise. This does not apply to police officer's notes, previous statements, testimony or affidavits in the list of documents.
4. Witnesses shall testify under oath or affirmation.
5. All witnesses without standing are entitled to have counsel present at the hearing while they testify. Counsel may make objections during the witness's testimony and may question the witness.
6. Except with the permission of the Commissioner, no counsel other than Inquiry counsel may speak to a witness concerning that witness's evidence during that witness's testimony. Except with the permission of the Commissioner, Inquiry counsel may not speak to a witness while that witness is being cross-examined by other counsel.

## 12. Evidence

1. The Commission may receive any relevant evidence which might otherwise be inadmissible in a court of law under the strict rules of evidence, subject to the principle of fairness.
2. Counsel may use leading and non-leading questions with any witness subject to the direction of the Commissioner but are expected not to use leading questions in controversial or disputed areas of evidence.
3. Unless otherwise directed by the Commissioner, the order of examination shall be as follows:
  - (1<sup>st</sup>) Inquiry counsel.
  - (2<sup>nd</sup>) Counsel for any witness who, alternatively, may elect to question in the fifth place.

- (3<sup>rd</sup>) Counsel with a substantial commonality of interest.
  - (4<sup>th</sup>) Remaining counsel.
  - (5<sup>th</sup>) Counsel for any witness should they so elect.
  - (6<sup>th</sup>) Inquiry counsel.
- 4. Inquiry counsel shall determine and indicate prior to each witness's testimony the order of counsel in the third and fourth places.
  - 5. The Commissioner may strike any question, remark or evidence from the record and direct that the question, remark or evidence not be published in any document or broadcast in any way.

### **13. Notice of Possible Findings of Misconduct**

- 1. The Commission shall, before making any finding of misconduct against any person, organization or office, notify that person, organization or office of the potential finding unless, in the opinion of the Commissioner, that person, organization or office is aware of the potential finding and has had a full opportunity to respond.
- 2. Any person, organization or office that receives a notice under rule 13 may apply for leave to adduce evidence in response to that allegation or to have Inquiry Counsel (Hearings) adduce evidence in response to that allegation.
- 3. Other counsel may cross-examine any witness called in response to a notice under rule 13 only with respect to matters adduced in evidence during examination by Inquiry counsel or counsel for the recipient of a notice under rule 13.

### **14. Submissions**

- 1. All counsel may make submissions at the conclusion of a particular phase of the Inquiry subject to any restrictions that the Commissioner deems appropriate.
- 2. The Commissioner will direct when submissions are to be made and whether they are to be made orally and/or in writing.

**15. Public and Media Access to Information**

Anyone, including members of the media, who wishes to have access to or copies of any information in the possession of the Commission must put their request in writing to Inquiry Counsel (Hearings). Requests will be dealt with on a case by case basis. The Commissioner may set the terms and conditions upon which any person may have access to or copies of any such information.



Supreme Court of Newfoundland and Labrador  
Court of Appeal

The Honourable Clyde K. Wells  
Chief Justice of Newfoundland and Labrador

Chief Justice's Chambers  
287 Duckworth Street, P.O. Box 937  
St. John's NL A1C 5M3

June 13, 2005

The Right Honourable Antonio Lamer, P.C., C.C., C.D.  
Commission of Inquiry  
P.O. Box 8700  
St. John's, NL  
A1B 4J6

Dear Commissioner Lamer:

Re: Delays caused by provision of transcripts in criminal appeals

I have your letter of June 8 concerning the earlier inquiry by Ms. Rosellen Sullivan, one of your counsel, respecting the Court's concern that provision of transcripts may be causing delays in the hearing of criminal appeals.

The Court has, for some time, (including time prior to my becoming Chief Justice) been concerned about the delay involved in the production of transcripts of criminal trials. In the past, judges of this Court have, using the only tool then available to them, ordered expedited production of the transcript concerned. The problem with this, as a solution to delay, is that it only serves to alter priorities. Ordering a transcript for one appellant to be expedited has the effect of introducing a concomitant delay for all other transcripts that were on the list in priority to the one ordered expedited, criminal as well as civil.

As criminal trials have become more lengthy, the time required, and the cost involved, for the production of full transcripts has greatly increased. As well as resulting in excessive delay in the hearing of the appeal, requiring production of the full transcript results in substantial costs that are quite unjustified when, depending on the issues involved in the appeal, only a small percentage of the



transcript produced is actually used in the course of an appeal. In addition, it is not unusual for an appeal to be abandoned after a lengthy transcript has been produced. Page 362

Prior to the 2002 revision, our Criminal Appeal Rules required an appellant to request "the transcript referred to" in the Criminal Code. The text of the then applicable Rule 11 is attached as Appendix "A". It was because of concern about the delay consequent upon such a requirement and about the volume of material being filed that the major change in transcript requirements was made in the 2002 revision of the Criminal Appeal Rules. The text of the current Rule 11, which came into effect on July 1, 2002, is attached as Appendix "B".

As is quite obvious from the difference in the text of the two rules, in making the change, the Court was endeavouring to deal with its concerns by providing that the parties would file with the Court only those portions of the transcript that are necessary to deal with the issues on appeal. The new rule 11 also provides for either party to apply for excision of any portion of transcript unnecessary for determination of the issues on appeal, or for the Court to do so on its own motion.

Rule 11(11) was intended to be somewhat of a veiled hammer that would encourage transcript abridgment. It has not, to my knowledge, been employed by the Court as yet. Apart from any difficulty involved in employing that rule, there has been less need for it in the last two or three years. The lesser need results from two factors: (i) the court reporters in the Trial Division are no longer required to produce civil appeal transcripts; and (ii) replacement of the old trial court recording systems with modern digital audio recording systems. There is, however, occasionally still a delay of up to 9 or 10 months after request for a transcript of a criminal trial in the Supreme Court, before it can be made available. Attached as Appendix "C" is a summary of the Trial Division transcript delay statistics for the past 14 months. This represents a significant improvement over the situation prevailing in earlier years. The improvement is due, I believe, to the new digital audio recording systems and court reporting staff no longer transcribing civil appeals, not to changes in the Criminal Appeal Rules.

I am advised by the Deputy Registrar that in the case of appeals that can be taken directly to this Court from decisions of the Provincial Court, significant

delays are frequently encountered from some but not all of the Provincial Court centres. Steps directly taken to deal with transcript delays in appeals from the Trial Division and any further rule changes or steps to be taken would, of course, be applied to appeals from criminal trials in the Provincial Court.

Your letter specifically asks about "a proposal of [mine] made in a speech concerning transcripts". On behalf of the Court I addressed the transcript delay problem, along with other matters, with the profession through a Benchers meeting in October 2003 and at the mid-winter meeting of the Newfoundland Branch of the Canadian Bar Association in February 2004. On both occasions I advised the groups that the Court was considering amending its rules to deal with its continuing concern about transcript delay. I suggested to both groups that, for both civil and criminal appeals, we were prepared to consider requiring only that the trial court involved provide a disc or tape to counsel for the appellants and counsel for the respondents. The appellant would then arrange for transcription of only that portion of the record which the appellant considered necessary for determination of the issues in the appeal. The respondent would, of course, be entitled to arrange for transcription and filing of any additional portions that the respondent felt were necessary but had not been provided by the appellant. I invited response from the profession to this suggestion.

You have asked for a copy of the speech. I regret I am unable to provide a text because none was prepared. In the case of the comments to Benchers, they were made from a few very cryptic handwritten notes. The talk to the Canadian Bar meeting was more broad ranging and the notes were slightly less cryptic. As well, they were typewritten. They are attached as Appendix "D" in case they may be of value to you.

Thus far there has been very little response. The Canadian Bar - Newfoundland Branch published a summary, prepared by a notetaker at the meeting, which advised their members of the comments and that the Court was looking for feedback. A copy is attached as Appendix "E". The only formal feedback from the CBA related to the proposal that the Court sit periodically in Corner Brook if the profession desired, and that was only received in April of this year. Therefore, I have no basis for confirming that there is resistance on the part of the Bar, as your letter indicates. I have, however, been advised that there has

been some expression of opposition by some members of the Bar appearing before your Commission.

The only concern that the Court has with such a proposal is its impact on prisoner appeals and appeals by self-represented litigants. That concern would have to be addressed before such a proposal could be implemented. The Court has not yet taken any steps to implement the proposal but the matter is still under consideration by the committee.

The matter has also been raised by me, but only by way of general comment, in a meeting of the Court Administration Advisory Board. That board was set up last year for the purpose of facilitating discussions between the Department of Justice and the courts respecting proper provision for the needs of the courts. Requiring the trial court produce only a disc or a tape of the trial record was not addressed as a specific proposal at the time. Rather, it was advice as to the existence of the Court's concern about transcript delay and cost. I would not, as yet, expect a response from that discussion.

I do have some concern that, with respect to appeals from convictions or acquittals for indictable offences, it could be argued that the disc proposal would not satisfy the requirements of section 682(2) of the Criminal Code. On superficial examination, it would seem that providing a disc or tape of the proceedings, together with the exhibits, should satisfy the requirement of section 682(2) that "a copy or transcript of ... the evidence taken at the trial ... shall be furnished to the Court of Appeal, except insofar as it is dispensed with by order of a judge of that court." The Court may, however, have to deal with an argument, in a future appeal, that provision of the disc does not amount to providing a "copy" of the evidence and therefore does not satisfy the requirement of the Code. As a result, it could be argued, an order of the Court would be required in each case. The same concern does not arise with respect to appeals in the case of summary conviction offences as section 821(3) does allow for the rules of the Court to provide for the transcript in an alternative manner to that otherwise specifically provided in that section.

As greater progress is made toward electronic filing, presently under preliminary consideration by the committee, the provision of a disc would seem to be the logical answer in the case of most appeals. However, there remains the

concern about prisoner appeals and appeals by self-represented litigants who may not have the means to readily access the trial record unless it is otherwise transcribed. As the Attorney General presently pays the cost of all criminal appeal transcripts, it may be that the Attorney General would welcome a rule change that required the provision of transcripts only in the case of prisoner appeals or appeals by self-represented litigants. That, however, may be rather difficult to properly control and is a concern that would also have to be addressed.

I regret that I do not have a more definitive solution to the problem that arises because of the delays encountered in the provision of transcripts for criminal appeals. However, the Court intends to pursue further discussion of the foregoing proposals with the profession and the Department of Justice.

I trust that this letter will be helpful in your consideration of the transcript delay problem. If you require it, I would be pleased to provide any further information available to the Court.

Yours very truly,



Clyde K. Wells

## Transcripts

## ANNEX 6

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11. (1) The charge for every copy of material and of a transcript furnished to a party shall, pursuant to Section 609(4) of the Code, be as from time to time fixed by law.

(2) Except in the case of a prisoner appeal the appellant shall when he files the notice of appeal with the Registrar also file a copy of a letter from him to the reporter ordering copies of the transcript referred to in Section 609(2) of the Code. When completed, the reporter shall forward four copies to the Registrar who shall then advise the parties of the availability of the transcript from the reporter.

*Appeal Book—(appeals other than prisoner and sentence appeals)*

12. (1) Except in a prisoner or sentence appeal or where otherwise ordered by a Judge the appellant shall, as soon as practicable:

(a) file with the Registrar four copies of an appeal book for the use of the Court. The appeal book shall contain, in the following order:

- (i) an index,
- (ii) the notice of appeal,
- (iii) the information or indictment,
- (iv) the reasons for judgment, if not included in the transcript of the proceedings,
- (v) photocopies of all documentary exhibits if not reproduced in the transcript;

(b) serve on the respondent or his solicitor a copy of the appeal book and of the transcript of the proceedings.

(2) The parties to an appeal, or their solicitors, may by written agreement filed with the Registrar, omit part of the transcript of the evidence or material that would otherwise be included in the appeal book or agree to the inclusion in the appeal book of an agreed statement of facts in lieu of a transcript.

(3) If either party wishes to abridge either the transcript or appeal book, or both, as provided for in Rule 12(2) and has not obtained the agreement of the opposite party or parties, he may apply to a Judge who may give directions as to the form and contents of the transcript or appeal book; or both.

*Appeal Book—(Sentence Appeals)*

13. (1) In sentence appeals the appellant shall, as soon as practicable:

(a) file with the Registrar four copies of an appeal book for the use of the Court. The appeal book shall contain, in the following order:

- (i) an index,
- (ii) the notice of appeal,
- (iii) the information or indictment,

## Transcriptions

11. (1) Les frais afférents à chaque copie des documents et d'une transcription fournie à une partie doivent, conformément au paragraphe 609(4) du Code, être ceux fixés par la loi de temps à autre.

(2) Sauf dans le cas d'un appel interjeté par un détenu, l'appellant doit, lorsqu'il dépose son avis d'appel auprès du registraire, déposer également une copie d'une lettre qu'il aura adressée au sténographe pour demander des copies de la transcription visée au paragraphe 609(2) du Code. Une fois la transcription terminée, le sténographe doit en envoyer quatre copies au registraire, qui doit ensuite aviser les parties du fait que la transcription du sténographe est disponible.

*Cahier d'appel—(appels autres que l'appel interjeté par un détenu et l'appel de la sentence)*

12. (1) Sauf dans le cas d'un appel interjeté par un détenu ou d'un appel de la sentence, ou sauf ordonnance contraire d'un juge, l'appellant doit, dès que cela est matériellement possible:

a) déposer auprès du registraire un cahier d'appel en quatre copies à l'usage de la cour. Ce cahier d'appel doit renfermer, dans l'ordre suivant :

- (i) un index,
- (ii) l'avis d'appel,
- (iii) la dénonciation ou l'acte d'accusation,
- (iv) les motifs du jugement, s'ils ne sont pas inclus dans la transcription des procédures,
- (v) des photocopies de tous les documents déposés comme pièces s'ils ne sont pas reproduits dans la transcription;

b) signifier à l'intimé ou à son procureur une copie du cahier d'appel et de la transcription des procédures.

(2) Les parties à un appel, ou leurs procureurs, peuvent, par une entente écrite déposée auprès du registraire, omettre une partie de la transcription de la preuve ou des pièces qui serait autrement incluse dans le cahier d'appel, ou consentir à l'inclusion, dans le cahier d'appel, d'un exposé convenu des faits en remplacement de la transcription.

(3) Si l'une ou l'autre des parties désire abrégier soit la transcription, soit le cahier d'appel, ou les deux, comme le prévoit la Règle 12(2), et qu'elle n'a pas obtenu l'accord de la partie ou des parties adverses, elle peut en faire la demande à un juge, qui peut donner des directives quant à la forme et au contenu de la transcription ou du cahier d'appel, ou des deux à la fois.

*Cahier d'appel—(appel de la sentence)*

13. (1) En appel de la sentence, l'appellant doit, dès que cela est matériellement possible:

a) déposer auprès du registraire un cahier d'appel en quatre copies à l'usage de la cour. Ce cahier doit renfermer, dans l'ordre suivant:

- (i) un index,
- (ii) l'avis d'appel,
- (iii) la dénonciation ou l'acte d'accusation,

[5] N.B. It would appear that the reference to Section 609 in both rules 11(1) and 11(2) is in error and should be to Section 682.

## TRANSCRIPTS

11. (1) Subject to this Rule, the parties to an appeal shall file with the Court only those portions of the transcript of the proceedings in the court appealed from that are necessary to enable the issues raised on appeal to be determined.

(2) Except:

- (a) in a prisoner appeal,
- (b) in an appeal from a summary conviction appeal court, or
- (c) where a judge otherwise orders,

an appellant shall file with the notice of appeal a copy of the request for transcript and certificate in Form D requesting the preparation of those portions of the record in the proceedings that he or she believes are necessary to enable the

issues on appeal to be determined and containing certificates stating that the request has been sent to other parties and to the court reporter's office.

- (3) The appellant shall, within 15 days after filing the notice of appeal, file with the Registrar a certificate of court reporter in Form E certifying receipt of the request for transcript.
- (4) In a prisoner appeal, the Attorney General shall, after receiving a notice of appeal
  - (a) send a request for transcript and certificate in Form D and a certificate of court reporter in the manner set out in Form E, with such modifications as may be necessary;
  - (b) file copies of the completed certificates with the Registrar; and
  - (c) forward copies to the prisoner.
- (5) In an appeal from a summary conviction appeal court, the transcript shall, unless otherwise ordered by the Court, consist of
  - (a) the transcript of proceedings in the trial court as it was submitted on appeal to the summary conviction appeal court, and
  - (b) only those portions of the transcript of proceedings in the summary conviction appeal court as may be necessary to enable the issues on appeal to be determined,and the appellant shall file with the notice of appeal a request for transcript and certificate in Form D and, within 15 days thereafter a certificate of court reporter in Form E, with such modifications as may be necessary, in relation to any portions of the proceedings in the summary conviction appeal court which the appellant believes are necessary to enable the issues on appeal to be determined.
- (6) Unless the Court otherwise orders, where an appeal is against sentence only, the transcript shall be limited to
  - (a) the evidence given and submissions made on the issue of sentence; and
  - (b) the reasons for sentence given by the sentencing judge.
- (7) Where a party to an appeal receives a copy of a request for transcript and certificate prepared by another party, the receiving party may
  - (a) where he or she believes that additional portions of the transcript of the proceedings are necessary to enable the issues on appeal to be determined, and
  - (b) within 15 days after receipt, or within such longer time as the Court may allow,deliver a request for further portions of transcript and certificate in Form F to the applicable court reporter's office and to the other parties to the appeal, file a copy of it with the Registrar, and within 15 days thereafter file with the Registrar a certificate of court reporter in Form E, with such modifications as may be necessary, certifying receipt of the request for additional transcript.
- (8) A party to an appeal may at any time apply to the Court for an order
  - (a) excising portions of the transcript of the proceedings which have been requested or prepared and which are unnecessary or inappropriate for the determination of the issues on an appeal; and
  - (b) adding such further portions of the transcript of the proceedings as may be determined to be necessary to the determination of the issues on an appeal.

- 
- (9) The Court may at any time of its own motion order that the transcript of the proceedings be abridged or amplified.
- (10) The parties to an appeal may agree, in writing to be filed in the Court:
- (a) to substitute an agreed statement of facts in place of all or any portion of the transcript of the proceedings and the exhibits; and
  - (b) to submit a joint request for transcript in Form D and certificate of court reporter in Form E, with such modifications as may be required.
- (11) Where the Court concludes that all or any parties to an appeal have not made reasonable efforts to abridge the transcript of the proceedings so that only those portions as may be reasonably necessary to enable the issues on appeal to be determined are filed with the Court, the Court may make any order that it deems appropriate in the circumstances.
- (12) When the transcript of the proceedings has been prepared as requested, the court reporter shall forthwith forward the original transcript and three copies, together with the original file, to the Registrar and shall make arrangements for the delivery of copies to the parties to the appeal, or their counsel. The Attorney General shall, in the case of a prisoner appeal, be responsible for service of the transcript on the parties to the appeal.
- (13) The Registrar shall, on receipt of the original transcript and copies, notify the parties that the transcript has been received by the Court.



## APPENDIX "C"

### Recent Criminal Trial Transcript Delay Statistics

| Month Ending | Number in progress | Oldest (outstanding less than) |
|--------------|--------------------|--------------------------------|
| 30 Apr 2004  | 4                  | 7 months                       |
| 31 May 2004  | 5                  | 3 months                       |
| 30 June 2004 | 4                  | 9 months <sup>1</sup>          |
| 31 July 2004 | 3                  | 4 months                       |
| 31 Aug 2004  | 3                  | 5 months                       |
| 30 Sept 2004 | 4                  | 6 months                       |
| 31 Oct 2004  | 4                  | 7 months                       |
| 30 Nov 2004  | 4                  | 8 months                       |
| 31 Dec 2004  | 4                  | 9 months                       |
| 31 Jan 2005  | 5                  | 10 months                      |
| 28 Feb 2005  | 2                  | 9 months <sup>2</sup>          |
| 31 Mar 2005  | 3                  | 5 months <sup>3</sup>          |
| 30 Apr 2005  | 3                  | 6 months                       |
| 31 May 2005  | 6                  | 1 month                        |

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<sup>1</sup> This anomaly results from counsel in the appeal for which the trial transcript was filed in May indicating that transcripts of the pre-trial applications were also required.

<sup>2</sup> Oldest outstanding transcript filed 18 February 2005. Notice of abandonment of appeal filed by Federal Crown prosecutor 25 February 2005.

<sup>3</sup> Staff were advised by counsel involved in oldest outstanding request that the matter would not proceed. However, notice of discontinuance still not filed. Court reporters maintain the request on list but, from March onward, it is not used in this summary as oldest outstanding.

