The State, Criminal Justice Politics and the Nova Scotia Royal Commission on the Donald Marshall, Jr., Prosecution

A thesis submitted by Bob Wall in partial
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in Atlantic Canada Studies at
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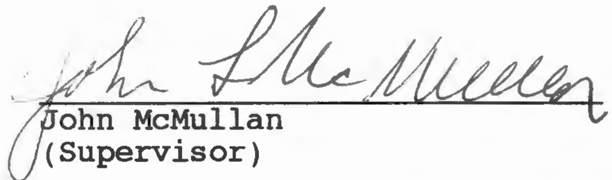

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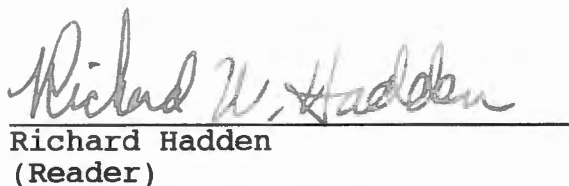
(Supervisor)



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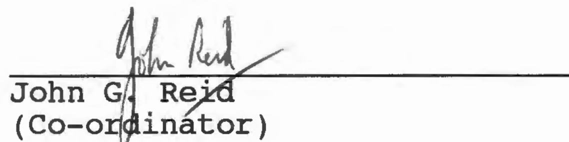

John G. Reid
(Co-ordinator)

ABSTRACT

Donald Marshall, Jr., a sixteen-year old Micmac Indian, was wrongfully convicted of the murder of a Black youth named Sandy Seale in Sydney, Nova Scotia in 1971. Eleven years later, Marshall was exonerated, but at the same time, the Nova Scotia Court of Appeals blamed him for causing the miscarriage of justice. In 1986, the government of Nova Scotia, in response to public, media and political pressure, established a Royal Commission to find out why the justice system failed in the Marshall case.

"The State, Criminal Justice Politics and the Nova Scotia Royal Commission on the Donald Marshall, Jr., Prosecution" reviews the history of Marshall's treatment by the criminal justice system of Nova Scotia and examines the way in which the Royal Commission functioned in its effort to uncover the reasons for his wrongful conviction.

The thesis argues that Marshall's arrest, conviction and imprisonment were the result of incompetence and racial prejudice compounded by a cultural blindness of criminal justice professionals which placed Marshall in a state of dependency from which he was powerless to escape for eleven years. When Marshall eventually won his freedom, the response of the criminal justice system was to blame the victim of the miscarriage in an attempt to restore an aura of legitimacy to the system.

Conflicts between the Royal Commission and the government of Nova Scotia, caused when the Commission expanded its mandate from a limited look at the Marshall case to a broad-ranging inquiry into the politics of the criminal justice system, are examined in detail. As well, the difficulties which the Commission faced in trying to avoid an explicit public examination of the issue of racism are analyzed.

Finally, the thesis argues that the work of the Royal Commission, by exposing the complex interaction of

various levels of the criminal justice system and the concomitant political and social conflicts at work in the case, supports the theory that the criminal justice system operates with a degree of relative autonomy within the context of the Canadian State.

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Clarence Darrow is reported to have said that there is no such thing as justice - in or out of court. I quote this, not in relation to the subject matter of the thesis, but rather because this little page simply can't do justice in acknowledging adequately, and I stress, adequately, all those who have helped me on the way to making this thesis a reality. But, Disraeli insisted that justice is truth in action. And, Thomas Fuller adds that a fox should not be of the jury at a goose's trial. This last saying doesn't belong here but I liked it so I threw it in.

I don't have room here to name all who have encouraged, driven, steered, directed, supported and otherwise aided my research and writing. Besides, after reading this, there may be some who did who would rather not be named.

Five must be named: John McMullan, the Simon Lagree who, as thesis advisor, drove me to reach deeper and try harder for almost two years.

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And especially Ruth who waited while I worked, endured my absence, cheered my downs, shared my ups, sustained my spirit, kept me going when I needed a push, and welcomed me when I needed a rest.