## TOPICS FOR DISCUSSION

Mid winter meeting

Canadian Bar Association- Newfoundland Branch

Corner Brook, February 6<sup>th</sup> 2004

Appreciation for the invitation

Provides requested opportunity

Speak to the profession

Four matters- important to Court

Important to the profession

Discussion of which is important to both

Where most of practitioners affected by one of the  
issues are more likely to be present- CORNER BROOK

BEFORE DOING SO appropriate to comment on Court's state

Number of appeals filed in 2003 up

Previous five years dropping—same nationally

Docket

Still in excellent condition

Could set down one or two in February if necessary

Could still set three or four for March

Assuming counsel ready

Decisions outstanding

Also in excellent condition

Oldest decision outstanding heard mid November

Next oldest heard mid December

Next oldest heard in mid January

Explanations—in addition to efforts by judges

Some reduction in number of appeals filed

Rule changes, including deemed abandoned

Practices—especially setting down within two months

Co-operation of practitioners

Most important—availability of law clerks

Great time saver, better research,

CRITICAL to maintaining state of docket

Now to the four specific points I want to raise with the profession

FIRST—Location of Court sittings

Court only ever sat in St John's

Most convenient—least costly—for Court

Happy to have it remain that way

However, judges noticed change over recent years

Appeals originating from Western Newfoundland decreasing

Statistics—1999=15.4%; 2001=6.6%; 2003=6.8%

Unsure of reasons, assume

Not number of practitioners

Western lawyers not less litigious

New judges not better than former

Not apprehensive about Court of Appeal

Most likely some other reason or reasons

Changed economic factors

Cost and inconvenience

If COST AND INCONVENIENCE is the reason

Court is concerned—responsibility to correct

Only practical solution

Sit in WN to hear WN appeals

Court is prepared to do so—NOT seeking to do so

Happy to do so, if practitioners

Think sitting only in St. John's is a problem

Sitting in CB would solve the problem

Can work with Court to organize

Would have to be structured—NOT ad hoc

Two, maybe three sittings per year

Times certain

Perhaps--Mid Fall; Mid Winter and Late Spring

Fixed first or last full week of specified months

Practitioners and parties could be certain

Frequent enough all WN appeals would be heard

None (barring emergency) heard in St. John's

Applications for dates only could be heard

On a specified day each month

In St. John's

Closed circuit

Telephone conference call

Other applications not requiring immediate hearing

Heard in CB same week appeals being heard

**Emphasize** Court NOT promoting such sittings

Rather, concerned about what underlies the statistics

If cost and inconvenience, Court prepared to move to correct

Having advised the profession of the Court's willingness to act

Leave it entirely to profession to respond

Invite Newfoundland Branch CBA

Ascertain wishes of profession in WN

Advise the Court

If hearing WN appeals in CB is the preferred

Work with the Court to implement

**SECOND** relates to mediation by the Court

Over last few years some successful efforts

Resulted in satisfactory resolution without cost of appeal

Particularly—but not exclusively—in family matters

**Emphasize** entirely voluntary—Court NOT promoting

Rather, Court is prepared to offer the service to parties

Court considering Practice Note to outline

Inviting reaction from profession

Court would not propose mediation, entirely optional

Parties would have to initiate request

Counsel could do so by contacting Chief Justice

Would suggest either of two stages of proceedings

Stage one—as soon as possible after filing Notice of appeal

This can save costs of transcripts, facta etc.

Stage two—after perfection of the appeal

Court would welcome response from the profession

### THIRD Changes to civil rules

Committee of Court doing another full review

Considering comprehensive Court of Appeal rules

No longer one numbered rule of *Rules of Supreme Court*

Separate Part, BUT still part of *Rules of Supreme Court*

However, would be comprehensive, in appeal context

May result in significant duplication

BUT benefit from being stand alone for appeals

TD would then not have to be concerned about impact on CA

When formulating rules for TD purposes

Still in preliminary stage

Consultation with profession before implementing

However, would mention, now, two changes being considered

ONE, Rules, civil and criminal, relating to ordering transcripts

Presently

Civil rule requires filing letter undertaking to request

transcript within 10 days or undertaking to apply to

Court for order dispensing with transcript

Criminal rule requires filing with notice of appeal copy

of letter requesting relevant portions of transcript AND

within fifteen days, a certificate from the court reporter

confirming receipt of the request

Two significant adverse consequences

Inordinate delay and inordinate cost

Delay of a year not uncommon, occasionally more

Very expensive for Government to produce—Criminal

Very expensive for parties to produce—civil

Frequently

Appeals abandoned after transcript produced

Tiny portion of the transcript used in the appeal

There has to be a better system

Court considering changing rules to require

Trial court involved produce DISC or TAPE

To counsel for appellants and respondents

Parties produce portion of transcript they wish  
 Would require procedure to resolve disputes  
 BUT overall speedier and less costly appeals  
 Acknowledge this is very substantial change  
 Inviting consideration and response by profession

TWO, Converting present court practice re custody appeals  
 Into a formal rule  
 Presently, after 30 days of inactivity  
 Registrar, at my direction, contacts counsel  
 Requests information as to intentions  
 Attempts to speed matter along  
 Not really satisfactory  
 Considering special rule for custody matters  
 Enabling Registrar to bring application  
 If 30 days of inactivity  
 For any other reason she thinks necessary  
 Instead of waiting six months (ordinary civil appeal)  
 Again, acknowledge, significant change  
 Invite profession's consideration and response

FOURTH Offer explanation for delay in following up  
 On my tentative reply on November 21<sup>st</sup> 2003  
 To your letter of October 28<sup>th</sup> 2003  
 Respecting CA Practice Note No. 2001-3  
 Relating to use of electronic versions of law reports  
 Explain  
 Citations Court must use in write decisions  
 Must be able to read report actually cited  
 Unreliability of electronic versions  
 Requires access to reports actually cited  
 Solution was to require  
 Copies of Nfld & PEIR reports for NL cases  
 SCR, CCC or DLR citations for other national cases  
 However, Government cancelled our subscriptions

For CCC and DLR

If counsel do not provide copies of those cases

Judges, or law clerks, have to go outside to obtain

The contract of one of the law clerks ended early January

The request to advertise for her replacement

Made October 23, 2003

Has not yet been approved

The position, as of now, is still frozen

I am hopeful we will get the critically important subscriptions  
reinstated

I am also hopeful we will soon receive approval to fill the  
vacant law clerk position

The purpose of discussing this today is

To explain my long delay in following up

My interim reply to your October request

To ask for your understanding

AND ANY HELP YOU CAN PROVIDE

Thank you, again, for your invitation and your courtesy

## Report of Chief Justice Wells' Address to the CBA

Chief Justice Wells addressed the CBA - Newfoundland and Labrador Branch at our Mid-Winter Meeting at Marble Mountain Resort on February 6, 2004. The Chief Justice addressed several issues, including the status of the Court of Appeal's docket, and contemplated changes to the Court of Appeal's rules. Chief Justice Wells also addressed the CBA's letter regarding the Court of Appeal's practice note regarding the Court's preference that practitioners not use electronic versions of case reports in their Court of Appeal filings. What follows is a summary of the Chief Justice's remarks.

### Status of the Court of Appeal's Docket

- Presently, the court has a full complement of judges, with no supernumeraries.
- Chief Justice Wells noted that the number of appeals filed with the Court has been dropping off for the previous 5 years, although last year, the number of appeals filed was up 20% over the previous year.

Chief Justice Wells noted that possible reasons for the overall decrease may include the increasing costs of litigation, as well as the general lessening of Charter litigation as the Courts have addressed many Charter issues.

- The Chief Justice noted that the Court of Appeal's Docket is in reasonably good shape, and has improved significantly over the past several years. Parties attending at the Court on an applications day can expect their appeal to be heard within that month or the following month.
- In terms of outstanding decisions, Chief Justice Wells advised that as of the date of his address, the Court had only three outstanding judgements for cases that had not been heard in February, 2004.

Chief Justice Wells advised the reasons for the Court's success in diminishing the delay in release of reserved judgments include the rules changes that introduced a "deemed abandonment" rule. The Chief Justice advised that while up until this point in time, the Court has relaxed the requirements for reinstating appeals that were deemed abandoned, practitioners can expect that the Court's approach in the future will see the rules more strictly applied.

The cooperation of the bar was also noted as being a factor in assisting the Court to clear the backlog of cases.

In the Chief Justice's view, the singly biggest factor that has allowed the Court to greatly reduce the delay in releasing reserved judgments has been the addition of 2 law clerks to the Court of Appeal four years ago. The presence of the clerks greatly reduces the need for judges to do research. Chief Justice Wells noted that as the law clerks are usually recent law school graduates, their research skills are very up-to-date, and they can perform very effective and efficient research. Chief



Justice Wells noted that the law clerks have been an important resource for the Court.

After completing this overview of the status of the Court of Appeal, Chief Justice Wells then addressed four specific points he wished to bring to the Bar's attention.

Four points to address with the profession:

### 1. Location of Court Sittings

The Court of Appeal has only ever sat in St. John's. The Court has never had requests to sit anywhere else. In recent years, the Court has noticed a decrease in the number of appeals originating in Western Newfoundland and Labrador. In 1999, for instance, 15.4% of appeals originated in Western Newfoundland, while in 2003, only 6.8% of appeals originated there. Chief Justice Wells surmised that part of the reason for the decrease could be the cost and inconvenience of attending at the Court of Appeal in St. John's. If cost and inconvenience are factors in accessing the Court of Appeal, the Court must do something about it.

The Court is concerned about this particular issue and suggests that one practical solution may be to have the Court sit in Western Newfoundland to hear appeals, if practitioners wish. Such sittings would not be on an ad hoc basis, but would occur at specific times in the year. The Court has only ever sat in St. John's and the Court is not seeking to make a change but are prepared to do so. Chief Justice Wells indicated that the Courts would leave it entirely to the profession to respond and invite members of the CBA - NL Branch to advise the Courts if hearing Western Newfoundland appeals in Corner Brook is preferred then the profession should work together with the Courts to have it implemented.

In addition, the Chief Justice noted that it may be costly and inconvenient for counsel outside of St. John's to appear in the Court of Appeal on applications days in order to obtain hearing dates. The Chief Justice suggested that the court consider an alternative process to set dates, for instance, by teleconference.

### 2. Mediation Services

The Court is moving towards offering mediation services where parties wish to avail of it. Such mediation services may



be made available to parties now by contacting the Chief Justice, but the Court is looking at a more formal process. Mediation services should be available at an early stage in the proceeding, and may be available even prior to the filing of the transcript from the court below, if the parties choose. This would be an entirely voluntary process, and would be introduced on a more formal basis only if parties and the profession want to see it happen.

The rationale for this move is to address the growing cost of litigation, and the growing number of self-represented litigants. The Court is contemplating a Practice Note on this issue, but for now, parties can contact the Chief Justice's office.

### 3. Reassessment of the Rules for the Court of Appeal

Approximately one year ago, Chief Justice Green was involved in an effort to restructure the Family Court Rules. One of the obstacles faced in this rule restructuring was the fact that the rules are used generally by the Court of Appeal. Proposed changes to the rules had repercussions for the Court of Appeal.

It was agreed at that time that it may be preferable to have stand-alone Court of Appeal Rules. The Court is in the preliminary stages of looking at this, and plans to have widespread consultation prior to any rule changes.

Chief Justice Wells invited an early response from profession on the following rules issues:

#### a) Transcripts

Chief Justice Wells noted that the present wait for transcripts can result in inordinate delays, especially in criminal cases. Chief Justice Wells noted that obtaining transcripts can sometimes take as long as a year or eighteen months. This can become a factor in Askov applications.

The Court also noted that the cost of transcripts can be significant for litigants, especially when you consider that appeals are sometimes abandoned, and judges often do not need to read every word of transcripts in deciding an appeal. Chief Justice Wells noted that it seems unnecessary to produce 3200 pages of transcript when counsel will only be referring to 23 of those pages.

The present transcript approach increases time delays, and increases costs to litigants and to government. There must be a better approach.

One alternative suggestion: when parties file their Notice of Appeal, the Court below would produce a copy of the disc or tape of the proceedings to all parties, and counsel could have transcribed only those parts of the recording that the appeal require.

The Court is looking for feedback from the profession on this or alternate suggestions regarding transcripts.

#### b) Custody Appeals

The Court is looking at converting its present practice with respect to custody appeals into a rule. The present practice is that if 30 days pass with no action on a custody appeal, the Deputy Registrar calls counsel involved to inquire as to the reason for the delay. The Court would prefer the Rules

be changed to allow the Deputy Registrar to bring the matter forward, either after 30 days or upon becoming aware of information affecting the case. The Court has a particular responsibility to children, and delays in custody cases are unacceptable.

The Court is seeking the profession's input on this issue, and is open to alternate suggestions.

### 4. Electronic Case Reports

Chief Justice Wells began with an apology and explanation for delay in responding, fully to the CBA's letter regarding the Court of Appeal's practice note addressing the use of electronic versions of case reports.

Chief Justice Wells noted that the Court must use official or semi-official citations in its judgements. Electronic citations are not generally acceptable unless the decision has not yet been otherwise reported, in which case the court can use the uniform citation.

The difficulty for the Court is that it cannot, in writing its decisions, cite an official report if the court has not seen that report. Often, there are differences between the electronic report and the official report. Sometimes, even paragraph numbers differ. The court needs a high level of confidence in the accuracy of its citations, and quotations.

Up until recently, the Court believed it could address this by allowing counsel to use paragraph references to electronic versions of cases from various reporters, including the NLPER, the SCC (SCR's), the DLR's, and CCC. The Court of Appeal had copies of the actual reporters in the court's library, and could check the reporter where necessary. Unfortunately, Government has cancelled the Court's subscriptions to the DLR's and CCC's, although the Department of Justice library presently has current subscriptions to both reporter series. Chief Justice Wells advised that he is awaiting a reply from the Department of Justice and is hopeful a solution can be found. (Chief Justice Wells has since advised that the cancelled subscriptions have been reinstated.)

Chief Justice Wells also noted that one of the law clerk's terms expired on January 7. In October, the Court requested approval to advertise for the position, but the request was denied. The Court was advised that hiring was frozen. The Court then inquired as to whether the clerk's contract could be extended (as has occurred with clerks in the past) but was advised that the contract renewal was frozen too. Since January, then, the Court of Appeal has had only one clerk. Chief Justice Wells has written to the Department about this, and is hopeful there will be a resolution soon. (Chief Justice Wells now advised that filling the vacancy in the clerk's position has also been approved.)

The Chief Justice concluded his remarks by advising that the purpose of his speech was to advise as to initiatives the court is considering, to seek the profession's input, and to explain the delay in responding to the CBA's letter regarding the use of electronic cases. The Court is facing some external pressures as outlined in the Chief Justice's remarks, and any assistance or input the CBA and its members can provide would be welcomed.

Information provided to the Commission by Supreme Court of Newfoundland and Labrador (Judicial Centre- St. John's) Court Reporters office with respect to the preparation of transcripts.

- In 1988 the positions of court clerk and court reporter were two separate positions. During trials, one court clerk and one court reporter would be present in court. The court reporter was solely responsible for transcribing and shorthand.
- At that time, there were 12 court reporters on staff, one supervisor and 11 persons who were dedicated to transcription only.
- In 1988 additional transcriptionists were hired and overtime was approved for staff to assist with the preparation of transcripts.
- In 1990, a new tape recording and transcribing system eliminated the use of court reporters in the court room.
- From 1991- 2003 the positions of court reporter and court clerk were combined so that the same individuals performed the functions of both positions and were responsible for both clerking duties and preparation of transcripts.
- In 2003 there are 8 court reporters, including the assistant deputy registrar, on staff. One of the 8 was contracted for, and dedicated solely for the preparation of one specific transcript. Five are responsible for both clerking and transcribing. One person is dedicated to the digital recording system.
- In 2002- 2003, a digital recording system was installed. The public accessibility of this system can negate the need for some transcripts thereby decreasing the waiting period for other transcripts. This decrease is mainly evident in civil cases.
- Civil transcripts, if needed, are often prepared by outside agencies as criminal transcripts are given priority and therefore their waiting time is quite lengthy.
- During the summer months when court is not in session, more time can be devoted to transcripts however, most staff are also taking annual leave at this time.
- When a judge orders an expedited transcript, staff are instructed to concentrate on the transcripts and it takes priority over other duties. If there are several orders for expedited transcripts at one time, either one is prepared after another or a number of staff prepare them simultaneously.
- Expedited transcripts are prepared first and others are prepared in order of the date a request was received by the court reporters office. They are prepared when the court reporter is not in court performing clerking duties.

- Currently, there are 12 outstanding criminal trial transcripts to be prepared and or completed. Two of the 12 have been started, one of which is the specific case referred to above which has its own transcriber assigned to it. The second is a transcript of a 32 day trial for which a request was made on October 30, 2002. Transcription of this case was commenced recently.
- The use of the digital recording system has no impact on the time it takes to prepare a transcript. Generally, each day in court requires 3 to 4 days of transcribing by someone doing it full time and to the exclusion of any other duties.

Information provided to the Commission by the Provincial Court of Newfoundland and Labrador with respect to the preparation of transcripts.

- In 1989 a Court Reporter Overload System was implemented to deal with the backlog in transcript requests.
- Between 1989 and 1996 there were 6 persons throughout the province dedicated to transcript preparation through the Court Reporter Overload System.
- In 1996, those 6 positions were terminated due to budget cutbacks.
- Since 1996 there have been no positions dedicated to transcript preparation. Transcripts are prepared by court clerks when they are not performing clerking duties. Until recently staff worked overtime, for time off in lieu, to prepare transcripts. However, this is no longer the practice because staff have been accumulating overtime but unable to use it. To date, the unused overtime hours equates to 2.5 full time staff persons.
- In 2002-2003, a digital recording system was installed at Provincial Court, however, this has no impact on the time required for transcript preparation.
- Preliminary Inquiry and trial transcripts required for appeal are given priority.
- Until recently, Orders for Expedited transcripts are done before any others. However, the court has been unable to abide by the last two Orders due to staff shortage.
- Currently, there are two positions in judicial centres outside St. John's for court clerks that are vacant and will not be filled in the foreseeable future and a request for 2 full time staff in St. John's has been denied.
- Provincial Court currently has 43 outstanding transcripts awaiting preparation. These 43 outstanding transcripts total 56 days of court proceedings. Generally, it takes 4 days to transcribe one day in court.

February 15, 1994

Sgt R. Morgan  
NCO i/c Identification Section  
Royal Nfld Constabulary  
St. John's, Nfld

Re: R vs Gregory Parsons  
First Degree Murder

Sir:

Over the past three years, I have been directly involved with this file and during the course of the trial, a number of issues have been identified and need to be addressed. Some are obvious, more are common sense, and others have been commented on by the various experts that have been called as witnesses to testify at the trial.

These matters directly relate to problems that surfaced during the investigation, and identify deficiencies in our section that caused some of these problems.

The two main concerns were:

1. Why did the police not find any footprints of the suspect on the blood-covered floor?
2. We had one photograph that depicted bloodstains differently than the others but when all the photos were entered as evidence, the court was told they all accurately represent the scene as the photographer saw it. How could this be allowed to happen and how can we prevent it from recurring in the future?

Other concerns were the lack of fingerprints found anywhere in the house, problems identified in our photo processing quality controls, and lack of supervision and planning in our approach to the crime scene.

- 1 No footprints found in the bathroom by the crime scene investigators.

FOOTWEAR  
LIFELAND  
OVERLAYS

Bloodstain Enhancement

Footwear Enhancement.

BOOKS

REFERENCE PUBLICATIONS

CHEMICALS.

SCALES  
MEASURING DEVICE  
MED FORMATS  
PROTECTIVE CLOTHING  
2 FLASHES  
TRIPODS

NIKON 105 MICRO

4V (Kumalight)

200W DIRECTIONAL FLOOD.

200W QUARTZ OR 5500°K

200W Flood controlled beam

DC Voltage OPERATOR

COVERALLS  
BOOTS COVERED  
MASKS  
GLOVES.

- There should always be footwear impressions of the person responsible somewhere on the floor, especially in this case where there was a blood transfer medium everywhere. Although the scene was severely contaminated, there should still be partial impressions remaining. After all, most positive footwear identifications aren't made with complete footprints.

No elimination fingerprints or footwear impressions were ever taken from the people at the scene including firemen, medical attendants, police officers and civilians. There weren't even any impressions made of the footwear seized during the course of the investigation.

- This section has never put any effort into developing impressions in blood. There is no reference material available to the technicians. There is no one with any training in bloodstain analysis, or detection and enhancement of bloodstains. Other than the recently obtained luminol, there are no chemicals or equipment available for detection and enhancement of bloodstains.

- We only have bits and pieces of equipment available to record a bloodstain scene for consultation. We don't have all the required equipment if the bloodstain analysts are unavailable from Halifax and advise us to record it ourselves and forward the photos for an interpretation. We should have a kit prepared and ready for usage at short notice.

A photo flash records more bloodstain detail than the naked eye can see under normal light conditions. In this case, it made us look bad and neglectful. This only stresses the need for a kit with different light sources (light temperatures and intensities) to use in searching major crime scenes. This kit should also be prepared and ready for usage at short notice.

- A 105 micro lens could have prevented some of the problems photographing the scene. It would have permitted Sgt Tilley to take his closeup photographs without having to take as many steps in the bathroom. This lens is also recommended by the Canadian Police College for photographing assault victims because you don't have to get inside their personal space to take close-ups.

- Officer Protection Suits are being used by all other police forces when investigating crime scenes where there is any amount of bloodletting. These suits consist of disposable coveralls with hoods, disposable high top boots, rubber gloves and small particle masks.

2. The problems with the photographs arose when one photograph that was a photographic anomaly we entered as an accurate representation of the scene.

- Are photos really an accurate representation of the scene? No. Because of the difference in light temperature, it actually shows different detail. This opens a legal argument because in order to have photographs admitted into evidence, we have to be able to state that they are an accurate representation of the subject as it appeared.

The photographs weren't scrutinized before they were entered. If they were, the abnormal photo which has caused most of the problems would have been disregarded by the photographer and there would not have been a problem. This is probably due to a number of reasons; the high number of photos, lack of available time, transfer of the photographer, manpower restraints, etc. In this case, the photographer played no part in selecting which photos to present in court.

3. Processing problems arose when similar photographs were entered, showing different densities, colorations, and contents.

Replacement  
PHOTOS

- Extra photos had to be prepared and the RNC Identification Section couldn't provide them in time due to the short notice and manpower restraints. Consequently, some of the same photographs were reprinted at Foto One. They use a different processing method therefore they had slightly different formats and coloration.

Sunlight balanced  
light system

- Our photo lab processing area uses florescent lighting which is not the proper lighting to visually inspect and analyze photographs and negatives during processing to correct for proper densities and colour balance.

CONTROL STRIPS

- Control strips aren't being used or retained for future reference. Should a question arise in court about the quality of the processing, they can be pulled from file and the issue satisfied without having to call experts.

policy

- Exhibits should be seized at all major crime scenes to show predominant colours, eg. carpet, flooring, paint from walls, or wall paper. This way, the photos can be colour balanced to be as accurate as possible.

Full frame  
neg CARRIERO

Certain photographs should be printed "full frame" showing the sprockets, edge, negative number and film type. This eliminates the suspicions of hiding things at crime scenes by cropping the photographs. It also shows the court which negative was printed when there are more than one exposure of the same negative. Provided the photographs are properly composed, full frame photos look better for technical type photographs and seem to have a greater impact on the court and jury.

4. There was only one partial fingerprint found at the scene.

- There should have at least been prints of the deceased, seeing she lived there. There were also firefighters, medical attendants, civilians and police officers present, some of them had to leave fingerprints somewhere. Although the house was quite clean, this seems to indicate a some type of a problem.

SPRAY  
CHEMICALS  
FUMING

We should have a look at the techniques we use to fingerprint major crime scenes and give consideration to methods other than fingerprint powders.

- Fingerprint techniques used at all major crime scenes should be selected to ensure the greatest probability of results, not the least amount of damage we will do to the scene.

VACUUM CHAMBER  
LONG CURSOR

TEMP FRAMP  
HEATING POLYETHYLENE  
COVER WARM  
HUMIDIFIER (small)

- No consideration was given to fingerprint the remains of the deceased. There was some indication of cleaning up after the fit of rage was over so he had to touch it somewhere.

5. There was no indication of the date and time each roll of film was taken

PHOTO IDENTIFIER  
CARDS

- Each roll of film should be dated, timed, and contain the file #, location, and a colour chart.

It would also make it possible to file all the photographic contact sheets chronologically and with no suggestions of error.

6. A 35 mm format camera is not suitable for examination quality photographs.

- For examination quality photographs, a medium or large format camera should be used.



5

VPH  
VPS 35mm

For examination quality photographs, professional film should also be used instead of the bulk purchased, cheaper priced film normally used by this section.

EXTRA FLASH(S)  
SLAVE SENSOR(S)

For examination quality photographs taken with a medium or large format camera, proper lighting techniques must be used. eg. 45 degree lighting from two light sources to provide even exposure and eliminate hot spots.

MAKINAH  
MACRO Z 140 MM  
AUTO EXTENSION TUBE  
R267

A medium format camera should be used for all bloodstain pattern analysis.

At present we don't have a lens for our medium format camera that will allow us to focus at short distances. Some type of "micro" lens and extender is required for technical 1:1 or 1:2 photographs.

NO 1 = 45 MM  
NO 2 = 82 MM

7. During this trial, we were requested to provide copies of negatives to the defense.

- If the defense applied to the court to obtain the original negatives, the Judge could rule that we provide them to the defense.
- In this case, we provided copies of reprints or second generation negatives. This satisfied the defense until partway through the trial. They realized there was a loss of a certain amount of detail and increased difficulties processing reprints from these negatives.
- 2 - It wouldn't be prudent to provide our negatives to the defense so we should research and utilize some method to reproduce accurate copies of negatives. I doubt the defense would make this mistake the next time.

8. Lack of planning, supervision and team effort in relation to the investigation

- The crime scene should be left almost entirely to the Identification personnel. There is no need for anyone else other than the main investigator and the exhibit person to be there. Any evidence from the scene would be entered by the crime scene team.
- The crime scene examination should be done in close consultation with the main investigator. At the start of this case, debriefings were scheduled without notifying Identification personnel. Besides finding direct evidence to link a suspect to a crime, the scene investigation also corroborates or disproves various aspects of statements provided by the witnesses or suspect(s). It can also identify routes for the investigation to follow.

- Examination and recording of this crime scene was basically left to a technician with 6 months identification experience and no major crime scene exposure.
- An Identification supervisor should be appointed and responsible for all major crime scenes, either a Sergeant or a identification technician with an acceptable level of competence. In this case there ~~was~~ a sergeant but once the scene was released, he didn't seem to have any further involvement. He wasn't involved with court preparation nor did he have much evidence to offer. The scene supervisor should be the most experienced of the crime scene team and should be required to enter most of the observations and conclusions concerning the crime scene examination in court. He should co-ordinate the crime scene investigation and be accountable for its success or failure. He should be involved with the court preparation and trial until all the identification evidence is finished.

There was no debriefing at the conclusion of this file to discuss the problems that came up. There was no effort to identify our weaknesses and deficiencies so they could be addressed and their recurrence eliminated.

This report is only a summary of some of the problems which surfaced during this investigation relating to deficiencies within the Identification Section. It is not submitted to assess individual blame but to identify problems, increase our efficiency and prevent future embarrassment to the Royal Newfoundland Constabulary.

Please feel free to discuss any concerns associated to this report with the undersigned at your earliest convenience.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Cst KPP' followed by a flourish and the number '322'.

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CONSTABLE KARL PIERCEY  
#322



Est. 1871

# Royal Newfoundland Constabulary

*Office of the Chief of Police*

ANNEX 9

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November 4, 2005

The Right Honourable Antonio Lamer, P.C., C.C., C.D.  
Commission of Inquiry  
P. O. Box 8700  
St. John's, NL  
A1B 4J6

Dear Commissioner Lamer:

During the testimony of Deputy Chief Robert Johnston on June 6, 2005 he made reference to a policy which was being contemplated to address the police-crown relationship. I wish to advise that a new policy has now been drafted which has been endorsed by both agencies as per the attached letter from Mr. Thomas Mills, Director of Public Prosecutions.

I am pleased to forward a copy to the Inquiry for its consideration.

Respectfully,

**PAUL NOBLE**

Legal Counsel &  
i/c Professional Standards Bureau

attach.

cc: Executive Committee  
Mr. Thomas Mills  
Ms. Sharon Thenholm



GOVERNMENT OF  
NEWFOUNDLAND AND LABRADOR

Department of Justice  
Office of the Director of  
Public Prosecutions

November 1, 2005

Deputy Chief Robert Johnston  
Royal Newfoundland Constabulary  
1 Fort Townshend  
St. John's, NL

Dear Sir:

**RE: Police-Crown Relationship**

Thank you for the most recent draft of this document. I agree with the contents and am grateful for the opportunity to collaborate on this document.

I think it will go a long way towards clarifying the relationship.

Yours Sincerely,

**Thomas G. Mills**  
Director of Public  
Prosecutions

TGM/dmo

## ANNEX 9

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**POLICE - CROWN RELATIONSHIP****1. General:**

The role of police must remain distinct from (while cooperative with) that of Crown Attorneys (both Provincial and Federal). Case law has recognized that both entities operate in an environment of mutual independence. However it is understood that maintenance of cooperative and effective communication between police and the Crown is essential to the proper administration of justice in Newfoundland and Labrador. Despite this, the policing function (investigation and law enforcement) is fundamentally distinct from the prosecuting function. The following chapter provides members of the Royal Newfoundland Constabulary with direction regarding their official dealings with both Provincial and Federal Crown Attorneys.

**2. Responsibilities of the Police and Crown in Investigations:**

Although it is appropriate and necessary that police shall seek legal opinions from Crown Attorneys, it must be emphasized that these opinions are understood in proper context. It is neither the role nor function of the Crown to direct police operations in any manner.

- a) In Newfoundland and Labrador, the police have exclusive responsibility for the conduct of investigations up to the laying of charges in court (while pre-charge screening by Crown Attorneys occurs in other provinces, it does not occur in this province. Consequently, care must be taken when looking at authorities, practices, and case law from other provinces). In the investigative stage the Crown will only be in an advisory role. In these circumstances the advice provided by a Crown Attorney will be limited to legal advice on specific legal issues only. The Crown Attorney will not provide advice on investigative strategy or any other such issues. Under no circumstances will any investigative decisions be abrogated to the Crown prior to the laying of charges. All charging decisions rest with the police.
- b) Once a charge has been laid full responsibility and control of the case rests with the Crown. All decisions, including whether or not to proceed with a prosecution, become the exclusive domain of the Crown. The role of the police at this point is simply supportive, at the discretion of the Crown Attorney. The Crown Attorney may request that further investigation take place and that in the absence of that further investigation the Crown Attorney may decide not to prosecute.
- c) In certain circumstances, particularly in complex or challenging investigations (e.g., undercover investigations, wiretap investigations), the Director of Public Prosecutions may be called upon through the Commanding Officer of the Criminal Investigation Division, to identify a Crown Attorney to provide

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specific and ongoing legal advice in an investigation. Generally, a Crown Attorney who has been involved in the investigative phase of an investigation will not be involved in the prosecution once a charge has been laid.

### 3. Obtaining Legal Advice from the Crown:

Police officers need to be aware of the protocol for seeking legal advice from Crown Attorneys.

- a) All requests for legal advice from the Crown shall be in writing where practicable and channeled through the member's supervisor. Only under exigent circumstances shall a member seek legal advice orally. In such cases the request will be provided to the Crown in writing at the first available opportunity.
- b) All legal advice from Crown Attorneys, whether oral or in writing, is solicitor – client privileged, meaning that it is not subject to disclosure.
- c) All legal advice from Crown Attorneys shall be documented and clearly marked as 'Privileged Legal Advice' and not included in disclosure materials. The existence of such material must be made known to the Crown Attorney handling the case.
- d) Individual members of the Royal Newfoundland Constabulary do not enjoy solicitor – client privilege when receiving legal advice relating to their police duties. It is the Royal Newfoundland Constabulary as an organization that represents the 'client' in these circumstances. Only the Chief of Police or his/her designate may waive solicitor – client privilege on behalf of the Royal Newfoundland Constabulary. This means that individual members of the RNC may not waive solicitor – client privilege by their own initiative.
- e) As soon as is practical after a charge has been laid, the investigator shall consult the Crown Attorney and RNC Legal Counsel regarding any potential issues with respect to waiver or non-waiver of solicitor – client privilege.
- f) Members of the Royal Newfoundland Constabulary may consult with RNC Legal Counsel at any time for general advice, information, or case law. However, legal advice respecting specific investigations must be referred to a Crown Attorney.

### 4. Police Complaint Investigations:

In cases of police complaint investigations, all requests for information from Crown Attorneys should be directed to the RNC Legal Counsel who will refer the request

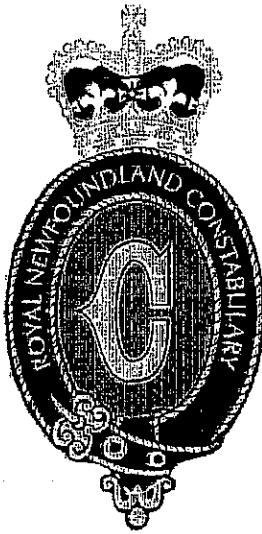
## ANNEX 9

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directly to the Director of Public Prosecutions. Under no circumstances should the individual investigator make such a request to an individual Crown Attorney.

**5. Disputes or Disagreements:**

In order to ensure ongoing channels of communication, the Deputy Chief of Police (Criminal Operations), or his designate, shall meet with the Director of Public Prosecutions, or his designate, on a quarterly basis. This RNC - Crown Liaison Committee shall deal with any dispute or disagreement arising from this policy.



# Royal Newfoundland Constabulary

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## Systemic Issues Report and Submissions Commission of Inquiry

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May 20, 2005



### 3.10 Polygraph

It has been frequently stated that the polygraph is a valuable investigative tool. From a police perspective there is a great deal of truth to this statement. However, it is not just the results of the test itself which may be considered useful in an investigation.

Most police officers who are identified to undergo training as polygraph examiners are usually selected on the basis of their interviewing skills. This

is because in addition to the actual testing component the polygraph examination also includes significant pre and post polygraph interaction with the examiner. It is the entire process, with an emphasis on the interviews, that can yield much in the way of valuable information to assist police in their investigations.

The process consists of the pre-test, which is the time an examiner spends developing a rapport with the subject focusing on making him or her feel at ease - this typically lasts for about an hour to an hour and half. During this time the subject is asked to give his/her side of the story, the operation of the instrument is explained and the questions to be asked are reviewed. The next phase is the in-test during which the instrument is attached to the subject, the questions are asked and the physiological data is collected.

The third component is the post-test phase. This phase involves an interview between the subject and the examiner. If the results of the test are "no deception indicated" (NDI) then a brief discussion about the process takes place with an opportunity for the subject to ask questions and subsequently the interview is ended. A result of "deception indicated" (DI) will usually be followed up with an interview that is considered to be an interrogation. This entire process is always video taped from the beginning to the end. A polygraph test must never be conducted if video taping is unavailable.

Furthermore, a polygraph examination should never be conducted after an interview or interrogation with an investigator. Nor should an investigator who is trained as an operator fulfill both roles.

We are also mindful of the valuable recommendations in relation to the polygraph found within the Kaufman Commission on the Proceedings Involving Guy Paul Morin (recommendation 113) as follows:

Police officers should be trained as to the appropriate use of, and limitations upon, polygraph results. Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for full and complete investigation. Officers should be cautious about

making decisions about the direction of a case exclusively based upon polygraph results.

The RNC currently has two experienced polygraph examiners within its ranks. A third member was recently trained. All RNC polygraph examiners have been trained through the Canadian Police College.

***The Canadian Association of Police Polygraphists should be utilized as a governing body which can periodically audit results of polygraph examinations to ensure high professional standards and reliable results are maintained.***

### 3.1.1 Profiling

Offender profiling (also referred to as psychological profiling, criminal profiling, criminal investigative analysis and criminal personality profiling), is the subject of considerable academic debate regarding its value as an investigative technique. There are several major issues being debated, one is whether profiling is an art or a science. Some practitioners of profiling readily admit that what they practice is an art, and that their observations are largely based on clinical judgements. This raises important issues that must be considered by a major case manager who may consider using a profile in a criminal investigation. One issue is whether or not profiling actually works. There has been very little empirical research regarding the validity of profiling methods. Most published accounts of profiling are based on common sense arguments with no reference to empirical data, for example, anecdotes are frequently used to illustrate examples of profiling validity. Empirical research has not been encouraging, as research illustrates that profiler's judgements are no more accurate than lay people; and the accuracy of actuarial approaches appear to be limited to predictions based on simple base rates. Caution needs to be exercised by case managers who incorporate offender profiling into criminal investigation, simply because of the potential for problems that may arise due to the perceived "expert" nature of these reports. At best, an offender profile can only provide ambiguous information to a criminal investigation. Profiles are sufficiently general so that they will match many individuals in a community, and rarely (if ever) would a profile describe a specific offender. Therefore, improperly using a profile to prioritize or eliminate

ROYAL NEWFOUNDLAND CONSTABULARY

R.N.C. FILE# 93-13132

The following is the statement of Cindy Josephine Youne lives at 194 Empire Avenue,

St. John's NF and was born on the 4th day of August 1983.

Statement taken at R.N.C. - H.O. on the 12 day of June 1993 at 1237 /p.m.

Q. Who do you live with @ 194 Empire Avenue?

A. Mom and Tyrone

Q. What is your mom's name?

A. Brenda Young.

Q. Who is Tyrone?

A. My brother.

Q. How old is Tyrone?

A. He's four.

Q. Do you go to school?

A. Yup, Seventh Day Adventist.

Q. Do you like school?

A. Yes.

Q. What do you like about school?

A. My friends go there. I like some of the homework too.

Q. What are your friend's names?

A. Jennifer Lahey, Ashley Upshall, Naomie Curlet and Martina Coffey.

Q. What grade are you in?

A. Grade four.

Q. Who is your teacher?

A. Mrs. Pearcey. She's the principal.

Q. Can you tell me what time you got up from bed yesterday morning?

A. I got up around 7:00 a.m. and got ready for school.

Q. Who was @ your home?

A. My mom and Randy and Tyrone and me.

Q. Who is Randy?

A. Randy Druken.

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Q. How do you know Randy Druken?

A. Mom used to go out with him.

Q. Does she still go out with him?

A. No.

Q. How do you know?

A. 'Cause they don't sleep in the same bed or nothing. Whenever he sleeps over, he stays on the couch 'cause he stays on the couch and sometimes when I get up in the morning, that's where he is.

Q. Are there other times when he sleeps somewhere else in your house?

A. No, he just sleeps on the couch.

Q. Did you go to school yesterday?

A. Yes.

Q. Where were Mom, Tyrone and Randy when you were getting ready for school?

A. Mommy was in the chair by the phone watching tv and Randy was sleeping on the couch. Tyrone was in the kitchen having breakfast.

Q. What time did you go to school?

A. 8:30 a.m.

Q. What was your Mom doing?

A. Getting Tyrone ready for Day Care.

Q. How did you get to school?

A. I walked with my friend Ashley. She just lives three houses away.

Q. Do you know what day of the week it was yesterday?

A. Friday.

Q. Where does Tyrone attend Day Care?

A. Up by Tim Horton's - Little People's Workshop.

Q. How does Tyrone get to Day Care?

A. Bus.

Q. Does your Mom drive him there sometimes?

A. Maybe if he's sick in the morning and better in the afternoon.

Q. Does your Mom have a car?

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A. Yes.

Q. Do you know what kind of car it is?

A. No, but it's white and has rust spots on it.

Q. How many doors does the ~~car~~ have?

A. Two.

Q. What time do you have lunch break @ your school?

A. 12:15 p.m.

Q. What did you do for lunch yesterday?

A. I went home for lunch and had a sandwich.

Q. Who was home?

A. Randy.

Q. What was he doing?

A. Watching t.v.

Q. Was he dressed?

A. Yes. I think he had on jeans and a white and black top.

Q. Where was your Mom?

A. Randy said she was out shopping.

Q. Was your Mom's car gone?

A. Yup. She normally **parks** on front but sometimes on the back too.

Q. Did Randy say anything else to you?

A. No, just bye and then I went back.

Q. What time did you go back to school?

A. I went back around 12:50 p.m. and played outside and a few minutes after that, the bell rang.

Q. What subjects did you do in the afternoon?

A. Math corrections, health, we played a few games and Mrs. Pearcey read a story.

Q. What time did you finish school in the afternoon?

A. Around 3:30 p.m.

Q. After school, what did you do?

Page 4/Cindy Young

A. I came home and put my bag in my room and then went out and played with my friends.

Q. Who was home when you got home from school?

A. Randy.

Q. What was he doing?

A. Watching t.v.

Q. Was your Mom or Tyrone home?

A. No.

Q. Where did you play?

A. Around my door and we were skipping. Then me and Ashley went up by Mary Brown's on Freshwater Road and played with a couple of her friends, Catherine and Nicole. Then we played by the school and then went down by Ashley's house and played for a while. Then we went to the store and came back and Catherine and Nicole had to go home. Me and Ashley skipped and played ball for a while and Mom called me in for supper around 6:00 p.m.

Q. Then what happened?

A. Mom came up around 9:00 p.m. and she started watching a movie in the living room. I had the same movie on in my Mommy's room and it was a movie about a man who left his wife for another lady. The wife came in and started spray painting things and breaking plates and glasses and that.

Q. Did you go out in the living room with your Mom and Randy?

A. No.

Q. Why not?

A. 'Cause I was afraid Mom would put me to bed. I did go out to look @ the Herald and Mommy said my eyes looked tired and she told me to go to bed. I went to bed and then I could hear them putting their boots on out by the bathroom where the closet was. Mom was taking Randy home.

Q. How do you know your Mom was taking Randy home?

A. 'Cause when I got home from school that afternoon, Randy told me he wasn't sleeping over when I asked him if he was.

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Q. Did you Mom or Randy come in and talk to you?

A. No.

Q. Did they say good-bye?

A. No.

Q. How do you know that they left?

A. 'Cause I could hear the two of them walking down the stairs to leave.

Q. While the movie was on and your Mom and Randy were in the living room, did you hear them talking?

A. They were talking and saying what was going to happen next in the movie.

Q. Did you hear them say anything else to each other?

A. No.

Q. What did you do after you heard them walking down the stairs?

A. I turned my tv on for a few minutes and there was something on about a PC Election and then I turned my radio on and put a Samantha Fox tape on. I turned my tv off and got in bed and then I fell asleep - it was going on 10:00 p.m.

Q. Did you see or hear your Mom come back?

A. No.

Q. What do you remember next?

A. I heard a big bang and I thought it was the coffee table knocked over because I thought it might be Mom sleepwalking or something. She was saying, "no, no, Cindy, leave me alone, leave me alone" and I could hear another voice say once or twice, "be quiet Brenda".

Q. Did you know who the other voice was?

A. No. It wasn't a familiar voice. I never heard it before.

Q. Was it a woman's voice or a man's voice?

A. It sounded like a man's voice. It sounded like a soft voice.

Q. Are you certain you never heard your Mom return home?

A. I'm sure.

Q. After you heard your Mom talking and the other voice, what did you do?

A. I went back to sleep.



Q. Did you go out to see what the big bang was?

A. No.

Q. How close is your bedroom to where the coffee table was?

A. Not very far.

Q. What do you remember next?

A. Tyrone woke me up shouting out, "Mommy, Mommy". I looked @ my clock and it was 8:39 a.m. and I thought it was weird because Mom normally gets up and unlocks his door and she didn't this time.

I went out to see where Mommy was and the coffee table was tipped over near the kitchen and there was a broken glass by the coffee table. Mommy was lying on her stomach and I just thought she was asleep. I went in and unlocked Tyrone's door and I asked him if I could go in and play with him. He said "yes" and I was going to play but instead I cleaned up the mess on his floor and I told him to stay in his room 'cause I didn't want him to see things tipped over and that.

I went out and Mommy was lying on her stomach and she had a black blanket covering her from her waist down. I could see blood on her shoulder and some blood near her chest dripping down. I took the blanket off and saw some scratches on her legs. I put the blanket down, I knew that she was dead. I went and called 911 and told them I saw my Mom dead on the floor and then I called my Nan. I went to see if the doors were unlocked and the back door was locked and so was the Front one. I waited by the front door for the ambulance to come.

Q. Does your Mom have any other friends that might sleep over?

A. No. just Randy and Lisa and her husband. Lisa LeGrow and his name is "Faouk" Owens.

Q. Does your Mom have a boyfriend right now?

A. No. She said that she didn't want to go out with anyone else.

Q. Why?

A. 'Cause she didn't want to go fighting with anyone else. Her and Randy used to fight and argue about silly things.

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Q. What do you think happened to your mom?

A. I think maybe she killed herself. I don't know.

Q. How do you think she killed herself?

A. I think a knife.

Q. Why do you think she killed herself?

A. 'Cause she was under a lot of stress. She never had no luck with boyfriends and that and she always had a lot to do.

Q. Did you see anything else on the floor near your Mom?

A. The cushions on the chesterfield were messed around and the coffee table was broken.

Q. Is the statement I read to you the same as you told Cst. Hogan?

A. Yes.

93-06-12 @ 1450 Hrs.

Witness: T.P. Hogan, Cst.