For the many others who helped, I recall Aesop in The Lion and the Mouse, "No act of kindness, no matter how small is ever forgotten"

For financial assistance I am indebted to the Graduate Fellowship Committee of Saint Mary's University and the Atlantic Institute of Criminology.

For the subject matter of this thesis: "The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings" (Shakespeare, Julius Caesar, I, ii).

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CHAPTER ONE

Introduction

> "Any miscarriage of justice is, however, more apparent than real" (Decision, Nova Scotia Court of Appeals, May 10, 1983).

In 1971, Donald Marshall, Jr. was arrested, tried, convicted and sentenced to life imprisonment for the stabbing death of Sandford William "Sandy" Seale, a crime which he did not commit. Eleven years later an RCMP reinvestigation of the incident uncovered new evidence which exonerated Marshall and pointed to the actual killer. In a special reference held in 1982-83, the Nova Scotia Court of Appeals then found Marshall not guilty, but in the decision blamed him for the original conviction. At the same time they said that the wrongful conviction and imprisonment was not a miscarriage of justice. This finding and the allegation that Marshall was in part the author of his own misfortune became issues in Marshall's attempt to win compensation for his years of incarceration and in the eventual establishment of an inquiry

into the circumstances of the case.

While Marshall's original conviction for non-capital murder was barely noted beyond Nova Scotia, his exoneration in 1982 thrust him and the criminal justice system of Nova Scotia into national prominence. The case was widely reported in regional and national news media[1] and became the topic of a popular book (Harris:1986).

In 1986, Marshall's conviction, imprisonment, release, acquittal, and the role of the Nova Scotia criminal justice system in the affair were the subject of an Inquiry named the Royal Commission on the Donald Marshall, Jr., Prosecution.[2]

The government of Nova Scotia appointed the Commission by Order in Council dated October 28, 1986[3] with a limited mandate. The mandate directed the Commission to inquire into the death of Sandy Seale and the charging, prosecution, subsequent conviction and sentencing of Donald Marshall, Jr., all of which happened before the end of 1971.

The Order in Council named three Superior Court judges to act as Commissioners: T. Alexander Hickman,[4] Chief Justice of the Newfoundland Supreme Court (Chairman); Lawrence A. Poitras, Associate Chief Justice of the Quebec Superior Court; and the Honorable Gregory T. Evans, (now retired) from the Supreme Court of Ontario.

The Commission hired three counsel: David B. Orsborn, George W. MacDonald, and W. Wylie Spicer,[5]

> "and directed them to carry out a full investigation of the events; to identify

and interview witnesses; to collect and collate all documentary evidence necessary for presentation to the Commission; to obtain such experts as are necessary to carry out research and present opinions to the Commission; and to do all other necessary and incidental work to ensure that all issues are considered by the Commission and that all relevant and necessary evidence is presented."[6]

In addition to counsel, the Commission staff consisted of an executive secretary, administrative assistant, word processing person, receptionist/secretary, two investigators, a part-time senior librarian, a part-time assistant librarian, a library assistant, a media relations firm and two law professors.[7] A researcher was added to the staff later to oversee studies ordered by the Commission into native and black perceptions of the justice system, public policing, the Office of the Attorney General, and the role of prosecuting officers.[8]

A number of other firms and individuals were hired under contract to provide services such as transcribing the proceedings, providing a sound system for the public hearings, and occasional research chores.[9] The hearings were videotaped under contract with CBC television and during the Sydney portion of the inquiry were broadcast on a local cable channel.