Sgd: Cindy Young

R. Baggs, Cst.

1993 St. J. No. 5240

In the Supreme Court of Newfoundland  
Trial Division

BETWEEN:

Her Majesty the Queen

AND:

Randolph Druken

VOLUME LX

Transcript of proceedings heard before Mr. Justice Wells,  
on the 24th day of January, A.D., 1995.

Mr. Wayne Gorman for the Crown  
Mr. William Collins for the Accused

JANUARY 24, 1995

VOIR DIRE BEGINS

THE COURT: Thank you. Now gentlemen I indicated that I would give my decision of the application at this time and I am going to read it now. I haven't copies to give you at the moment because it's got to be proofread as it were, but after its given sometime later this afternoon or at the latest tomorrow morning you will be able to have copies.

The accused is charged with murder and the Crown has applied to have the evidence of a witness at the preliminary inquiry to whom I will refer as M.D. read to the jury as evidence under the provisions of Section 715 of the Criminal Code. The Crown also seeks to play to the jury a sworn video taped interview which the witness made on June 22, 1993.

The issues raised by the application are:

- a) if M.D. cannot now give evidence, is there a right either at common-law or under the provisions of Section 715, to play or read the

(Voir Dire)

video interview in addition to the preliminary inquiry evidence;

- b) under what circumstances does the use of the word "may" in Subsection 1 of Section 715 authorize a judge to exclude either videotaped or preliminary inquiry evidence, and what constitutes concerns as to its reliability;
- c) when may the Court exercise a discretion to exclude all or part of such evidence, should it find that its reception would operate in a way that would infringe upon the accused's right to a fair trial;
- d) do considerations of prejudicial effect versus probative value, apply to determination under Section 715.

Evidence was heard in the absence of the jury, and in order to place the matters at issue in context, I will refer also to other evidence heard at the trial. It is

(Voir Dire)

not to be inferred that in so doing I am making findings of fact.

Brenda Young was killed in her apartment in St. John's on the early a.m. of June 13th, 1993. Her death was caused by multiple stab wounds to the chest. Ms. Young's apartment which had until shortly before her death shared with the accused, was in a block of four apartments in a single building. M.D., who may be unable to give evidence now, lived with her husband, her son and grandson in a three bedroom apartment on the ground floor immediately below Ms. Young. Her evidence at the preliminary inquiry and in the sworn videotaped interview says that she was then 62 years old and in poor physical health. On the evening of June 12th, 1993, she was at home and for the most part confined to her bed. A number of visitors, most of whom were family members, came to her home that evening but she was unable to participate in the family gathering and remained in her bedroom.

M.D. was on medication at the time and in addition to her regular medication took a sleeping pill around

(Voir Dire)

9:30 p.m. She awoke at about 12:55 a.m. on the 13th, by which time all guests had left, and she, feeling that her earlier sleeping pill had worn off, took another and returned to her bed at about 1:15 or 1:20 a.m. Her husband was asleep in their bed, her son Patrick had gone to his room and her grandson Patrick, Jr. aged 18, was lying on the chesterfield in the living room watching T.V.

As she lay in bed before going to sleep, M.D. says that she heard the footsteps of two people go up the stairs which led to Brenda Young's apartment. She felt that one of the persons ascending the stairs was Brenda Young. As soon as they reached the top of the stairs she heard Brenda kick off her shoes, which she says she thought to be pumps or shoes with high heels. At the same time she says she heard Brenda say, "don't do that no more Randy, don't do that no more". She said the words were screamed at first, but that Brenda's voice became lower until there was complete silence, after which she heard nothing more and went to sleep.

The significance of the alleged use of the name

(Voir Dire)

"Randy" by Ms. Young is immediately obvious, because if accurate, it leads to the inference that the accused was in the apartment at or about the time that she was killed.

There are nevertheless serious concerns raised by other evidence both at trial and on the voir dire. Some of these are:

- a) M.D.'s bedroom was at the back of the building and Brenda Young's front stairs were not over M.D.'s room'
- b) there is no evidence that her grandson who was in the living room, or anyone else in the house, heard the voice of Brenda Young or any other person;
- c) Brenda Young's next door neighbours in the upstairs apartment were separated from her apartment only by an interior wall. At the time they were awake and watching a movie. Their evidence is that they heard no sound from the adjoining apartment until sometime around 3:00 a.m. when heard a sound like "furniture



(Voir Dire)

being dragged across the floor", either from Young's apartment or from M.D.'s apartment below;

- d) a pedestrian passing on Empire Avenue shortly after 1:00 a.m. saw a women who she had seen before, entering the front door of Brenda Young's apartment at about 1:05 or 1:10 a.m. At the same time, a neighbour who was standing in her doorway a few feet away from Brenda Young's entrance, both saw and spoke to Ms. Young whom she knew well, as she entered the front door of her apartment at approximately 1:05 or 1:10 a.m. Both witnesses say that the women whom the neighbour identifies as Brenda Young, was alone;
- e) at some time in the early morning of June 13th, Brenda Young's daughter C.Y., who was asleep in her bedroom in the Young apartment, heard a loud bang which she thought was the coffee table being overturned, after which she heard her mother's voice referring to the name "Randy". M.D.'s evidence makes no reference to a bang;

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- f) the evidence of a "crime scene" expert, is to the effect that there was no evidence of violence or bleeding anywhere except on the living room chesterfield and the living room carpet. The location of these blood stains could lead one to infer that Ms. Young was attacked and died while lying on the her chesterfield and that the body was subsequently moved onto the livingroom floor;
- g) there is physical evidence that after entering her apartment, Brenda Young changed into her nightgown and prepared to, or did in fact, lie on the chesterfield where she intended to sleep that night. In addition to changing and preparing for sleep, Brenda Young apparently ate a meal which she had purchased a few moments before at a Wendy's restaurant a short distance from her home.

Evidence of the foregoing matters will be evaluated by the jury along with M.D.'s evidence, should it be read.

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The Crown has called Dr. Howard Strong, a fully qualified and experienced psychiatrist. Dr. Strong assessed M.D. in May of 1994 and again shortly before coming to Court and on a third occasion during the voir dire. He has concluded that since May 1994, M.D. has experienced and is suffering from a mental illness, namely frontal lobe dementia and that she is now, and has been since May 1994, psychotic, delusional, and out of touch with reality. Without detailing the full extent of Dr. Strong's evidence as to M.D.'s illness, his evidence is that she is now clinically insane and as such is incapable of giving evidence. His findings are supported by the observations of her husband, her daughter and Constable Barry Randell who attempted to interview her a few days ago.

Of more significance of Dr. Strong's findings with respect to her past medical and psychiatric history. M.D. suffered from severe depression in the 1950's and received electric shock therapy at that time. She has had frontal lobe dementia at least since 1994 but he cannot be sure when the onset of that disease began. He concluded that

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her brain was vulnerable to begin with, and that the dementia could have developed over weeks, months or even years. Dr. Strong viewed her sworn videotaped statement and read the transcript of her preliminary inquiry evidence, which shows elements of confusion. It is possible in his view that the early stages of the frontal lobe dementia could have been present and caused problems for M.D. as early as June of 1993 or before. In relation to her evidence at the preliminary inquiry he said, "her answers are not what I would expect from a normal 63 year old, functioning properly".

In addition to the foregoing, her IQ was numerically in the range of 74, while an average IQ is 100. Psychological testing showed that she had for some years at least, functioned at a low level. In Dr. Strong's opinion, her perception of facts could have been impaired in 1993. Before concluding his evidence, Dr. Strong had further psychological testing done during the voir dire itself and he again examined M.D.

His final conclusion is that in 1993 he had a good

(Voir Dire)

memory - she had a good memory for events but not for their time sequences. That is, she could remember events but not the event - but not their place in time. His comments he says are applicable to the evidence which she gave at the preliminary inquiry. He believes that the closer in time her statements were to the events which she described, the more reliable they would be, nevertheless, it is possible that she could have confused the events which she says occurred in the early morning of the 13th of June, with other events which occurred the night before or in the previous weeks and months.

Dr. Strong's opinion becomes especially significant in the light of the evidence already before the Court, but on the previous night the accused went to Brenda Young's apartment in the early hours of the morning and that they had an argument after she had let him in the front door and they had gone upstairs to the apartment. Furthermore there is evidence that the accused and Ms. Young lived together off and on for more than year prior to June 13th, 1993 and that they had stormy relationship involving loud quarrels.

(Voir Dire)

Dr. Strong said that a CT scan of M.D.'s brain taken in May of 1994 shows that there had been atrophy of the brain to a mild degree, and that this is common with dementia and is ordinarily a sign of prior brain problems. Dr. Strong's evidence raises considerable concern over the possibility or likelihood that M.D. may have been experiencing some degree of mental incapacity or impairment as early as June 1993 and that impairment could have affected her memory and thus her evidence of the preliminary inquiry.

An examination of the transcripts of the preliminary inquiry and the taped interview, tend to confirm Dr. Strong's observations with respect to M.D.'s timing of events. For example:

- a) M.D. was not sure when she told the police about what she heard.
- b) She was not sure when she talked to the police, i.e. it may have been a week or even two weeks after Brenda Young's death.

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- c) She did not remember speaking to the police on June 12th or 13th, 1993.
- d) She says that she told the police everything in her first interview.
- e) She said at one point that she did hear Brenda say "don't do that no more Randy" until 10 or 12 minutes after she had heard more than one person go upstairs.

In addition, M.D. demonstrated some difficulty in hearing questions which were asked to her at the preliminary inquiry and at times may have been confused.

There is another complicating factor. On June 13th at 5:12 p.m. M.D. gave a statement at her home. She related in the statement how she went to bed between 9:30 and 10:00 p.m. and then said,

"I remember I got up at about 12:55 a.m. or 1:00 a.m. to get a drink of water to take my medication. It could have been

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two or three times I got up before this. When I came out into the kitchen Pat was in the front room cleaning up the coffee table. I took my pill and then went to the bathroom and went back to bed. My husband had a friend over earlier and they were drinking a few beer. He was in bed when I got up and Pat was cleaning up after them. A little while after Pat came in and opened my bedroom door and asked if I called out to him and I said no and he just left the room. I took notice of the time because of the medication I am on. I would say it was about 1:15 a.m. or 1:30 a.m. when I heard more than one person going up the stairs to the apartment upstairs. I never heard a sound after this. I asked my husband if he heard anything and he said no. I think the stairs to the upstairs apartment go over my bedroom and I can hear them clearly when they walk up the stairs. I know it was more than one person that went up over the stairs because I could hear them take their shoes off".

On the 13th and 14th of June, immediately after Brenda Young's death, M.D.'s son was under intensive police question at RNC headquarters and was told that he was a suspect in the murder. About mid-afternoon on the 14th of June her son requested an opportunity to call a lawyer. After speaking to a lawyer he told police that he had nothing further to say to them, at which point he was taken home. About 40 minutes later the police again came



(Voir Dire)

to the home and at 4:57 p.m. M.D. gave another statement to the police in which she said in part,

"Between 1 and 1:30 a.m. I heard Brenda kick off her shoes, because you can hear on the hardwood floor. About 10 to 15 minutes later cause I got in bed quarter after one, after getting a drink of water and taking a pill, I went back to bed. My grandson was up around. I heard Brenda say stop Randy don't do it anymore. She was screaming it out loud. I never heard anything after that. Question: And where were you when you heard all of this going on upstairs? Answer: In my bed. I went back to bed at 1:15, 1:20 a.m. Between that and 1:30 I heard the noise. Question: M.D., who else was in your house when you heard Brenda? Answer: My husband he was asleep, Pat was in bed at the time I heard Brenda, my grandson Paddy was up. Question: M.D. did you tell anyone else about what you heard? Answer: I told my husband, my son-in-law Jim Kearney and my daughter Bernadette Kearney. Question: When did you tell them about what you heard? Answer: Yesterday after Randell left. She continued with matters.

In her videotaped interview of June 22nd, 1993, M.D. again described what she heard and said in answer to a question: "well, she was just at the top of the stairs when I heard her. Constable Randell "yes". This is why when she said "Randy, don't do that no more", I figured

(Voir Dire)

well, there had to be something done to her before she took off her shoes".

Later in the same video interview M.D. said in response to a question, Singleton: "M.D. how much time passed from the time you heard Brenda come in and kick off her pumps to the time that you heard, you say, this silence? How much time passed: M.D.: I'd say from quarter after one to quarter to two, about a half hour, from the time I heard it, it was quarter after one until I went to - until I heard Brenda saying "Randy, don't do that no more".

In the preliminary inquiry in November 1993, M.D. said at pages 168 - 169, Question: You indicate that the evening you heard "don't do it any more" how many times was the word Randy mentioned? Answer: Randy got up over the stairs. She said, "Randy, don't do that". And it was sort of loud that I could hear her. In the still of the night when there is nothing going you're bound to hear it. And then she said again "Randy, don't do that", about three times. And then her voice started to get low, until

(Voir Dire)

there was nothing. I could hear nothing".

M.D. was questioned at the preliminary inquiry as to why she had first omitted to tell the police about hearing Brenda's voice on the early morning of June 13th and was until to give, according to my reading any explanation of that omission. Furthermore, she seemed to maintain that she had told the police. Furthermore it is unclear whether or she understood the significance of what she was being asked, or why she was being asked it.

I now turn to Section 715 of the Criminal Code which says in subsection (1) and (2):

715.[643](1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

(a) is dead,

(b) has since become and is insane,

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(c) is so ill that he is unable to travel or testify, or

(d) is absent from Canada,

and where it is proved that his evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, if the evidence purports to be signed by the judge or justice before whom it purports to have been taken, unless the accused proves that it was not in fact signed by that judge or justice or that he did not have full opportunity to cross-examine the witness.

(2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be read as evidence in the prosecution of the accused for any other offence on the same proof and in the same manner in all respects as it might, according to law, be read in the prosecution of the offence with which the accused was charged when the evidence was taken.

The first issue I can dispose of very quickly, it is whether it has been proved on oath that the witness "has since become and is insane"; and/or "is so ill that she is unable to travel or testify". On both questions I am fully satisfied on the evidence of Dr. Strong that clauses (b) and (c) are both applicable and that the requirements of these clauses have been satisfied, with the result that

(Voir Dire)

M.D. is unable to give evidence at this trial. However, says Novalinga, 19 C.C.C. etcetera, respecting mental as distinct from physical illness.

The next question which I must consider is, whether the Crown is entitled to have the videotaped evidence, together with the evidence taken at the preliminary inquiry, placed before the jury as an exception to the rule against the admission of hearsay evidence and pursuant to Section 715 of the Criminal Code. In the alternative the question becomes, did Parliament in enacting Section 715, intend to provide a full and complete mechanism for resolving questions of the kind which we are considering.

In my view, it is implicit in the wording of Section 715 that the section was designed to resolve questions relating to both the use of a sworn statement made to the police and the sworn evidence from a preliminary inquiry. Subsection (1) uses the words "or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry". I interpret the use of the

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word "or" to mandate the use of one or the other, not both the sworn statement and the record from the preliminary inquiry. Had M.D. been able to give evidence at trial, neither her videotaped statement nor her preliminary inquiry evidence would have been placed before the jury. To allow both to be placed before the jury at a trial in which she is unable to give evidence, would permit one statement to reinforce the other, despite the fact that the video statement was not subject to cross-examination.

I find that in the present circumstances, the Crown is entitled only to have the Court determine whether or not the evidence which was subject to cross-examination, namely that from the preliminary inquiry, can be read.

Interpretation of Section 715 was considered by the Supreme Court in *R. v. Potvin*. The Court concluded that the word "may" confers on the trial judge a discretion not to allow the previous testimony to be admitted in circumstances that would operate unfairly to the accused. However, such circumstances will be relatively rare, and the discretion is not a blanket authority to undermine the

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object of the subsection.

The commentary in Tremeear's Criminal Code consider such evidence when it says at page 1402 in respect to Section 7 of the Charter and Potvin.

A Code provision allowing the admission of previously obtained testimony as evidence in a trial where the witness is unavailable does not contravene the accused's right to a fair trial, in the absence of circumstances which negated or minimized the accused's opportunity to cross-examine the witness when the previous testimony was given. The right to confront unavailable witnesses at trial is neither an established nor a basic principle of fundamental justice. However, the accused would have a constitutional right to have the evidence of prior testimony excluded where it was obtained in the absence of a full opportunity to cross-examine the witness.

That reference follows and echoes the words of Martin, J.A. of the Ontario Court of Appeal as referred to at page 301 of Potvin. The Court then went on to say:

I would respectfully agree with Martin J.A. that the accused would have a constitutional right to have the evidence

(Voir Dire)

of prior testimony obtained in the absence of a full opportunity to cross-examine the witness excluded. When the evidence is sought to be introduced in order to obtain a criminal conviction which could result in imprisonment, the accused is threatened with a deprivation of his or her liberty and security of the person and this can only be done in accordance with the principles of fundamental justice that the accused have had a full opportunity to cross-examine the adverse witness.

It is important in a consideration of this kind, to remember the words of MacIntyre, J. in *Mezzo v. The Queen*.

"The problem which arises here has its 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."

It is important to be aware of the distinction between "reliability" and "weight". The weight of a



(Voir Dire)

particular piece of evidence is for the trier of fact. The reliability of evidence, as the term is used by the courts and confirmed in **Potvin**, goes not to the issue of weight, but to reliability in the way in which the earlier evidence was obtained and formally tendered at the preliminary inquiry or by sworn statement as the case may be. I should say to you that - that paragraph which I have just read is mine I finished the quote as you - as you are probably aware.

The distinction is clearly shown by the matters which occupied the attention of the Court in **Potvin**, namely, was it under oath, was it given in the presence of the accused, was there full opportunity to cross-examination, were the formalities of authentication observed. These considerations, which are matters of law, are quite different from consideration of the weight, or as it has sometimes been expressed, the quality of the evidence itself. Such matters are always for the trier of fact.

In my view there maybe problems with M.D.'s testimony. Some of these arise from:

(Voir Dire)

- a) confusion
- b) possible hearing problems;
- c) being ill and/or on medication;
- d) having taken sleeping pills up to approximately one-half hour before the events which she described;
- e) her location which was in the bedroom at the back of the building, not underneath the stairs and landing of Brenda Young;
- f) the fact that others who might have been expected to hear screamed words, apparently heard nothing;
- g) the fact that her first statement to the police specifically said that she heard nothing after hearing the footsteps, while 24 hours later when she knew that her son was a suspect, she in a statement, placed suspicion directly on the accused;
- h) that she was of low measured intelligence with functional mental abilities which were borderline;
- i) the fact that medical evidence now

(Voir Dire)

indicates that she had suffered from severe depression and had received electric shock treatment that she may have been suffering from some degree of brain atrophy in June 1993, and that she may have been in the early stages of frontal lobe dementia; and that her continuing difficulties appeared to be especially in respect of the times at which events happened rather than the events themselves.

All of the foregoing except for (i) were known to the defence at the time of the preliminary inquiry in November 1993 and were or could have been pursued on cross-examination. All of the foregoing are clearly matters which the jury are fully capable of assessing and taking into account in their deliberation, in much the same way as they would have had M.D. been able to give evidence, save of course for the observation of her demeanour.

(Voir Dire)

The problem now before this Court is, did the accused have a full opportunity to cross-examine the adverse witness by reason of the fact that neither the Crown nor the defence knew at the time, that M.D. may possibly have had some degree of mental illness or impairment, at the time when she was giving her evidence at the preliminary inquiry.

The medical evidence was neither known nor available at the time and cross-examination could hardly have elicited from the witness an accurate, or indeed any, diagnosis of her own mental state. The "new" evidence is nevertheless available to the defence at trial. M.D.'s probable mental state at the time of the preliminary inquiry and in June 1993, is available and may be presented to the jury to assist it in the determination and evaluation of matters of fact, which role is exclusively granted to the jury by law. As the Supreme Court said in *Potvin* at page 304 in referring to Section 715:

"It is my view that the word "may" is

(Voir Dire)

directed not to the parties but to the trial judge. I believe it confers on him or her a discretion not to allow the previous testimony to be admitted in circumstances where its admission would operate unfairly to the accused."

In the context of the present case, the words "circumstances where its admission would operate unfairly to the accused", are the operative words. The discretion is a statutory discretion to be used to prevent any unfairness that could otherwise result, in the words of the Court, from a purely mechanical application of the section. As the Court said at page 307:

"In my view there are two main types of mischief at which the discretion might be aimed. First, the discretion could be aimed at situations in which there has been unfairness in the manner in which the evidence was obtained. Although parliament has set out in the sections specific conditions as to how the previous testimony has to have been obtained if it is to be admitted under Section 715. The most important of course being that the accused was afforded full opportunity to cross-examine the witness. Parliament could have intended the judge to have a discretion in these cases in which compliance with the requirements of Section 715 gave no guarantee that the evidence was obtained in a manner of fair to the accused."

(Voir Dire)

And again at page 308:

"In my view, once it is accepted that Section 643(1), referring to the old section, gives the trial judge a statutory discretion to depart from a purely mechanical application of the section, the discretion should be construed as sufficiently broad to deal with both kinds of situations, namely where the testimony was obtained in a manner which was unfair to the accused or where, even although the manner of obtaining the evidence was fair to the accused, its admission at his or her trial would not be fair to the accused."

Thought this case presents some difficulty, I have nevertheless concluded that safeguards can be imposed which will satisfy the criteria of fairness to the accused. I am satisfied that the law permits the evidence given by M.D. at the preliminary inquiry, to be read to the jury. However, in allowing it to be read, I have an obligation to ensure that that procedure is not unfair to the accused. I have concluded that fairness can be ensured by making available to the jury all relevant facts both medical and otherwise, touching on M.D.'s evidence, so that they will form a part of the entire evidence and enable the defence to argue the issue of the weight or

(VoiR Dire)

quality of M.D.'s evidence, in the light of all of the circumstances surrounding it. To do otherwise would be manifestly unfair to the accused and could allow the jury to receive a distorted view of M.D.'s evidence and a distorted view of her capabilities and/or her possible motives to misrepresent.

It shall be a condition precedent to the reading of M.D.'s evidence taken at the preliminary inquiry, that the Crown will call Dr. Strong to give evidence as to her present and past medical condition insofar as he knows it, and the Crown shall introduce through the appropriate police officers the statements made by M.D. to the police on June 13th and 14th, and will also call Constable Randell to give evidence as to the taking of the statements and the sequence of events involving the suspicions of M.D.'s son, between the times of M.D.'s first and second statements. The accused shall have full right of cross-examination of such medical and other witnesses, after which M.D.'s evidence taken at the preliminary inquiry, may be read to the jury.

(Voir Dire)

I am satisfied that with these safeguards, the jury will be able to make proper factual determinations, and that M.D.'s evidence will have been presented to the jury in a manner which will address the concerns expressed in *Potvin* at page 308 in respect of:

"The two competing and frequently conflicting concerns of fair treatment for the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue."

So copies will be available for you very shortly.

MR. COLLINS: Thank you, my lord.

THE COURT: Okay. Now we asked the jury to come back at 10:00 tomorrow morning. Mr. Cormier is obviously at the funeral this afternoon in Corner Brook, weather being as it is I'm not sure when he will get back but all we can do is be here 10:00 tomorrow morning and if necessary delay matters until all the jurors turn up. I think that's about all we can do and see what happens tomorrow.

VOIR DIRE ENDS

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## STATEMENT SYNOPSIS

ANNEX 13

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Phyllis Duke  
Address:

DOB: 4-06-29  
190 Empire Avenue, St. John's

## June 1993, Mrs. Duke Hears Argument at Brenda's Apartment

Insp. Kenny,  
telephone conversation  
Oct. 4/99

- Said that less than a week before Brenda's death she was in the back hall and heard an argument in Brenda's apartment, she said it wasn't Randy. She never seen Randy that night. She went up to Brenda's door, Brenda opened it a little, she asked if she needed her to call someone and Brenda said no. When asked if she knew who it was with Brenda, Mrs. Duke said that she don't want to get involved, that the Police just twists things around.

Insp. C. Kenny  
Oct. 20/99

- A few days to a week prior to Brenda's death Mrs. Duke hears an argument coming from Brenda's apartment. Went up and asked Brenda if she needed the Police called, Brenda says no and closed the door.

- Don't remember what the argument was about

- Know who the other person was but refused to tell.

- Mrs. Duke refused to divulge certain information on tape, the following information was given in confidence, and according to Mrs. Duke, she will not testify to it.

- Mrs. Duke further states (off the record), that the argument that she heard coming from Brenda's apartment a few days before Brenda's death was between Brenda and Pat Dooley Sr., and they were arguing about stolen goods. This is when Mrs. Duke went to Brenda's apartment, Brenda opened the door ajar, and Mrs. Duke asked if she wanted the Police called. Brenda says no.

(Please note: This incident is Similar to that of Mrs. Duke going to Brenda's apartment on Friday night and asking Brenda the same thing, but was then referring to Randy's behaviour and not Pat Dooley Sr. Mrs. Duke now denies going to Brenda's Friday night)

Thursday, June 10/93

Mrs. Duke hears a person yelling and swearing out back

S/Sgt. Singleton  
and Cst. Randell  
(KGB statement)  
August 1993

"Mrs. Duke heard Randy Thursday night, shouting and yelling and swearing. She said "I don't know if he swore on me or wore on Brenda cause I was taking my grandson in on the back."

- She heard them arguing, "like you couldn't hear every word, like all you could hear was most generally swearing and yelling." Only heard "bits and pieces, like nothin that could really make sense - like you son of a bitch, you ~~won't go no where~~."

- When asked who was saying this, she said, "As I thought, it was Randy. I couldn't swear cause I closed the door and came in out of it..."

- Referring to hearing the Thursday night argument, Mrs. Duke said: "...I never paid no attention to time. It was early, cause Michael wasn't in bed, it had to be, Michael generally comes in between 9:30, quarter to ten..."

- Questioned - Did you see him Thursday night? Mrs. Duke replied "Yeah, well I - I didn't actually see him, like he was on the side of the house, but you could hear him swearing and yelling"

LL D Peddie,  
verbal statement,  
noted on 1624 form  
Nov. 7/93

- Thursday, June 10/93, sometime after supper, but before dark, she heard Randy Druken shouting up to someone in Brenda's apartment. Randy was at rear of apartment, just outside and went up the entrance to the back steps. He was looking up at the area of Brenda's kitchen window. She heard Randy shout: "You fucking whore, you'll never get to the mainland, I'll make away with you"

Cst. P. Davis, 2:23 p.m.

Nov. 13/93

- See Randy on Thursday, June 10/93 around supper time.

- Pat Dooley was there too.

- In kitchen, heard yelling, Randy was calling her a slut and a whore. Mrs. Duke said "I can't remember exactly what he said but he said you'll never make it to the mainland or you'll never get to the mainland or away or something."

- She seen Pat Dooley in window (kitchen).

- Stood up by the back window when she saw Randy

- In the kitchen with the door closed after she got Mike, a d sh could still hear Randy.

Preliminary Hearing,  
examined by  
Mr. Gorman  
Nov. 93

- On Thursday heard Randy say "You'll never get to the 'ing mainland."

- Swearing, yelling bitch, whore, hitting the side of the house.

Trial Voir Dire,  
by Mr. Gorman  
Oct/94

- Thursday, Mrs. Duke heard "you slut", "you bastard", "you fucker you'll never get to the mainland", "whore", "you cocksucker".

XX, by Bill Collins  
Oct. 94

- Kitchen door was open when she heard Randy outside on Thursday, June 10/93.

- Closed the kitchen door when she got Mike in and locked it.

- Never saw anybody else around when Randy was suppose to be shouting and hitting the house Thursday June 10, 93.

Pre-trial preparation,  
Wayne Gorman and  
Cst. Randell  
(Cst. Randell's notes)

Nov. 20/94 - Randy was in a rage like he was hitting the side of the house.

- He said, "You cocksucker, you'll never make it to the mainland."

Trial, Wayne Gorman

Nov. 29/94 - Said "you will never get to the fucking mainland."

Trial, Mr. Collins

Nov. 30/94 - Referring to Des Peddle's interview in November 1993 and her comment that she heard "I will make away with you", referring to Randy outside the house on Thursday, Mrs. Duke say that "I can't remember saying it like that."

Insp. Kenny,  
audio taped interview  
July 2/99

- Thursday night, Mrs. Duke was in her kitchen, had back door open and window open, heard commotion, shouting and swearing. Went out back door, down the steps and had her grandchild Michael to come in.

Insp. Kenny  
Oct. 20/99

- Thursday, heard and saw Randy Druken out back shouting and swearing. Saw another person out back standing by a car, don't know who he was or if he was with Randy.

Cpl. G. C. Walsh

June 13/93

- Second last time I saw Brenda was about 4:30 p.m., new dress and shoes.

Lt. D. Poddle and

S/Sgt. A. Singleton

August 11/93

- Friday afternoon, June 11/93 up at Brenda's, showed me new dress and shoes.

- Randy was not there at the time.

- This was around 4 - 4:30 p.m. before supper.

\* Check Lisa Legrows statement and evidence regarding time spent with Brenda on June 11/93.

S.Sgt. Singleton

and Cst. Randall

(KGE statement)

August 19/93

- Friday afternoon 4:30 p.m. or 5:00 p.m. maybe 5:30 p.m. talking to Brenda at top of stairs between the living room and by the bathroom. Brenda showed her the shoes and dress she had bought. Conversation occurred between the bathroom and livingroom.

Cross Examination,

Bill Collins

Nov. 29/94

- Seen Brenda Friday afternoon coming out of Dooley's, spoke to her about her new dress and shoes, they spoke at top of Brenda's front staircase. Mrs. Duke had her hand on the knob of the door but still on the stairs.

Insp. C. Kenny

Oct. 20/99

- Friday afternoon up on top of stairs at Brenda's, seen new dress and shoes. Mrs. Duke goes on to say that she is not sure if it was Friday or a couple of days before that. Then states that it couldn't be Friday, it had to be Wednesday or Thursday.

Friday, June 11/93, Mrs. Duke visits Brenda's apartment after Bingo -

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Lt. D. Poddie,  
verbal statement,  
noted on 1624 form  
Nov. 7/93

- Mrs. Duke went to Brenda's Friday night, after she got home from Bingo. She wanted to know if Brenda had any trouble tonight, like last night, should she call the Police. Brenda said no. Brenda also told Mrs. Duke she had to give Randy a ride home. Brenda also said she had to go because she was on the phone to her mother.

Cst. P. Davis, 4 00 pm.  
Nov. 13/93

- Went to Brenda's apartment on Friday, June 11/93 at 5 or ten after ten, maybe a bit earlier maybe a bit later.

- She went up the back hall, Brenda opened the door ajar, not fully. Said to Brenda "If you have any problem tonight do you want me to call somebody."

- Brenda said "No, I'm talking to Mom and then I'm taking him home."

Trial, Mr. Collins  
Nov. 30/94

- Referring to Cst. Davis' statement in November/93. Mrs. Duke went to Brenda's and asked if she had problem tonight if she should call someone. Brenda said no, I'm talking to Mom and then I'm taking him home. Mrs. Duke now says that she don't know if that was Friday night, Thursday night or Wednesday night.

- Mrs. Duke states, "No, not Friday night, it either had to be Wednesday night or Thursday night or one night during the night when it was a ruckus upstairs."

Insp. C. Kenny  
Oct. 20/99

- Did not go to Brenda's apartment after Bingo as previously noted by Des Poddie. Mrs. Duke was emphatic about this point.

Friday, June 11/93, Mrs. Duke, home from Bingo, leaves residence

L. D. Peddis and

- August 11/93 - Went to Bingo, got home around 10:30 p.m.
- Went out by door to cool off, walked around building.
  - Around 11:00 p.m., on back of building to cool off.

S/Sgt. Singleton  
and Cst. Randall  
(KGB statement)  
August 19/93

- Returned to her own apartment, got supper and went to Bingo at Country Bingo, Rickett's Road.

- Returned from Bingo, Judy Janes went home, Mrs. Duke went home.

- Heat up on 90° and went for a walk, walked down the road, came up back lane, back door was jammed, "Went up around Dooley's, young fellow came out this way and for the minute, I can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on... I heard the door close and I heard the car leave."

Preliminary Hearing,  
examined by  
Mr. Gorman  
Nov. 93

- Went to store and bought beer for Peter
- Returned home and left again to go down and see what is keeping Judy (Janes). Went to Judy's, she was in the washroom so Mrs. Duke left and returned home.

Pre-trial preparation,  
Wayne Gorman and  
Cst. Randall  
(Cst. Randall's notes)  
Nov. 20/94

- Got home from Bingo Friday night at 10:00 p.m.
- Got 1/2 dozen beer at store (2 blocks away).
- Walked down by Judy Janes' house and turned around and walked behind apartment building.

Trial, Wayne Gorman

- Nov. 29/94 - Got home, went to the store, bought a half dozen beer and went back home.
- Went for a walk down toward Judy Janes' house, cut down between Judy's house and Marion Carroll's and came up the back. Saw Randy Druken, anywhere from 10:30 p.m. - 11:00 p.m.
  - Q. Did you go to Judy Janes' apartment at any time?
  - A. No.

Insp. Kenny, audio  
taped interview  
July 2/99

- Went down to the store, on the way back met her two boys, they were looking for money, advised them she would come back and meet them. This was Friday night.
- Referring to Friday night, Mrs. Duke said she came home from Bingo, went to the store and bought her husband a dozen beer, banged into her boys and they wanted money. She brought the beer home and walked back towards the store and met her son and gave him a few dollars. Walked around the house and came up the back way. Mrs. Duke states, "I banged into a person, I was about three or four feet away from 'em when he told me mind my 'fing business." She went into Dooley's, they had company and she went home. Mrs.

Duke said, "I just made an excuse, I had to go up finish playin cards, and I went in the house, played cards until I'm not sure, it was five to one or five after one."

Insp. Kenny,  
telephone conversation

July 2/99

- Mrs. Duke said that after speaking with her husband subsequent to our interview yesterday, she realized that it was only Kenny that came home that night (Friday, June 11/12, 1993) and Paul stayed with his girlfriend on Prince of Wales Street or Campbell Avenue.

Insp. Kenny,  
telephone conversation

Oct. 4/99

- Mrs. Duke called and said that she never gave beer or beer money to her sons that night (June 11/93). She said that Paul wasn't there that night at all, Kenny was down on the corner with 8 or 9 young fellows. She may have given him money and he told her he was going downtown. She said that neither Paul or Kenny were living at home at the time, Kenny lived on Cook Street and Paul lived on either Campbell Avenue or Prince of Wales Street. She said Kenny never came back home that night, she was up until 3:00 a.m. and never heard a sound.

Insp. C. Kenny

Oct. 20/99

- Kenny and Paul did not live at home in June 1993

- Met Kenny Friday night after Bingo and gave him money, he was going downtown.

- Paul was not there Friday night.

- Neither Kenny nor Paul came back home Friday night.

Friday, June 11/93, Mrs. Duke meets a person on side of apartment building ANNEX 13  
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Lt. D. Poddie and  
S/Sgt. A. Singleton  
August 11/93

- Saw Randy Druken coming around Southwest corner going North to a car parked at back of building.
- He walked toward car. Heard door close and car drove off.
- Car went too fast for Randy to be driving, think he got into the back.
- Thinks there was someone else in car.
- Had not looked back.
- Not Sure of time but definitely after 10:30 p.m.

Verbal by Lt. D. Poddie  
and Singleton  
(Poddie's notes)  
August 11/93

- Saw Randy Druken at around 10:30 - 11:00 p.m. Friday night 93-06-11 at rear of 194 Empire Avenue. He got into a car with someone else driving and left area. Never told Police before because she was afraid of Druken.

S/Sgt. Singleton  
and Cst. Randall  
(KGB statement)  
August 19/93

- Heat up on 90° and went for a walk, walked down the road, came up back lane, back door was jammed; "Went up around Dooley's, young fellow came out this way and for the minute, I can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on. I heard the door close and I heard the car leave."

- Went into her own house.

- Under questioning:  
"Yeah, to me I thought it was Randy Druken. I couldn't - that's what I thought - that's what I thought it was."

"Cause I met him before and like I wasn't paying no mind to him because he really passed me really fast and he put his head down and but - the night before there was kind of an argument out in the back and -"

"Cause... I don't know why I felt that way because every time I ran into Randy, it's like I use to get a cold feeling, like an afraid feeling and this is what I got when he passed by me I got a really cold, afraid feeling when he passed by me, even though the young fellow never did say nothin' to me on the way. But that's just the way I used to feel every time I use to talk to him or be handy to him."

- Referring to Friday night, Mrs. Duke said, "But I can't swear to it, you know like - to my opinion, it was Randy -", "That's only my opinion."

- Talking about Friday night seeing Randy at 10:30 to 11 o'clock, Mrs. Duke replied, "Yeah, or maybe a bit later or maybe a bit earlier, I don't know." "It wouldn't have been no earlier than 10:30 but it could have been a bit later than 11, I couldn't swear to it"

Preliminary Hearing,  
examined by  
Mr. Gorman  
Nov. 93

- Back door locked, went up around the front.



- Saw person, he put his head down, thought it was Randy Druken.

- Thought she heard a car door close.

Preliminary Hearing,  
crossed by  
Mr. Collins  
Nov. 93

- Friday night, just had a view of the person for a couple of seconds.

- Mrs. Duke never looked behind, and don't know where he went.

Pre-trial preparation,  
Wayne Gorman and  
Cst. Randell  
(Cst. Randell's notes)  
Nov. 20/94

- Saw Randy on corner of Brenda's house between 10:30 p.m. - 11:00 p.m.

- Hesitant to tell Police, feared for son's safety.

Pre-trial interview  
by Wayne Gorman  
and Cst. Randell  
(Cst. Randell's notes)  
Nov. 27/94

- Mrs. Duke stated that when she met Randy Druken on the corner of Brenda Young's house, he said words to the effect of: "You fucking slut, keep you're fucking mouth shut and go in out of it." He also called her a bitch as he walked away muttering. Mrs. Duke said Randy was like he was "bombed" or something. He was unsteady on his feet and his balance was off.

Verbal by D. Peddle  
and Singleton  
(Peddle's notes)  
Nov. 28/94

- Interviewed Mrs. Duke about her meeting with Wayne Gorman and Cst. Randell the previous evening. Mrs. Duke wouldn't say what she told them.

- Mrs. Duke said she saw Randy around 10:45 - 11:00 p.m. Friday night.

- Mrs. Duke advised that Wayne Gorman had promised her he wouldn't tell anyone what she had to say to him last evening. She felt he was now going to ask her this on the stand and she was not going to answer it. She would leave the court room.

- Peddle: "I asked her why she was so afraid of saying what, if anything, Randy Druken said to her that Friday night and if he had threatened her - she became very upset" crying uncontrollably." Interview concluded.

Tral. Wayne Gorman  
Nov. 29/94

- Went for a walk down toward Judy Janes' house, cut down between Judy's house and Marion Carroll's and came up the back. Saw Randy Druken, anywhere from 10:30 p.m. - 11:00 p.m.

- "He kind of shout and yelled at me when I was there. He was either drunk—he looked like—like he wasn't Randy that I knew—"

- "We shouted and yelled at me and told me to mind my own fucking business and go in and keep your mouth shut and stuff, like he was just raving on."

Cross Examination,  
Bill Collins  
Nov. 29/94

- Told Mr. Gorman in confidence what Randy had said to her on Friday night going around the building.

- Heard a car door close but didn't hear the car driving away (referring to Randy at back of apartment on Friday night).

- Never talked to anybody about what she seen or heard. Didn't watch the news or read the newspaper.

Insp. Kenny,  
verbal interview  
(Insp. Kenny's notes)  
July 2/99

- Mrs. Duke said that the night she saw the man walking around the building was on Thursday night and not Friday night. She said it was late, after 2:00 a.m. Friday morning, so that's how she got confused, she considered that to be Friday.

Insp. Kenny,  
audio taped interview  
July 2/99

- Referring to Friday night, Mrs. Duke said she came home from Bingo, went to the store and bought her husband a dozen beer, banged into her boys and they wanted money. She brought the beer home and walked back towards the store and met her son and gave him a few dollars. Walked around the house and came up the back way. Mrs. Duke *dates*, "I banged into a person. I was about three or four feet away from *em* when he told me mind my 'fing business." She went into Dooley's they had company and she went home. Mrs. Duke said, "I just made an excuse, I had to go up finish playing cards, and I went in the house, played cards until I'm not sure, it was five to one or five after one."

- Mrs. Duke said that it was only when the person said mind your 'fing business that she recognized Randy's voice. She stated "If he didn't have to speak to me I would never know who it was."

- When asked if the person she met going around the building and telling her to mind her own 'fing business could it have been one of Randy's brothers, she replied "It could've been."

- Said ~~this~~ this had to be Friday night because she had no money on Thursday night, but she was at Bingo on Friday night.

- Referring back to ~~meeting~~ Randy, Mrs. Duke said ~~this~~ the person telling her to mind her own 'fing business sounded like Randy. He was three or four feet gone past her when he spoke, she didn't look back and didn't ~~see~~ where he went.

- When asked if she seen his face, Mrs. Duke said: "Yes I seen his face. But it still never, no, wait now, yes cause he, like I couldn't, really it was *dark*, it was just, I really thought it was Randy cause it was really dark, you couldn't tell right off but. But when he spoke, that's what kinda scared me. And when he said that to me, that really scared me. But I, no."

Insp. C. Kenny  
Oct. 20/99

- Sure it was Friday night that she seen the person going around the apartment building.

- Nearly banged into the person going around the building, but did not ~~see~~ his face. The person never said anything to her either. This was around 10:30 p.m. - 11:00 p.m.

- Mrs. Duke says she is now confused because she met a person going around the building again around 1:30 a.m., maybe 2:30 a.m. when she went out looking for he boys. ("The beys didn't live at her residence according to Mrs. Duke) The person then says to Mrs. Duke: "Keep your nose outta me business" or "mind your own business."

Q. "Did you recognize the persons' faces either time?"

A. "The first I just had a feeling who it was. I knew who it was. Like I didn't have to look at *em* it's just, I knew it was Randy."

- Around 2:30 a.m. see other person on side of building. he had his head down and said mind your own God damn business or keep your God damn nose outta my business.

- See nobody else around but there could have been a dozen there.

Referring to seeing the person at around 10:30 - 11:00 p.m., Mrs. Duke said that the person never said anything and that she never saw a car or heard a car.

Q. "The person you seen that you nearly banged into, did you see that person again later around two o'clock?"

A. "I'm not sure it was him, seriously."

"I seen somebody but I'm not sure it was him and the person had their heads down and they told me either, I'm not sure if they said keep your nose outta my God damn business or you always got your nose in somebody's business, something sarcastic, and I turnt around and walked right back into me house and that's where I stayed at."

When Mrs. Duke was referring to "him" she was referring to "Benny Drake."

On this occasion (2:00 a.m.), Mrs. Duke walked around the front of the apartment building.

- Mrs. Duke said she was not sure of who this person was, nor did she recognize his voice.  
(Please note: that this aspect of Mrs. Duke's statement relating to seeing a person at around 2:00 a.m. Saturday morning is a completely new scenario that has not been divulged in any prior statement or testimony, and she is now changing her account of seeing the person around the building at 10:30 p.m. - 11:00 p.m.)

Saturday, June 12/93, Mrs. Duke speaks to Brenda out in front  
 THE TIMES: 1993 JUN 13 11:15 AM

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Cat. C. Walsh  
 June 13/93

- Last time saw her, 1:15 a.m., 93-06-12.
- Definitely did not see Brenda with anybody on Friday morning

S/Sgt. Singleton  
 and Cat. Randell  
 (KGB statement)  
 August 19/93

- Judy Janes arrived and played cards.
- Judy Janes left about five after one.
- Gut washed and dressed. Heat back up on 90°, went out on front doorstep.
- Spoke to Brenda about the weather, went back in house, did puzzle book and went to bed.
- See Brenda on the stairs leading down to the apartment building. Don't know which way Brenda went.

Preliminary Hearing,  
 examined by  
 Mr. Gorman  
 Nov. 93

- Saw Brenda at around :00 a.m.