The Commission granted standing to 19 parties[10]: Donald Marshall, Jr.; John MacIntyre and William Urquhart[11], Sydney Police officers mainly responsible for the original investigation of Marshall; the estate of Donald C. MacNeil, Crown Prosecutor in the 1971 trial; Attorney General of Nova Scotia; Department of Attorney General of Nova Scotia; City of Sydney; RCMP; Correctional Services of Canada (including the branch formerly known as the National Parole Service); Oscar Seale, father of victim Sandy Seale; RCMP Officers Evers, Green, McAlpine, Carroll, Wheaton, Scott and Davies; Union of Nova Scotia Indians (UNSI); and the Black United Front (BUF). The Police Association of Nova Scotia (PANS) and the Nova Scotia Branch of the Canadian Bar Association had observer status.

The Commissioners sat in public for the first time in Halifax on May 13, 1987 to hear arguments on the issue of funding for parties who had been granted standing at the Inquiry.[12] Formal public hearings on the issues arising from the Marshall case started in a church basement in Sydney, Nova Scotia on September 9, 1987 and continued periodically for over a year.

The public hearing phase of the Inquiry ended on November 3, 1988. In all, the Commission sat for 93 days in four locations (one in Sydney and three in Halifax); heard from 112 witnesses, some of whom testified more than once; recorded more than 16,300 pages of transcript; and, received close to two hundred lengthy documents into evidence

(Chronicle Herald, November 4, 1988). The final report and recommendations of the Commission, originally planned for June 1989, were delayed while two matters raised at the hearings were appealed to the Supreme Court of Canada.[13] On October 5, 1989, the court ruled that the judges who sat on Marshall's 1982 reference to the Nova Scotia Court of Appeals could not be compelled to testify about their deliberations or the reasoning behind their finding that no miscarriage of justice had occurred. In the other matter, the Supreme Court affirmed that the Commissioners acted properly in limiting the scope of questions asked of Nova Scotia Cabinet Ministers to the general content of their discussions in Cabinet about Marshall, rather than specifics of who said what. With these issues settled, the Commission hoped to have its report and recommendations complete before the end of the year (Daily News, October 6, 1989). The report of the Royal Commission on the Donald Marshall, Jr., Prosecution, in seven volumes plus an executive summary, came from the presses dated December 1989, and was formally released on January 26, 1990.

Perhaps because the final report of the Commission has only recently been submitted for public scrutiny, there has been little scholarly investigation of the Marshall case, the reasons why the Commission was established or the work of the Commission itself. As Salter notes, "given how frequently they are commissioned, it is surprising how little has been written about inquiries... the cause may simply be that the political issues raised by specific inquiries seem more

important to commentators than the discussion of how politics is conducted through them" (1988:1). But, because of the apparent failures of the criminal justice system in Nova Scotia already revealed in the wide ranging Inquiry and the numerous media reports about it, the Commission has had, and will no doubt continue to have, a significant effect on the administration of justice in this province and elsewhere.[14]

The purpose of this thesis is to provide a critical look at the Marshall Commission and attempt to understand its social and political significance. First I look at the criminal justice system in the province of Nova Scotia as it functioned in the Marshall case in 1971. From this I draw conclusions about why Marshall was arrested and convicted, and why it took eleven years to recognize the error. Then I analyze the reinvestigation of the case in 1982 and describe the actions of the Nova Scotia criminal justice system in trying to explain the apparent miscarriage of justice. I discuss the efforts of the provincial government to deal with the "crisis" that resulted from the discovery that the safeguards for the protection of the innocent in the justice system failed in the Marshall case. I examine the arguments offered by provincial government officials for not setting up an inquiry sooner than 1986 and the reasons why it was finally established. I evaluate the manner in which the Commission functioned and how it dealt with the political and social issues raised by the case. I interpret the Marshall Commission in light of "conventional wisdom" about inquiries

which Salter says, "play a pivotal role in the delineation of public issues and public debate, even when their recommendations are not implemented... but at the same time provide governments with the opportunity to delay, obfuscate and defuse political controversy" (1988:1). Lastly I analyze the Commission in the context of current thinking about the way in which the criminal justice system operates in Canada, generally, and Nova Scotia in particular. I argue that the complexities of the Marshall Commission are best explained by connecting them to the role of criminal justice in the state. I conclude that the Commission may be best understood through the theory of relative autonomy and criminal justice in the Canadian State (Ratner, McMullan, Burtch:1987:85-125).