Cross Examination,  
 Bill Collins  
 Nov. 29/94

- Referring to after seeing Brenda outside, she said "went back to my kitchen, and I sat down with a puzzle book and then I went to bed."

Insp. Kenny, audio  
 taped interview  
 July 2/99

- Last seen Brenda 1:10 a.m. or 1:20 a.m. Saturday morning, June 12, 1993.
- Brief discussion with Brenda about the weather.
- Brenda was alone.
- After cards, Mrs. Duke went outside to cool off and spoke to Brenda.

Insp. Kenny,  
 telephone conversation  
 Sept. 1/99

- Mrs. Duke expressed fear of going back to court and said that the Police back then were pressuring her to say that Randy was with Brenda when she saw Brenda on the steps that night, but she wouldn't say it because she only saw Brenda by herself. Mrs. Duke said that Barry Randell was good but the others were pressuring her.

Saturday, June 12/93

Mrs. Duke leaves residence, sees two men and one woman out front

Insp. Kenny,  
audio taped interview  
July 2/99

- Mrs. Duke, around 2:00 am. (Saturday morning) outside looking for her sons.

- Mrs. Duke returned home, and was waiting for her boys to come home. It was after two o'clock, Mrs. Duke went down Empire Avenue looking for her sons, went back up at the rear of the building and met three people near Brenda's front entrance, 2 males and a female, nothing spoken, returned home and her sons arrived home at around 2:45 am.

- Said when her sons came, they were drunk, Kenny and Paul

- During the break in the taped interview and at the conclusion of the interview after the tape was shut off, Mrs. Duke advised that she is pretty sure that she recognized the man who was on the Dooley/Young doorstep as being Pat Dooley Sr. He was with the other male and female after 2:00 am. when she walked around the apartment building on June 12/93. She also feels that it was Pat Dooley Sr. who called and threatened to harm her son Kenny. This information was documented on a separate sheet of paper and sealed in an envelope in my briefcase and not documented in my notebook as per the norm.

Insp. Kenny,  
telephone conversation  
July 3/99

- Mrs. Duke said that after speaking with her husband subsequent to our interview yesterday, she realized that it was only Kenny that came home that night (Friday, June 11/12, 1993) and Paul stayed with his girlfriend on PMce of Wales Street or Campbell Avenue.

Insp. Kenny,  
telephone conversation  
Oct. 4/95

- Mrs. Duke called and said that she never gave beer or beer money to her sons that night (June 11/93). She said that Paul wasn't there that night at all. Kenny was down on the corner with 8 or 9 young fellows. She may have given him money and he told her he was going downtown. She said that neither Paul or Kenny were living at home at the time, Kenny lived on Cook Street and Paul lived on either Campbell Avenue or PMce of Wales Street. She said Kenny never came back home that night, she was up until 3:00 a.m. and never heard a sound.

Insp. C. Kenny  
Oct. 20/99

- Mrs. Duke stated that she has probably seen Paul Druken visit Brenda's once or twice.

- Mrs. Duke refused to divulge certain information on tape, the following information was given in confidence, and according to Mrs. Duke, she will not testify to it.

When referring to seeing two men and a woman out in front of Brenda's apartment during the early hours of Saturday morning, she states that one person was Pat Dooley Sr. and now says that she is pretty sure that the other male was "Paul Druken". She also initially stated that Paul Druken was out on the back stairs, stating that she heard him and made mention of Mrs. Evoy seeing him. Mrs. Duke goes on to say that she didn't know who the person on the back steps was. (There is little doubt that Mrs. Duke has heard something about Paul Druken's involvement and is now incorporating this in her account of events) Mrs. Duke did say that she definitely did see Paul Druken in front of Brenda's Saturday morning.

Sunday, June 13/93, Mrs. Duke receives telephone call from Randy

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Verbal notes made  
by Cst. Robert Root  
(Scene Security)

June 13/93

- Received a call from Randy Druken.

- Randy was asking her what she was saying to Police.

- Acted casual on the phone because she didn't want her husband Pete to hear her call, and for fear her neighbours would hear.

Cst. T. K. Walsh  
June 23/93

- Phone call received from Randy.

- Questions asked by Randy:

What time did you see Brenda?

Was she by herself?

Did she seem mad?

What time was it that I seen her?

- Randy said "Cause I left her at 10:30."  
Questions - Was she alone?

- He said "Good, tell that the Police."

- Asked more questions but can't remember what.

- The last thing he said was "If I remember anything else to tell it to the Police."

Lt. D. Fiedler and  
S/Sgt. A. Singleton

August 11/93

- On Sunday received call. Questions asked:  
What time did you say you saw Brenda?  
What was she wearing?  
Was anyone with her?

- Randy said "You make sure that you tell the cops that I left Brenda at 10:30 p.m.; if you know anything else; to tell the cops." He said this in such a way as to make sure I didn't tell the cops anything... My impression was that I shouldn't tell the cops anything.

- Mrs. Duke didn't tell Police this before because she was afraid for the safety of her son Kenny. Told today because her husband made her.

S/Sgt. Singleton  
and Cst. Randell  
(KGB statement)

August 19/93

- Received phone call from Randy Druken on Sunday lunch time. Randy said "by the way and anything else you knows he said tell it to the God damn Police" and that's the way he put it.

- Randy said "I left her quarter after ten."

- Referring to the telephone call, Mrs. Duke stated; "And the reason I didn't mention it before cause I was afraid of him and I still am afraid of him."

Preliminary Hearing,

examined by  
Mr. Gorman

Nov. 93

- Randy phoned Sunday asking questions. Randy never said nothing to me in his whole life out of the way but this day he really scared me. Randy said "Make sure you tell the Police the time I left between quarter after 10 and half past 10 that night."

Preliminary Hearing,

crossed by Mr. Collins

Nov. 93

- Phone call from Randy, Mrs. Duke said that Randy told her to "tell everything that you know to the Police."

Verbal by D. Peddle

and Singleton

(Peddle's notes)

Nov. 28/94

- Mrs. Duke was afraid for herself and her children. The phone call from Randy had frightened her to death.

Trial, Wayne Gorman

Nov. 29/94

- Referring to phone call from Randy:  
"What time was it Brenda came home"  
"Who was she with"  
"Was she by herself"

- Told Randy that she didn't want him calling anymore.

Trial, Mr Collins

Nov. 30/94

- Referring to Mrs. Duke's statement of June 23/93 about Randy's phone call: "If I remember anything else to tell it to the Police."

- And in the August 11/93 KGB statement she said "Tell it to the God damn Police."

## June 1993, Mrs. Duke Receives Threatening Telephone Calls

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Insp. Kenny,  
audio taped interview  
July 2/93

- Received threatening phone calls from a male but it wasn't Randy. The caller threatened to do harm to her son Kenny. Person disguised his voice. Mrs. Duke said that the caller said "keep your nose out of other people's business or you're gonna be sorry, and I'm gonna hurt you where you last expect it."

Insp. C. Kenny  
Oct. 26/99

- Mrs. Duke talks about receiving threatening phone calls, but changes her account by first saying that the caller did make utterance, to the caller never saying anything but just hanging up.



## November 1993, Mrs. Duke Receives Money from Police

Insp. Kenny,

telephone conversation  
July 4/99

- Mrs. Duke said that she never received any money from the Police and neither did her sons Kenny or Paul. When asked about her husband, she passed the phone to him. Peter Duke explained that he received \$200.00 from Des Peddle for an unrelated incident involving stolen property and that he gave the money to Mrs. Duke because she had missed seven days work (due to testifying in court).

Insp. Kenny,

telephone conversation  
Sept. 1/99

- Mrs. Duke asked what was going on with the \$200.00. I explained that there was some mention that she had been paid. Mrs. Duke said that she did get \$200.00. She said that Sgt. Peddle gave her four 50 dollar bills, when she asked him what it was for, he said it was for all the time she missed off work when she was in court. Mrs. Duke went on to say that after Peddle left, her husband wanted money for a dozen beer, and when he got drunk he told her that the money was his for something that he did and he told Peddle to give it (money) to her for the time that she missed from work. She never learned of this stolen property that Mr. Duke passed over to Peddle until lately.

Insp. C. Kenny

Oct. 20/99

- Speaks about receiving \$200.00 from Des Peddle, and it was her initial belief that it was for missing hours of work but later learned that the money was given as a result of something unrelated between her husband and Peddle.

November 1993, Mrs. Duke Threatened by Derek Druken

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Insp. Kenny,  
telephone conversation  
Sept. 1/95

- Called Mrs. Duke concerning being threatened by Derek Druken. She stated that she was at her daughter Deanne's house on Hunts Lane and Derek walked down the street past her, she was out by the car and Derek called her a "slut" or a "whore". She's not sure which. She didn't know who he was until Deanne told her he was Derek Druken, and then she got scared (this is contrary to Deanne's recollection, as Deanne says that Derek never threatened or spoke to her mother).

Insp. C. Kenny,  
Oct. 20/99

- When asked about the incident on Hunt's Lane when Derek Druken allegedly threatened Mrs. Duke, she now says that he didn't say nothing to her but looked at her in such a way that scared her. Mrs. Duke gives a similar account of her feelings as she gave about allegedly meeting Randy Druken. Again, Mrs. Duke's daughter, Deanne, tells a completely different story.

Cst. G. C. Walsh  
June 13/93

- Randy wanted to control her.

Trial Voir Dire,  
by Mr Collins  
Oct. 94

- Mrs. Duke can't remember speaking at Dooley's residence as described in the transcripts.

Pre-trial preparation,  
Wayne Gorman and  
Cst. Randell  
(Cst. Randell's notes)  
Nov. 20/94

- Brenda told Mrs. Duke that she was afraid of Randy and wanted to get away from him.  
  
- Saw bruise on Brenda's face a couple of days to a week before she died.

Cross Examination,  
Bill Collins  
Nov. 29/94

- Told Mr. Gorman in confidence what Randy had said to her on Friday night going around the building.

- Referring to about what she said in confidence to Mr. Gorman, "When he gave me his—when he said—whatever is said here is said here I didn't think that he could say it in court." He said, "Whatever bes (sic) said here, it'll be left here."

- Never talked to anybody about what she seen or heard. Didn't watch the news or read the newspaper.

Des Peddle, verbal  
March 2/95

- Mrs. Duke telephoned Peddle, very upset that she was subpoenaed by Bill Collins. Discussion with Peddle but evidence not discussed as Peddle was also subpoenaed by Bill Collins.

Insp. Kenny, initial  
contact by telephone  
to set a meeting  
July 1/99

- Mrs. Duke said that she had too many CID coming to her house at all hours and they would write down things and when they read it back they had it all twisted.

Insp. Kenny,  
verbal interview  
(Insp. Kenny's notes)  
July 2/99

- Mrs. Duke said that CID really confused her the last time, different officers kept coming back every day at all hours and were pressuring her to tell more, but she said she didn't know more. Said it made her really confused.

- Said CID had all her statements twisted.

Insp. Kenny,  
telephone conversation  
Sept. 1/99

- Mrs. Duke expressed fear of going back to court and said that the Police back then were pressuring her to say that Randy was with Brenda when she saw Brenda on the steps that night, but she wouldn't say it because she only saw Brenda by herself. Mrs. Duke said that Barry Randell was good but the others were pressuring her.

Insp. Kenny,  
telephone conversation  
Oct. 4/99

- Mrs. Duke said something happened yesterday regarding this case but she don't want to get involved, but she do want to meet me.

- Mrs. Duke agreed to be interviewed, when apparently her husband came in the room and she said that she would call back in half hour

Insp. C. Kenny  
Oct. 20/95

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Mrs. Duke refused to call a doctor and get pills for Brenda upon her request. Brenda  
then ~~came away from her~~ <sup>to</sup> ~~her~~ <sup>her earlier</sup> accounts of visiting  
the ~~place~~ <sup>place</sup> frequently.

STATEMENT SYNOPSIS

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ANNEX 13

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Phyllis Duke  
Address:

DOB: 03-04-25  
190 Empire Avenue, St. John's

June 13/93 by Cst. G. C. Walsh

- Randy wanted to control her.
- Second last time I saw Brenda was about 4:30 p.m., new dress and shoes.
- Last time saw her 1:15 a.m., 93-06-12.
- Definitely did not see Brenda with anybody on Friday morning.

June 13/93, verbal, notes made by Cst. Robert Rose (Scene Security)

- Received a call from Randy Druken.
- Randy was asking her what she was saying to Police.
- Acted casual on the phone because she didn't want her husband Pete to hear her call, and for fear her neighbours would hear.

June 23/93 by Cst. T. K. Walsh

- Phone call received from Randy.
- Questions asked by Randy:
  - What time did you see Brenda?
  - Was she by herself?
  - Did she seem mad?
  - What time was it that I seen her?
- Randy said "Cause I left her at 10.30."
- Questions - Was she alone?
- He said "Good, tell that the Police."
- Asked more questions but can't remember what.
- The last thing he said was "If I remember anything else to tell it to the Police."

August 1/93 by Lt. D. Peddle and S/Sgt. A. Singleton

- Friday afternoon, June 11/93 up at Brenda's, showed me new dress and shoes.
- Randy was not there at the time.
- This was around 4 - 4:30 p.m. before supper.
- Check Lisa Legrows statement and evidence regarding time spent with Brenda on June 11/93.
- Went to Eingo, got home around 10:30 p.m.
- Went out by door to cool off, walked around building.
- Around 11:00 p.m., on back of building to cool off.
- Saw Randy Druken coming around Southwest corner going North to a car parked at back of building.
- He walked toward car. Heard door close and car drove off.
- Car went too fast for Randy to be driving, think he got into the back.
- Thinks there was someone else in car.
- ~~Had~~ not looked back.
- Not sure of time but definitely after 10:30 p.m.
- On Sunday received call. Questions asked:
  - What time did you say you saw Brenda?
  - What was she wearing?
  - Was anyone with her?
- Randy said: "You make Sure that you tell the cops that I left Brenda at 10:30 p.m.; if you know anything else; to tell the cops." He said this in such a way as to make sure I didn't tell the cops anything... My impression was that I shouldn't tell the cops anything.
- Mrs. Duke didn't tell Police this before because she was afraid for the safety of her son Kenny. Told today because her husband made her.

August 11/93, verbal by Lt. D. Peddle and Singleton (Peddle's notes)

- Saw Randy Druken at around 10:30 - 11:00 p.m. Friday night 93-06-11 at rear of 194 Empire Avenue. He got into a car with someone else driving and left area. ~~Never~~ told Police before because she was afraid of Druken.

August 19/93 by S/Sgt. Singleton and Cst. Randall (KGE statement)

- Friday afternoon 4:30 p.m. or 5:00 p.m. maybe 5:30 p.m. talking to Brenda at top of stairs between the livingroom and by the bathroom. Brenda showed her the shoes and dress she had bought. Conversation occurred between the bathroom and livingroom.
- Returned to her own apartment, got supper and went to Bingo at Country Bingo, Rickett's Road.
- Returned from Bingo, Judy Jones went home. Mrs. Duke went home.
- Heat up on 90° and went for a walk, walked down the road, came up back lane, back door was jammed; "Went up around Dooley's, young fellow came out this way and for the minute. I can't swear to it, but it looked to me like it was Randy Druken, but he put his head down, very quickly, and he went on... I heard the door close and I heard the ~~car~~ leave."
- Went into her own house.
- Judy Jones arrived and played cards.
- Judy Jones left about five after one.
- Got washed and dressed. Heat back up on 90°, went out on front doorstep.
- Spoke to Brenda about the weather, went back in house, did puzzle book and went to bed.
- Under questioning:
  - "Yeah, to me I thought it was Randy Druken. I couldn't - that's what I thought - that's what I thought it was."
  - "Cause I met him before and like I wasn't paying no mind to him because he really passed me really fast and he put his head down and but - the night before there was kind of an argument out in the back and -"
  - "Cause... I don't know why I felt that way because every time I ran into Randy, it's like I use to get a cold feeling, like an afraid feeling and this is what I got when he passed by me I got a really cold, afraid feeling when he passed by me, even though the young fellow never did say nothin' to me on the way. But that's just the way I used to feel every time I use to talk to him or be handy to him"
- See Brenda on the stairs leading down to the apartment building. Don't know which way Brenda went.
- Received phone call from Randy Druken on Sunday lunch time. Randy said "by the way and anything else you knows he said tell it to the God damn Police" and that's the way he put it.
- Randy said "I left her quarter after ten."
- Referring to the telephone call, Mrs. Duke stated; "And the reason I didn't mention it before cause I was afraid of him and I still am afraid of him."
- Mrs. Duke heard Randy Thursday night, shouting and yelling and swearing. She said "I don't know if he swore on me or swore on Brenda cause I was taking my grandson in on the back."
- She heard them arguing, "like you couldn't hear every word, like all you could hear was most generally swearing and yelling." Only heard "bits and pieces, like nothin' that could really make sense - like you son of a bitch, you won't go no where."

- When asked who was saying this, she said, "As I thought, it was Randy. I couldn't swear cause I closed the door and came in out of it..."
- Referring to Friday night, Mrs. Duke said, "But I can't swear to it, you know like - to my opinion, it was Randy.", "That's only my opinion."
- Referring to hearing the Thursday night argument, Mrs. Duke said "I never paid no attention to time. It was early, cause Michael wasn't in bed, it had to be, Michael generally comes in between 9:30, quarter to ten..."
- Talking about Friday night seeing Randy at 10:30 to 11 o'clock, Mrs. Duke replied, "Yeah, or maybe a bit later or maybe a bit earlier, I don't know." "It wouldn't have been no ~~earlier~~ than 10:30 but it could have been a bit later than 11, I couldn't swear to it."
- Questioned - Did you see him Thursday night? Mrs. Duke replied "Yeah, well I - I didn't actually see him, like he was on the side of the house, but you could hear him swearing and yelling."

November 7/93 by Lt. D. Peddle, verbal statement, noted on 1624 form

- Thursday, June 10/93, sometime after supper, but before dark, she heard Randy Druken shouting up to someone in Brenda's apartment. Randy was at rear of apartment, just outside and went up the entrance to the back steps. He was looking up at the area of Brenda's kitchen window. She heard Randy shout: "You fucking whore, you'll never get to the mainland, I'll make away with you."
- Mrs. Duke went to Brenda's Friday night, after she got home from Bingo. She wanted to know if Brenda had any trouble tonight, like ~~last~~ night, should she call the police. Brenda said no. Brenda also told Mrs. Duke she had to give Randy a ride home. Brenda also said she had to go because she was on the phone to her mother.

November 13/93 at 2:23 p.m. by Cst. P. Davis

- See Randy on Thursday, June 10/93 around supper time.
- Pat Dooley was there too.
- In kitchen, heard yelling, Randy was calling her a slut and a whore. Mrs. Duke said "I can't remember exactly what he said but he said you'll never make it to the mainland or you'll never get to the mainland or away or something."
- She seen Pat Dooley in the window (kitchen).
- Stood up by the back window when she saw Randy.
- In the kitchen with the door closed after she got Mike, and she could still hear Randy.

November 13/93 at 4:00 p.m. by Cst. P. Davis

- Went to Brenda's apartment on Friday, June 11/93 at 5 or ten after ten, maybe a bit earlier maybe a bit later.
- She went up the back hall, Brenda opened the door ajar, not fully. Said to Brads "If you have any problem tonight do you want me to call somebody."
- Brenda said "No, I'm talking to Mom and then I'm taking him home."



November 20/94, Pre-trial preparation. Wayne Gorman and Cst. Randell (Cst. Randell's notes)

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Referring to Thursday night:

- Randy was in a rage like he was hitting the side of the house
- He said, "You cocksucker, you'll never make it to the mainland."
- Brenda told Mrs. Duke that she was afraid of Randy and wanted to get away from him.
- Saw bruise on Brenda's face a couple of days to a week before she died.
- Got home from Bingo Friday night at 10:00 p.m.
- Got 1/2 dozen beer at store (2 blocks away).
- Walked down by Judy Janes' house and turned around and walked behind apartment building.
- Saw Randy on corner of Brenda's house between 10:30 p.m. - 11:00 p.m.
- Hesitant to tell Police, feared for son's safety.

November 27/94, Pretrial interview by Wayne Gorman and Cst. Randell (Cst. Randell notes)

- Mrs. Duke stated that when she met Randy Druken on the corner of Brenda Young's house, he said words to the effect of: "You fucking shit, keep you're fucking mouth shut and go in out of it." He also called her a bitch as he walked away muttering. Mrs. Duke said Randy was like he was "bombed" or something. He was unsteady on his feet and his balance was off.

November 28/94, verbal by D. Peddle and Singleton (Peddle's notes)

- Interviewed Mrs. Duke about her meeting with Wayne Gorman and Cst. Randell the previous evening. Mrs. Duke wouldn't say what she told them.
- Mrs. Duke said she saw Randy around 10:45 - 11:00 p.m. Friday night.
- Mrs. Duke was afraid for herself and her children. The phone call from Randy had frightened her to death.
- Mrs. Duke advised that Wayne Gorman had promised her he wouldn't tell anyone what she had to say to him last evening. She felt he was now going to ask her this on the stand and she was not going to answer it. She would leave the court room.
- Peddle: "I asked her why she was so afraid of saying what, if anything, Randy Druken said to her that Friday night and if he had threatened her - she became very upset - crying uncontrollably." Interview concluded.

March 2/95 by D. a Peddle, verbal

- Mrs. Duke telephoned Peddle, very upset that she was subpoenaed by Bill Collins. Discussion with Peddle but evidence not discussed as Peddle was also subpoenaed by Bill Collins.

Preliminary Hearing, examined by Mr. Gorman

- Went to store and bought beer for Peter.
- Returned home and left again to go down and see what is keeping Judy (Janet). Went to Judy's. She was in the washroom so Mrs. Duke left and returned home.
- Back door locked. went up around the front.
- Saw person, he put his head down. thought it was Randy Druken.
- Thought she heard a car door close.
- Saw Brenda at around 100 a.m.
- On Thursday heard Randy say "You'll never get to the 'f'ing mainland."
- Swearing, yelling bitch, whore, hitting the side of the house.
- Randy phoned Sunday asking questions. Randy never said nothing to me in his whole life out of the way but this day he really scared me. Randy said "Make sure you tell the Police that I left between quarter after 10 and half past 10 that night."

Preliminary Hearing, crossed by Mr. Collins

- Phone call from Randy. Mrs. Duke said that Randy told her to "tell everything that you know to the Police."
- Friday night, just had a view of the person for a couple of seconds.
- Mrs. Duke never looked behind, and don't know where he went.

Trial Voir Dire, by Mr. Collier

- Mrs. Duke can't remember speaking at Dooley's residence as described in the transcripts.

Trial Voir Dire, by Mr. Gorman

- Thursday, Mrs. Duke heard "you shut", "you bastard", "you fucker you'll never get to the mainland", "whore", "you cocksucker".

XX, by Bill Collins

- Kitchen door was open when she heard Randy outside on Thursday, June 10/93.
- Closed the kitchen door when she got Mike in and locked it.
- Never saw anybody else around when Randy was suppose to be shouting and hitting the house Thursday June 10, 93.

Trial, November 29/1994, Wayne Gorman

- Said "you will never get to the fucking mainland."
- Got home, went to the store, bought a half dozen beer and went back home.
- Went for a walk down toward Judy Janes' house, cut down between Judy's house and Marion Carroll's and came up the back. Saw Randy Druken, anywhere from 10:30 p.m. - 11:00 p.m.
- Q. Did you go to Judy Janes' apartment at any time?
- A No.
- This was referring to when Mrs. Duke left the house and walked around the apartments and seen Randy.
- Referring to phone call from Randy:
- "What time was it Brenda came home"
- "Who was she with"
- "Was she by herself"
- Told Randy that she didn't want him calling anymore.
- "He kind of shout and yelled at me when I was there. He was either drunk - he looked like--like he wasn't Randy that I knew--"
- We shouted and yelled at me and told me to mind my own fucking business and go in and keep your mouth shut and stuff, like he was just raving on."

#### Bill Collins Cross Examination

- Seen Brenda Friday afternoon coming out of Dooley's, spoke to her about her new dress and shoes, they spoke at top of Brenda's 60th staircase. Mrs. Duke had her hand on the knob of the door but still on the stairs.
- Told Mr. Gorman in confidence what Randy had said to her on Friday night going around the building.
- Referring to about what she said in confidence to Mr. Gorman, "When he gave me his--when he said--whatever is said here is said here. I didn't think that he could say it in court." He said, "Whatever ~~bes~~ (sic) said here, it'll be left here."
- Heard a car door close but didn't hear the car driving away (referring to Randy at back of apartment on Friday night).
- Never talked to anybody about what she seen or heard. Didn't watch the news or read the newspaper.
- Referring to after seeing Brenda outside, she said "went back to my kitchen, and I sat down with a puzzle book and then I went on to bed."

November 30/1994, Mrs. Duke Cross Examined by Mr. Collins

- Referring to Mrs. Duke's statement of June 23/93 about Randy', phone call: "If I remember anything else to tell it to the Police."
- And in the August 11/93 KGB statement she said "Tell it to the God damn Police."
- Referring to Cst. Davis' statement in November/93. Mrs. Duke went to Brendi's and asked if she had problem tonight if she should call someone. Brenda said no, I'm talking to Mom and then I'm taking him home. Mrs. Duke now says that she don't know if that was Friday night, Thursday night or Wednesday night.
- Mrs. Duke states, "No, not Friday night, it either had to be Wednesday night or Thursday night or one night during the night when it was a ruckus upstairs."
- Referring to Des Peddle's interview in November 1993 and her comment *that* she heard "I will make away with yw", referring to Randy outside the house on Thursday, Mrs. Duke say that "I can't remember saying it like that."

December 1/94, Trial Testimony of Mrs. Duke, Cross Examination by Bill Collins

(rehash of previous testimony)

July 1/99 by Insp. Kenny, initial contact by telephone to set a meeting

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Mrs. Duke said that she had too many CID coming to her house at all hours and they would write down things and when they read it back they had it all twisted.

July 2/99 by Insp. Kenny, verbal interview (Insp. Kenny's notes)

Set interview for later today. Mrs. Duke had to go to work.

Mrs. Duke said that CID really confused her the last time, different officers kept coming back every day at all hours and were pressuring her to tell more, but she said she didn't know more. Said it made her really confused.

Mrs. Duke said that the night she saw the man walking around the building was on Thursday night and not Friday night. She said it was late, after 2:00 a.m. Friday morning, so that's how she got confused, she considered that to be Friday.

Said CID had all her statements twisted.

Set meeting/interview for 3:00 p.m. - 4:00 p.m.

July 2/99 by Insp. Kenny, audio taped interview

Last seen Brenda 1:10 a.m. or 1:20 a.m. Saturday morning, June 12, 1993.

Brief discussion with Brenda about the weather.

Brenda was alone.

Went down to the store. on the way back met her two boys, they were looking for money, advised them she would come back and meet them. This was Friday night.

Thursday night, Mrs. Duke was in her kitchen, had back door open and window open, heard commotion, shouting and swearing. Went out back door, down the steps and had her grandchild Michael to come in.

Mrs. Duke asked to have the tape recorder turned off.

Tape returned after 30 seconds.

Mrs. Duke, around 2:00 a.m. (Saturday morning) outside looking for her sons.

Mrs. Duke requested tape be shut off again at 4:38 p.m., turned on again at 5:37 p.m.

Referring to Friday night, Mrs. Duke said she came home from Bingo, went to the store and bought her husband a dozen beer, banged into her boys and they wanted money. She brought the beer home and walked back towards the store and met her son and gave him a few dollars. Walked around the house and came up the back way. Mrs. Duke states, "I banged into a person, I was about three or four feet away from 'em when he told me mind my 'fing business." She went into Dooley's, they had company and she went home. Mrs. Duke said, "I just made an excuse, I had to go up finish playin cards, and I wait in the house, played cards until, I'm not sure, it was five to one or five after one."

After cards, Mrs. Duke went outside to cool off and spoke to Brenda

Mrs. Duke returned home, and was waiting for her boys to come home. It was after two o'clock, Mrs. Duke went down Empire Avenue looking for her sons, went back up at the rear of the building and met three people near Brenda's front entrance, 2 males and a female, nothing spoken, returned home and her sons arrived home at around 2:45 a.m.

Said when her sons came, they were drunk, Kenny and Paul.

Mrs. Duke said that it was only when the person said mind your 'fing business that she recognized Randy's voice. She stated "If he didn't have to speak to me I would never know who it was."

When asked if the person she met going around the building and telling her to mind her own 'fing business could it have been one of Randy's brothers, she replied "It could've been."

Said that this had to be Friday night because she had no money on Thursday night, but she was at Bingo on Friday night.

Received threatening phone calls from a male but it wasn't Randy. The caller threatened to do harm to her son Kenny. Person disguised his voice. Mrs. Duke said that the caller said "keep your nose out of other people's business or you're gonna be sorry, and it's gonna hurt you where you least expect it."

Referring back to meeting Randy, Mrs. Duke said that the person telling her to mind her own 'fing business sounded like Randy. He was three or four feet gone past her when he spoke, she didn't look back and didn't see where he went.

When asked if she seen his face, Mrs. Duke said: "Yes I seen his face. But it still never, no, wait now, yes cause he, like I couldn't, really it was dark, it was just, I really thought it was Randy cause it was really dark, you couldn't tell right off but. But when he spoke, that's what kinda scared me. And when he said that to me, that really scared me. But I, no."

During the break in the taped interview and at the conclusion of the interview after the tape was shut off, Mrs. Duke advised that she is pretty sure that she recognized the man who was on the Dooley/Young doorstep as being Pat Dooley Sr. He was with the other male and female after 2 00 a.m. when she walked around the apartment building on June 12/93. She also feels that it was Pat Dooley Sr. who called and threatened to harm her son Kenny. This information was documented on a separate sheet of paper and sealed in an envelope in my briefcase and not documented in my notebook as per the norm.

July 3/99 by Insp. Kenny, telephone conversation

Mrs. Duke said that after speaking with her husband subsequent to our interview yesterday, she realized that it was only Kenny that came home that night (Friday, June 11/12, 1993) and Paul stayed with his girlfriend on Prince of Wales Street or Campbell Avenue.

July 4/99 by Insp. Kenny, telephone conversation

Mrs. Duke said that she never received any money from the Police and neither did her sons Kenny or Paul. When asked about her husband, she passed the phone to him. Peter Duke explained that he received \$200.00 from Des Peddle for an unrelated incident involving stolen property and that he gave the money to Mrs. Duke because she had missed seven days work (due to testifying in court).

September 1/99 by Insp. Kenny, telephone conversation

- Called Mrs. Duke concerning being threatened by Derek Druken. She stated that she was at her daughter Deanne's house on Kirts Lane and Derek walked down the street put her, she was out by the car and Derek called her a "slut" or a "whore", she's not sure which. She didn't know who he was until Deanne told her he was Derek Druken, and then she got scared (this is contrary to Deanne's recollection, as Deanne says that Derek never threatened or spoke to her mother).
- Mrs. Duke asked what was going on with the \$200.00. I explained that there was some mention that she had been paid. Mrs. Duke said that she did get \$200.00, she said that Sgt. Peddle gave her four 50 dollar bills. when she asked him what it was for, he said it was for all the time she missed off work when she was in court. Mrs. Duke went on to say that after Peddle left, her husband wanted money for a dozen beer, and when he got drunk, he told her that the money was his for something that he did and he told Peddle to give it (money) to her for the time that she missed from work. She never learned of this stolen property that Mr. Duke passed over to Peddle until lately.
- Mrs. Duke expressed fear of going back to court and said that the Police back then were pressuring her to say that Randy was with Brenda when she saw Brenda on the steps that night, but she wouldn't say it because she only saw Brenda by herself. Mrs. Duke said that Terry Randell was good but the others were pressuring her.

October 4/99 by Insp. Kenoy, telephone conversation

- Mrs. Duke called and said that she never gave beer or beer money to her sons that night (June 11/93). She said that Paul wasn't there that night at all. Kenny was down on the corner with 8 or 9 young fellows. 'Shemay have given him money and he told her he was going downtown. She said that neither Paul or Kenny were living at home at the time, Kenny lived on Cook Street and Paul lived on either Campbell Avenue or Prince of Wales Street. She said Kenny never came back home that night, she was up until 3:00 am. and never heard a sound.
- Mrs. Duke said something happened yesterday regarding this case but she don't want to get involved, but she do want to meet me.
- Said that less than a week before Brenda's death she was in the back hall and heard an argument in Brenda's apartment, she said it wasn't Randy. She never seen Randy that night. She went up to Brenda's door, Brenda opened it a little, she asked if she needed her to call someone and Brenda said no. When asked if she knew who it was with Brenda, Mrs. Duke said that she don't want to get involved, that the Police just twists things around.
- Mrs. Duke agreed to be interviewed, when apparently her husband came in the room and she said that she would call back in a half hour.

October 20/99 by Insp. C. Kenny

- Sure it was Friday night that she seen the person going around the apartment building.
- Kenny and Paul did not live at home in June 1993.
- Met Kenny Friday night after Bingo and gave him money. he was going downtown.
- Paul was not there Friday night.
- Neither Kenny nor Paul came back home Friday night.
- A few days to a week prior to Brenda's death Mrs. Duke hears an argument coming from Brenda's apartment. Went up and asked Brenda if she needed the Police called, Brenda says no and closed the door.
- Don't remember what the argument was about.
- Know who the other person was but refused to tell.
- Thursday, heard and saw Randy Druken out back shouting and swearing. Saw another person out back standing by a car, don't know who he was or if he was with Randy.
- Did not go to Brenda's apartment after Bingo as previously noted by Des Paddle. Mrs. Duke was emphatic about this point.
- Friday afternoon up on top of stairs at Brenda's. seen new dress and shoes. Mrs. Duke goes on to say that she is not sure if it was Friday or a couple of days before that. Then states that it couldn't be Friday, it had to be Wednesday or Thursday.
- Nearly banged into the person going around the building, but did not see his face. The person never said anything to her either. This was around 10:30 p.m. - 11:00 p.m.
- Mrs. Duke says she is now confused because she met a person going around the building again around 1:30 a.m. maybe 2:30 a.m. when she went out looking for her boys. ("The boys didn't live at her residence according to Mrs. Duke) The person then says to Mrs. Duke: "Keep your nose outta me business" or "mind your own business."
- Q. "Did you recognize the persons' faces either time?"  
A. "The first I, I just had a feeling who it was. I knew who it was. Like I didn't have to look at em it's just, I knew it was Randy."
- Around 2:30 a.m. another person on side of building, he had his head down and said mind your own God damn business or keep your God damn nose outta my business.
- See nobody else around but there could have been a dozen there.
- Referring to seeing the person at around 10:30 - 11:00 p.m., Mrs. Duke said that the person never said anything and that she never saw a car or heard a car.
- Q. "The person you seen that you nearly banged into, did you see that person again later around two o'clock?"  
A. "I'm not sure it was him, seriously."  
"I seen somebody but I'm not sure it was him and the person had their heads down and they told me either, I'm not sure if they said keep your nose outta my God damn business or you always got your nose in somebody's business, something sarcastic, and I turned around and walked right back into me house and that's where I stayed at."
- When Mrs. Duke was referring to "Him" she was referring to "Randy Druken."



On this occasion (2:00 a.m.), Mrs. Duke walked around the front of the apartment building.

Mrs. Duke said she was not sure of who this person was, nor did she recognize his voice. (Please note: that this aspect of Mrs. Duke's statement relating to seeing a person at around 2:00 a.m. Saturday morning is a completely new scenario that has not been divulged in any prior statement or testimony, and she is now changing her account of seeing the person around the building at 10:30 p.m. - 11:00 p.m.)

Mrs. Duke talks about receiving threatening phone calls, but changes her account by first saying that the caller did make utterances, to the caller never saying anything but just hanging up.

Speaks about receiving \$200.00 from Des Peddle, and it was her initial belief that it was for missing hours of work, but later learned that the money was given as a result of something unrelated between her husband and Peddle.

When asked about the incident on Hunt's Lane when Derek Druken allegedly threatened Mrs. Duke, she now says that he didn't say nothing to her but looked at her in such a way that scared her. Mrs. Duke gives a similar account of her feelings as she gave about allegedly meeting Randy Druken. Again, Mrs. Duke's daughter, Deanne, tells a completely different story.

Mrs. Duke stated that she has probably seen Pad Druken visit Brenda's once or twice.

Mrs. Duke refused to call a doctor and get pills for Brenda upon her request. Brenda then stayed away from her. This, of course, is contrary to her earlier accounts of visiting and speaking with Brenda frequently.

Mrs. Duke refused to divulge certain information on tape, the following information was given in confidence, and according to Mrs. Duke, she will not testify to it.

When referring to seeing two men and a woman out in front of Brenda's apartment during the early hours of Saturday morning, she states that one person was Pat Dooley Sr., and the other male was "Paul Druken". She also initially now says that she is pretty sure that the other male was "Paul Druken". She also initially stated that Paul Druken was out on the back stairs, stating that she heard him and made mention of Mrs. Evoy seeing him. Mrs. Duke goes on to say that she didn't know who the person on the back steps was. (There is little doubt that Mrs. Duke has heard something about Paul Druken's involvement and is now incorporating this in her account of events) Mrs. Duke did say that she definitely did see Paul Druken in front of Brenda's Saturday morning.

Mrs. Duke further states (off the record), that the argument that she heard coming from Brenda's apartment a few days before Brenda's death was between Brenda and Pat Dooley Sr., and they were arguing about stolen goods. This is when Mrs. Duke went to Brenda's apartment, Brenda opened the door ajar, and Mrs. Duke asked if she wanted the Police called. Brenda says no.

(Please note: This incident is similar to that of Mrs. Duke going to Brenda's apartment on Friday night and asking Brenda the same thing, but was then referring to Randy's behaviour and not Pat Dooley Sr. Mrs. Duke now denies going to Brenda's Friday night)

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ANNEX 14

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# THE INQUIRY

## REGARDING

## THOMAS SOPHONOW

THE INVESTIGATION,  
PROSECUTION AND  
CONSIDERATION OF  
ENTITLEMENT TO  
COMPENSATION

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COMMISSIONER  
The Honourable Peter deC. Cory  
SEPTEMBER 2001

620436

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## JAILHOUSE INFORMANTS, THEIR UNRELIABILITY AND THE IMPORTANCE OF COMPLETE CROWN DISCLOSURE PERTAINING TO THEM

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.

They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption of the administration of justice. Perhaps, the greatest danger flows from their ability to testify falsely in a remarkably convincing manner. In this case, it will be seen that an experienced detective thought that Mr. Martin, a very frequent jailhouse informant with a conviction for perjury, was a credible witness. He lied in this case and he has testified in at least nine other cases, undoubtedly with the same degree of mendacity. Jailhouse informants are a festering sore. They constitute a malignant infection that renders a fair trial impossible. They should, as far as it is possible, be excised and removed from our trial process.

Jailhouse informants are a uniquely evil group. Justice Kaufman in the Morin Inquiry dealt extensively with jailhouse informants and the harm that they occasion. His thoughtful and helpful recommendations are carefully set out in his report. I will adopt them but go still further in my recommendations on this subject.

This case provides a classic example of the use and the pernicious effect of their testimony. Mr. Peter Neufeld in his book, "Actual Innocence", (Inquiry, Exhibit 139) at page 361 studied 74 cases in which DNA had established that an innocent person had been wrongfully convicted. In 19% of those cases, jailhouse informants were used.

Let us consider the informants put forward in this case.

### **Thomas Cheng**

Mr. Cheng testified in the first and second trials and, despite the objection of Defence Counsel, his evidence was read in at the third trial. Mr. Cheng testified that Thomas Sophonow told him that he had tried to rob a donut shop. Mr. Cheng stated that Thomas Sophonow said that the girl who was in the shop was to tell him where the rest of the



money was located. She was to do this because they were friends. When she did not do this, it made him mad and he took her to the washroom and used a rope to kill her. (Inquiry, Exhibit 158 - Document Brief 7 re Police Investigation Review, page 2).

Mr. Brodsky, Counsel for Thomas Sophonow in the second and third trials, suggested to Mr. Cheng that he had made a bargain with the police in exchange for his testimony. (Inquiry, Exhibit 4 - 1983 Trial Transcripts, pages 1108, 1109).

Mr. Dangerfield was then permitted to re-examine to determine Mr. Cheng's motive for testifying. Mr. Cheng stated that he had not asked for any consideration in return for his story. Aside from the hope that he would be treated in a more kindly manner, the only other reason that motivated him to come forward was that it bothered him to see a murderer on the street. (Inquiry, Exhibit 4 - 1983 Trial Transcripts, pages 1113, 1114).

When Mr. Cheng was asked whether he understood that the police would drop some charges or do various things that would of assistance to him he replied: "sometimes I think so but that's not the main reason I approached the police" (Inquiry, Exhibit 4 - 1983 Trial Transcripts, page 1120). He was then asked if he had told the police officer that he wanted some favourable consideration for telling the story and he replied "no".

This was not true. Mr. Cheng told Sergeant Huff, the polygraph operator, that he considered himself to be a Christian and he believed that a Christian belief does not allow for the taking of a life. This was put forward as one reason that he advised the police of the conversation with Thomas Sophonow. However, he stated that the single most important reason for testifying was that he wished to get out of jail and have the charges against him dropped. He said that he was afraid of having a record as it would prevent him from re-entering the United States and that he would be deported back to Hong Kong. He also stated that he felt that he had brought shame to his family. (Inquiry, Exhibit 158 - Document Brief 7 re Police Investigation Review, Tab 3). Although this was all set out in the police material which was provided to Crown Counsel, it was not disclosed to Defence Counsel at any of the trials. Without that report, Defence Counsel were unable to effectively cross-examine Mr. Cheng. In the absence of that report, Mr. Cheng would appear to have come forward for nothing but the highest and best motives. The jury would assess his credibility based upon the praiseworthy motives that he gave for testifying.

Yet Mr. Cheng was facing 26 counts of fraud which were withdrawn by the Crown. Further, he was released from custody on the understanding that he would be expected to testify at the third trial. Although he did not appear for the third trial, his evidence was read in.

The report of Sergeant Huff was of fundamental importance to arriving at the truth. If it had been disclosed to Defence Counsel, Mr. Cheng could have been shown as the liar that he was. Crown Counsel agreed that this was the type of material that ought to have been disclosed to Defence Counsel in 1982 and 1985. It was not and it should have been. This failure to disclose, along with others referred to later, constituted a very serious error. They demonstrate that there was not a fair disclosure made based on the standards

of 1982. Those failures further indicate that there could not have been a fair trial based on the standards of that time.

On behalf of the police, it was submitted that they did all that was appropriate for the times in checking the reliability of Mr. Cheng. They required him to take a polygraph test and confirmed that he had been seen talking to Thomas Sophonow. For the police, it was contended by their counsel that all relevant documents were given to the Crown. It was argued, with justification in my view, that it was for the Crown to make the decision whether to call Mr. Cheng and for the Crown to disclose such documents as they deemed appropriate to the Defence. Even if it is assumed that the police did all that was required of them, perhaps what is most significant is that an extremely unreliable witness was called who must have had a devastating effect upon the result of Thomas Sophonow's trial. Further, as a result of the failure to disclose Mr. Cheng's statement to Sergeant Huff, the Defence was denied the opportunity to properly and adequately cross-examine Mr. Cheng.

Mr. Dangerfield, Senior Crown Counsel in the first and second trials, agreed at this Inquiry that he would have read the polygraph report before Mr. Cheng testified. (Inquiry, Vol. 47, page 8158). He also agreed that, in his taped conversation with Mr. Brodsky concerning Mr. Cheng, it did appear that he was referring to some of the contents of Sergeant Huff's report. (Inquiry, Vol. 47, page 8164). He went on to say that he had no independent memory of reading that report. Yet he did concede that some underlining, which can be seen in the report, would undoubtedly have been made by someone, other than the police, reading the report. He conceded that, if he had been given the report, he would certainly have seen it before Mr. Cheng testified. He also agreed that the Defence should have had the report but he suggested that he certainly did not keep it from Mr. Brodsky deliberately. I certainly accept that he did not deliberately keep the report from Mr. Brodsky. However, the fact remains that it should have been produced to him and it was not. The consequences of this failure to disclose must have been serious. Mr. Cheng would appear to the judge and jury to have come forward and testified for the highest and most praiseworthy motives. This was false and should have been known to the Crown to be false. The disclosure of the report would have afforded the Defence the opportunity to demonstrate the falsity of Mr. Cheng's evidence.