Chapter Two describes the events of 1971 that led to Marshall's arrest, trial and conviction. It looks at the original investigation conducted by the Sydney police, the progress through the courts, the first RCMP reinvestigation and the 1971 appeal to the Nova Scotia Court of Appeals. It shows that Marshall's conviction and imprisonment resulted from considerable ineptitude on the part of the justice system mixed with the racial prejudice and stereotyping prevalent at the time.

Marshall's plight confirms the role of the accused as a dependent person in the criminal process:

> "The options open to the accused are defined by the structure of the criminal process and how that structure is interpreted by the agents

who man it, so that the accused's freedom to make choices that might potentially serve his own interests is clearly circumscribed, and often foreclosed" (Ericson & Baranek:1982:3).

Marshall continued to be dependent on the agents of the criminal justice system during his eleven years in prison where his refusal to admit that he was guilty of the crime for which he had been convicted, became a bar to release on parole.[15]

The third chapter picks up the Marshall case in 1982 and describes the remarkable chain of circumstance that led to the second RCMP reinvestigation. This reinvestigation uncovered evidence that another individual was guilty of the crime; that Marshall was convicted on perjured testimony; and, that the perjury was alleged to have been caused by police pressure on the three teen-aged witnesses. This section argues that the professionals in the criminal justice system were blind to Marshall's plea of innocence because they operated from an unfounded belief in the integrity of the system. (Wall:1988) Chapter three analyzes the reactions of the provincial government and the Nova Scotia justice system to the fact that the wrong man had been jailed for over eleven years. It examines how the political and justice systems of the province maneuvered to deal with this apparent failure of the system. It shows how the justice system sought to ameliorate the public perception of its failure by blaming the victim. The denial of its own failure, coupled

with the attempt to shift blame to the accused demonstrate the way in which the justice system as an agency of the state attempts to legitimate its actions in order to maintain public support (Panich:1977:3-4). At the same time the actions of the justice system and the political power structure of the provincial government, in particular the Department of Attorney General, in trying to deal with Marshall, exposed the fact that various degrees of autonomy exist within the criminal justice system (Ratner, McMullan & Burtch:1987:104-108). While the Marshall case does not in itself fully confirm the structural Marxist position taken by Ratner, McMullan and Burtch that the justice system has a "general orientation to social order and capital" (ibid:106), it provides a strong basis for understanding how the Marshall Commission was able to function as it did. This argument will be explored further in chapters five and seven of this thesis.

In the years between the 1982 RCMP reinvestigation and the eventual announcement of the Royal Commission on the Donald Marshall, Jr., Prosecution in October 1986, there were three occasions when the provincial government could have initiated an inquiry into the reasons for the failure of the justice system in the case. Despite a penchant for using royal commissions (Kavanagh:1988:92-99) to take the heat off government (Salter:1988:28), the government of Nova Scotia steadfastly ignored the call for a Commission of Inquiry into the Marshall case for over four years. Chapter Four describes

how the delay in calling for an investigation of the facts of the Marshall case brought increased pressure on the provincial government to take action. The pressure, coupled with a number of political scandals involving government ministers led to a growing crisis of confidence in the government (Kavanagh:1988:142-153). Chapter Four analyzes the reasons for the delay in establishing an inquiry and points out the pressures that finally forced the provincial government to appoint a Royal Commission. It concludes that the appointment of a Royal Commission with a limited mandate was an attempt by the provincial government to defuse a political crisis rather than to explore the operations of the criminal justice system. Further, it argues that the political power structure of the province was trying to restore an aura of legitimacy to the criminal justice system rather than attempting to "repair and redesign hegemonic elaborations, in the face of ideological ruptures," as suggested by the research of Manette (1988:5).