At the third trial, two additional jailhouse informants were called, Adrian McQuade and Douglas Martin. Let us consider first Adrian McQuade.

### **Adrian McQuade**

Adrian McQuade was well known to the Winnipeg Police as an informant. On behalf of the police, it was submitted that informants must give reliable information to the police or they could not be recognized as informants. Therefore, it was submitted that it was appropriate to put an informant such as Mr. McQuade forward as a witness. When the circumstances surrounding the so-called confession of Thomas Sophonow to Mr. McQuade are reviewed in their proper context, it can be seen how very unreliable his testimony was. Sergeant Biener testified that "he wanted the Crown to know what they were dealing with in Mr. Adrian McQuade". (Inquiry, Vol. 50, page 7709). As a result,

the police made the Crown aware of the following circumstances pertaining to Mr. McQuade:

- 1) Upon being jailed on a material witness warrant, Mr. McQuade had threatened to sabotage the Crown case and intentionally perjure himself if necessary;
- 2) A taped conversation between Mr. McQuade and Officers Daher and Smith demonstrated clearly that Mr. McQuade was an informant for the Winnipeg Police and was dealing with them on at least five matters;
- 3) Mr. McQuade had been told that everything that he said to Officers Daher and Smith had been recorded and that if he did not testify voluntarily against Thomas Sophonow he would be treated as a hostile witness and the tape recording would be played in Court. This, of course, would expose him as an informant with all the dangers which that entails.

Sergeant Biener testified that all this information was disclosed to Crown Counsel. Obviously, this information was important to those who were assessing Mr. McQuade's credibility. Unfortunately, it was not disclosed to the Defence and, as a result, the jury was not made aware of the great frailties and apparent falsehoods in his testimony.

There is an extremely worrisome aspect of Mr. McQuade's evidence. Mr. Whitley, toward the beginning of his examination of Mr. McQuade in the third trial, referred to the March 19, 1982, date when Thomas Sophonow allegedly made his confession. The following appears from the transcript of the third trial.

- "Q: Mr. McQuade I want you to think back to 1982, March 27. I understand on that date you were arrested on the charge break entering and theft and possession of stolen goods; is that correct?
- A: Yes.
- Q: And the police took you where as a result of the arrest?
- A: At the Public Safety Building.
- Q: How long did you stay in detention at the Public Safety Building?
- A: About one weekend."

Mr. McQuade then testified as to the confession that he stated had been made that very weekend by Thomas Sophonow.

However, the evidence is very clear that Mr. McQuade was arrested by Constable Luczenczyn on the 27<sup>th</sup> of March, 1982. He attempted to exchange information about drugs for a deal pertaining to his charges. This was refused. He then offered to go into a cell in "B" Block with Thomas Sophonow whom he knew. The police accepted this offer and arrangements were made to place him in the cell with Thomas Sophonow. He was asked to talk to Thomas Sophonow and to get any information he could including, if possible, an admission. The following Monday, March 29, Mr. McQuade attended Court

and Constable Luczenczyn met with him. At that time, Mr. McQuade advised the Constable that, although he had spoken to Thomas Sophonow about four times, "the two did not talk of the murder". All of this information was put into a special report which is the Inquiry Exhibit No. 111. The report is, of course, of great significance. It demonstrates that Mr. McQuade, at that time, was denying that he had ever received the confession which he recited at the third trial.

Let us consider what Mr. Whitley knew of Mr. McQuade before he called him as a witness and what information should have been disclosed to Defence Counsel in this regard in 1985.

It is clear that Mr. Whitley knew of the tape recording made by Officers Daher and Smith of their talk with Mr. McQuade. Sergeant Biener's notes reveal that he delivered a transcript of this recording to Mr. Whitley and Mr. Gosman at 2:00 p.m. on January 16<sup>th</sup>, 1985. Mr. Whitley admitted that he knew Mr. McQuade feared for his life (as a result of being labeled "a rat") and knew Mr. McQuade had threatened to turn on the police and go to the other side. He further conceded that Mr. McQuade had been forced to testify. He stated: "we compelled him to testify, yes". This was accomplished, of course, by threatening Mr. McQuade with labeling him as a hostile witness and playing the tape in Court. (Inquiry, Vol. 50, page 8766).

When Mr. Whitley was asked about the Luczenczyn report, which indicated that there had been no confession, he stated that he was not aware of it. (Inquiry, Vol. 50, page 8768). However, when he was told that Sergeant Biener had submitted it to him, he agreed that this was a fair assumption and that the Luczenczyn report was part of the material he would have looked at in assessing Mr. McQuade's credibility. (Inquiry, Vol. 50, page 8770). With the passage of years, it can be appreciated that Mr. Whitley would not recall the Luczenczyn report. Nonetheless, it is also clear that he was in possession of it and that he would have read it and used it in assessing Mr. McQuade's credibility. When questioned as to whether it should have been disclosed to Defence Counsel on the basis of the practice in 1985, he stated that there was no doubt that Defence Counsel should have had the Luczenczyn report in order to cross-examine Mr. McQuade. He stated: "I can't say at the time if that happened". However, it does appear from the transcript that Mr. McQuade was not cross-examined on the Luczenczyn report. Yet, obviously, it would have been of fundamental importance to the Defence. I cannot imagine that Mr. Brodsky would not have cross-examined Mr. McQuade extensively with regard to it if it had been disclosed to him.

Mr. Whitley went further and agreed that the report should have been disclosed even in 1985 because it is: "such a ..... departure from what he had testified to it would be unfair for this person to testify as if this didn't exist". (Inquiry, Vol. 50, page 8772). Mr. Whitley stated that he didn't know why the report was not disclosed to Mr. Brodsky. His response was: "well I don't know, I don't have an answer for that". (Inquiry, Vol. 50, page 8773).

Unfortunately, the matter raises still more problems. Mr. Brodsky was told by Mr. Whitley that Mr. McQuade's statement was being taken "as we speak". Mr. Brodsky testified, referring to the Luczenczyn report:

"Brodsky: I never heard about it. I didn't know about it. I was told it did not exist, because as I've already said I was told the statement was the only one that was being taken.

Com. Cory: I'm sorry Mr. Brodsky who told you that?

Brodsky: The Crown.

Com. Cory: The Crown? Mr. Whitley?

Brodsky: Yes.

Com. Cory: Mr. Whitley?

Brodsky: He told me that the statement was being taken as we spoke and that was the only statement I knew about. I did not know about an earlier statement."

Mr. Brodsky prepared a memorandum and placed it in his file. It indicated that he was told by the Crown that Mr. McQuade's statement was taken for the first time on January 30<sup>th</sup>, 1985. (Inquiry, Vol. 57, page 10049). Thus, Mr. Brodsky was not aware either of the Luczenczyn report or the transcript of the conversation between Mr. McQuade and Officers Daher and Smith.

Mr. Brodsky, of course, confirmed that he would have liked to have seen the transcript from Officers Daher and Smith of the McQuade conversation. He further testified that he would have expected to be given something as important as the Luczenczyn report. (Inquiry, Vol. 57, page 10160).

I should have mentioned that the very fact that the Luczenczyn report was found in the Crown's files speaks volume for the candour and courage of Sergeant Biener. The report was probably only known to three people, Inspector DePourcq, Sergeant Biener and Mr. Luczenczyn. It was a document that the Crown would not normally have received. Yet Sergeant Biener realized that the Luczenczyn report was relevant and exceedingly important to any assessment to be made of Mr. McQuade. That the Luczenczyn report was made available to the Crown is a credit to Sergeant Biener's sense of fairness and integrity. He realized its relevance and importance and made certain that it was disclosed to Crown Counsel. It is unfortunate that a document as important as that was not, as it was conceded it should have been, disclosed to Counsel for the Defence. This meant that there could not be a fair trial for there could not be an appropriate assessment made by the jury of Mr. McQuade's credibility, tested by cross-examination with reference to the Luczenczyn report and the Daher and Smith transcript.

### **Douglas Martin**

Another jailhouse informant called at the third trial was Douglas Martin. He is a prime example of the convincing mendacity of jailhouse informants. He seems to have heard

more confessions than many dedicated priests. He has testified as a jailhouse informant in at least nine cases in Canada. When he came forward, the police learned that he certainly did have a significant record including a conviction for perjury. Inquiries were made regarding this conviction but it was thought that there was a reasonable explanation for it, namely, that threats had been made to his wife and that he perjured himself in order to protect her. The danger of jailhouse informants is emphasized by the assessment of Sergeant Paulishyn, at that time an experienced police officer. He thought that Mr. Martin was a credible witness and that he came across as a truthful type. (Inquiry, Vol. 41, pages 6570, 6571). To his credit, Sergeant Paulishyn carefully advised the Crown of Mr. Martin's record.

### ***Findings Regarding the Use of Jailhouse Informants in the Thomas Sophonow Trial***

It is apparent there was nothing untoward about the use of jailhouse informants in 1982 and 1985. The Winnipeg Police did attempt to investigate to assure themselves of the reliability of these witnesses and, on this issue, no fault can be attached to the work of the police. What the case does demonstrate is the ease with which experienced officers and Crown Counsel can be fooled by jailhouse informants as to their credibility and apparent truthfulness.

The very real problem arose in this case from the failure to disclose to Defence Counsel important aspects of the material regarding the jailhouse informants, which Crown Counsel readily agreed should have been disclosed. If that had been done, cross-examination would have helped to demonstrate the unreliability of these witnesses. The material was in the possession of the Crown. Crown Counsel agreed that it should have been disclosed to the Defence. It was not. This was a serious error on the part of the Crown and the Crown must accept responsibility for it. The error contributed significantly to the wrongful conviction of Thomas Sophonow.

### ***Some General Comments on Jailhouse Informants***

The manner in which jailhouse informants rush to give testimony in a prominent case is demonstrated by the Thomas Sophonow trial. Before the third trial, no less than 11 jailhouse informants had volunteered their services. The police and the Crown took pride in narrowing it down to the three who were called on the basis of their "credibility and reliability". Yet how deceptive and untruthful they were and how very unreliable they were. As a group, they have an unsurpassed record for deception and lying. As a group, they do merit very special attention and caution must be exercised in the use of their evidence.

It is true that Justice Dickson, in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, cautioned against placing witnesses in pigeon holes so that only some classes of witnesses would require warnings regarding their testimony. Nonetheless, jailhouse informants are in a special class with the demonstrated ability to mislead and deceive the most discerning

and experienced observers. They have, as a class, established a unique record of consistently giving false testimony. They must be given special attention and their evidence should generally be excluded and only be admitted in very rare cases. On those rare occasions that it is admitted, it must be approached with the greatest caution.

It is not unduly difficult for jailhouse informants to obtain information, particularly in high profile cases, which would appear to come only from the perpetrator of the crime. As a result, they appear to be reliable and credible witnesses. This case demonstrates that experienced police officers considered very unreliable informants to be credible and trustworthy. Crown Counsel obviously thought that they were credible witnesses who should be put forward. If experienced police officers and Crown Counsel can be so easily taken in by jailhouse informants, how much more difficult it must be for jurors to resist their blandishments. How difficult, if not impossible, it is for jurors to appreciate the polished and practiced facility with which they deliver false testimony. Jailhouse informants are, indeed, a dangerous group. Their testimony can all too easily destroy any hope of holding a fair trial and severely tarnish the reputation of Canadian justice.

There is always a very natural and healthy tendency to sympathize with the victims of the crime and with their families. There is as well a very real concern for the safety of society. Citizens of Canada have every right to be protected from perpetrators of crimes, particularly of violent crimes. The incarceration of those who commit violent crimes is the only feasible manner of protecting society. However, in the desire to protect society, we cannot compromise the principle of a fair trial. Our criminal justice system is based upon the principle that those accused of crimes are entitled to and will always receive a fair trial.

In the United States, the miscarriages of justice occasioned in whole or in part by jailhouse informants have been set out in the book, "Actual Innocence", co-authored by Peter Neufeld. In Canada, Justice Kaufman considered the same issue and made strong recommendations in the Morin Inquiry that would limit the use of these informants and require strong cautionary instructions to the jury with regard to their testimony. By now it should be clear that jailhouse informants are so unreliable that they tend to undermine criminal trials.

Their testimony has all too often resulted in a wrongful conviction. When such a miscarriage of justice occurs, the entire system of justice suffers. Indeed, the entire community suffers as a result of the demonstrated inability to provide the accused with a fair trial. How many wrongful convictions must there be before the use of these informants is forbidden or, at least, confined to very rare cases. In the rare case that they are called, their testimony should automatically be subject to the strongest possible warning to jurors to approach it with great caution. Lawyers, particularly Crown Counsel and Judges, must be made aware of the irreparable damage that these informants can cause to the administration of justice in Canada.

## ***U.S. Studies on Jailhouse Informants***

This conclusion is supported by studies done of jurors in the United States regarding the effects of a confession made to a jailhouse informant. Mr. Peter Neufeld gave impressive testimony with regard to this subject. His studies reveal that, in roughly 20% of the cases that were established to be wrongful convictions of innocent persons, jailhouse informants were used by the prosecution.

Further, it is unfortunately apparent that jurors give great weight to these alleged confessions. American studies indicate that, to the average juror, there is not much difference between the manner in which they receive and weigh a confession given to a police officer and a confession given to a jailhouse informant. (Inquiry, Vol. 56, page 9891). It is very easy to build a sufficiently compelling argument to convince the jury that the informant is a credible witness. (Inquiry, Vol. 56, page 9983). This occurs despite the fact that the experience in the United States has been that the same jailhouse informant may testify in numerous cases. Mr. Martin demonstrates the Canadian tendency to follow this pattern. It was Mr. Neufeld's recommendation that, because jailhouse informants are so unreliable and their testimony has such a devastating effect, they should not be used in any circumstances. Further, he noted that the testimony of multiple jailhouse informants in a case has a cumulative effect on the jury listening to the evidence. (Inquiry, Vol. 56, page 9909). He demonstrated, by means of a well documented example, how easy it was for jailhouse informants to obtain information which would appear to a juror could only have come from the perpetrator of the crime.

There have been recommendations made in the United States to exclude all evidence from jailhouse informants. The Morin Inquiry and the Sophonow Inquiry have demonstrated that their testimony gives rise to the same dangers in Canada as it does in the United States.

## ***What Have the Studies of Jailhouse Informants Revealed?***

The findings can be summarized in the following manner:

- 1) Jailhouse informants are polished and convincing liars.
- 2) All confessions of an accused will be given great weight by jurors.
- 3) Jurors will give the same weight to "confessions" made to jailhouse informants as they will to a confession made to a police officer.
- 4) "Confessions" made to jailhouse informants have a cumulative effect and, thus, the evidence of three jailhouse informants will have a greater impact on a jury than the evidence of one.
- 5) Jailhouse informants rush to testify particularly in high profile cases;
- 6) They always appear to have evidence that could only come from one who committed the offence.
- 7) Their mendacity and ability to convince those who hear them of their veracity make them a threat to the principle of a fair trial and, thus, to the administration of justice.



As a result of the foregoing, I have some hopes, suggestions and recommendations to put forward. I would suggest that Trial Judges and Appellate Court Judges should recognize the dangers that arise in hearing the testimony of these informants. I therefore most earnestly and respectfully express the hope that the occasion will arise for the Supreme Court of Canada to consider again the issue raised in *R. v Brooks*, [2000] 1 S.C.R. 237. It may be that the studies done in the United States, together with the Morin and Sophonow inquiries, have now sufficiently demonstrated the tragic dangers occasioned to the administration of justice by the testimony of jailhouse informants in light of the reliance jurors place upon alleged confessions made to these most unreliable of witnesses. Later, I will recommend that, as a general rule, the evidence of jailhouse informants should be inadmissible. However, in very rare cases and subject to stringent conditions, the evidence of a jailhouse informant may be admitted.

As an example of the rare case in which a jailhouse informant might be permitted to testify would be a situation where a kidnapping has taken place and only the kidnapper could possibly know the location of the victim. Should a jailhouse informant learn, as a result of a statement made by the accused person, of the whereabouts of the kidnapped victim and that location is confirmed by the police investigation, that evidence might be admissible. Generally, the evidence proposed to be given by the jailhouse informant should in itself relate to a very major aspect of the crime and be of such a unique and detailed nature that only the culprit would know it. That evidence would have to be independently confirmed by the police before the Crown should consider putting the informant forward as a witness.

Mr. Finlayson, Assistant Deputy Attorney General, gave very helpful evidence with regard to this issue. It is very clear that Manitoba has commendably taken giant steps forward with regard to significantly restricting the use of jailhouse informants. Indeed, the Manitoba Guidelines may lead the country in this regard. Mr. Finlayson forcefully observed that it was clear that, at the very least, there must always be a strong cautionary warning by the Trial Judge to the jury as to the dangers of the testimony of jailhouse informants. These excellent guidelines are attached as Appendix "F" to this Report.

To them, I would add the further restrictions outlined as follows.

## RECOMMENDATIONS

1. As a general rule, jailhouse informants should be prohibited from testifying.

They might be permitted to testify in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim. In such a situation, the police procedure adopted should be along the following lines.

Upon learning of the alleged confession made to a jailhouse informant, the police should interview him. The interview should be

videotaped or audiotaped from beginning to end. At the outset, the jailhouse informant should be advised of the consequences of untruthful statements and false testimony. The statement would then be taken with as much detail as can be ascertained.

Before it can even be considered, the statement must be reviewed to determine whether this information could have been garnered from media reports of the crime, or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place.

If the police are satisfied that the information could not have been obtained in this way, consideration should then be given to these factors:

Has the purported statement by the accused to the informant:

- a) revealed material that could only be known by one who committed the crime;
- b) disclosed evidence that is, in itself, detailed, significant and revealing as to the crime and the manner in which it was committed; and
- c) been confirmed by police investigation as correct and accurate.

Even then, in those rare circumstances, such as a kidnapping case, the testimony of the jailhouse informant should only be admitted, provided that the other conditions suggested by Justice Kaufman in his Inquiry have been met. In particular, the Trial Judge will have to determine on a voir dire whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Justice Kaufman.

2. Further, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used.
3. In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence. It may be advisable as well to point specifically to both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence was of jailhouse informants.

It is well to remember that in this case Terry Arnold, who was for a time suspected of the killing, volunteered to give evidence implicating Thomas Sophonow. Let us then consider a case where the real killer volunteers to give evidence implicating another. In those circumstances, the informant would have information that only the killer could possess. Thus, it would be easy to ascribe this knowledge to another with devastating

effect. At the same time, it would direct attention away from the true killer. There is then the danger that the jailhouse informant might be the culprit. It follows that, even if the proposed testimony meets all the conditions suggested in the Morin Inquiry Report and by me, the jury still must be given the same strong caution with regard to accepting this testimony. This very case might be used as an illustration in the instructions.

4. **There must be a very strong direction to the jury as to the unreliability of this type of evidence. In that direction, there should be a reference to the ease with which jailhouse informants can, on occasion, obtain access to information which would appear that only the accused could know. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial.**

It may be that the best hope for curtailing the evil doings of jailhouse informants, lies in all the Provinces accepting the Manitoba Guidelines with the additional recommendations which I have suggested. It should become apparent to all that a good case for the Crown does not need to be supported by the treacherous testimony of jailhouse informants.

Sgt. Wayne Harnum and Cst. Brad Butler, both Forensic Identification Officers, were involved in the 1993 investigation and continued to assist during this re-investigation. Attached is a detailed report from Sgt. Harnum where he describes the Forensic Laboratory Examination results, in particular, the D.N.A. results and the significance of same, as well a description given of the crime scene reconstruction. This reconstruction was completed in the writers presence and deals specifically with the carpet, cigarette butt, the doily, writing pad, file folder and coffee table. This test was made possible by utilizing crime scene photographs taken in 1993. The theory to be proven was that the cigarette had to be laid on the floor while still burning just prior to the doily landing on top and covering it over, again still while the cigarette was burning, and then the writing pad and file folder landing on top of the doily, applying weight onto the doily and the burning cigarette, causing the cigarette to burn into the doily and the butt actually attach to the doily while still burning the carpet and allowing the melted carpet, polypropylene, to apply a transfer stain onto the butt. Sgt. Harnum's conclusion is that this theory is correct and the writer concurs. Although we cannot deal with minute possibilities, 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. At the very least we can say that we cannot prove it did not occur as described above. Bearing all this in mind, the cigarette butt in question has been identified as containing the D.N.A. of Paul Druken. Sgt. Harnum's summary provides details of all D.N.A. tests and results, which includes a second cigarette butt with Paul's D.N.A. One of these butts had a white filter and one was a yellow filter, both with Paul's D.N.A.

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Mrs. Evoy states that the man that came to her door had a cigarette in his hand. This could explain the two different brands of cigarettes containing Paul's D.N.A., as there was also present an open package of Player's Lite cigarettes, white butts containing 17 cigarettes, found on the living room floor, partially underneath the coffee table. The sequence of events can't be described with 100% certainty, but we do know that Mrs. Evoy heard a noise like furniture moving about 15 minutes after the man knocked on her door. Plus Cindy describes she heard a loud bang like the coffee table being tipped over and then heard her mother's voice. This of course indicated that Brenda was still alive after the loud bang.

Dr. Simon Avis, Chief Medical Examiner, forwarded a brief report upon the writer's request explaining that he cannot state with any degree of certainty that the victim (Brenda) was alive or dead when placed on the carpet, based on autopsy evidence. The question as to whether Brenda was still alive while on the floor was put forward to try and establish when the coffee table got tipped over. If Brenda was still alive on the floor, then we could know that the coffee table had to have been at least moved out of the way to make room for Brenda to lay on the floor, and quite possibly the table would have been tipped over then during the struggle and not, for example, an hour later. Although Dr. Avis cannot give a firm conclusion, neither can it be ruled out, the fact that Brenda could be still alive while on the floor.