Chapter Five looks at how the Royal Commission adopted and adapted the mandate to suit its own ends. It rejected the limitation on its power to inquire, which the provincial government placed in the mandate. The Commissioners set out to look at the Marshall case, not in isolation but in the light of present day practices in the criminal justice system (Hickman:May 13, 1987:3). When it became clear that the Commission planned to look at areas beyond the details of the original Marshall case, the Attorney General and other

provincial government members immediately reacted by trying to get the Commission on the track set out in the mandate.[16] But the Commission persisted in walking its own path. As the Commission investigated events from 1971 to 1987, it threatened to become a political time bomb that could blow the government out of office (Kavanagh:1988:153). Thus, The Commission which the government of the province set up in order to defuse pressure became an added pressure. At the same time, the Commission itself was affected by its decision to look into the present day political climate of the justice system. Groups such as the Union of Nova Scotia Indians and Black United Front asked the Commission to look into the issue of systemic racism, an area where the Commissioners and Commission counsel were decidedly uncomfortable (Donham, Halifax Daily News, October 30, 1988). The Commissioners saw their role as one of reform. As Hickman observed, "meaningful recommendations, [are] the most important part of our mandate" (May 13, 1987:3). This spelled additional conflict for the provincial government.

Chapter Five analyzes the Commission's action in changing the mandate, the response of the government to that change, and the effects for both the government and the Commission itself. It argues that the Commission by stretching the mandate to effect meaningful recommendations was seeking the "legitimacy [which] is a prerequisite for effectiveness" (Fattah:1987:79). It also shows how attempts to intervene or bring about change may often have unintended

results which may be either negative or positive (ibid.:76-77). It concludes that the actions of the Commission exemplify the relative autonomy of components and sub-components of the criminal justice system as described by Ratner, McMullan & Burtch (1987:109-115).

The mere fact that Donald Marshall, Jr. is an MicMac Indian and the victim, Sandy Seale was Black, was sufficient to raise the question of whether racism was a factor in the slaying. Although the Commission did not set out to look into the issue of racism, it rose repeatedly at the Commission hearings. Early in the hearings when Union of Nova Scotia Indians' attorney Bruce Wildsmith asked a witness questions which might show the extent of systemic racism, Justice Hickman dubbed it, "[t]he silliest cross-examination I've heard in 30 years on the bench" (Globe and Mail, September 17, 1987). Gradually racism forced its way onto the agenda and it became part of the academic studies ordered by the Commission as an adjunct to the public hearings.[17] Two separate studies about the effects of racism were commissioned: one examined Natives and the justice system; the other, discrimination against Blacks in Nova Scotia.

In Chapter Six, I show that the provincial government did not want racism explored by the Commission, and the Commission, for its part, had no special insight or desire to deal with the issue. Racism arrived on the agenda as an unexpected consequence of the Commission's desire to expand its mandate to look into the political aspects of the

criminal justice system. Unfortunately, the hastily designed and conducted academic studies provide an uncertain basis for the Commission to make recommendations to deal with the problem and further, because the Commission lacked the interest[18] and expertise to understand systemic racism, the best that can be hoped is that they will recommend a separate and broader inquiry into the extent or degree of racism prevalent in Nova Scotia society today. As Salter contends, by failing to have participation from all possible advocates, a commission wastes its potential to define important public issues (Salter:1988:28).

As much as we would like to believe that justice is blind and 'just the facts' determine who is arrested, tried, convicted and imprisoned, the reality in the Marshall case undermines that belief. The case raises many fundamental questions about the efficacy of the criminal justice system. The attempt to answer these questions by using a Royal Commission of Inquiry begs as many issues as it hopes to illuminate. Can a bureaucratic system, such as criminal justice, investigate itself and reach conclusions which are not tainted with the inbred bias of the investigators? Kavanagh argues that because it proceeds by means of "a detailed examination of the justice system using the very same instruments and techniques it's examining", it is an "exercise in naval gazing" (1988b:20).

Can a Commission which admittedly has no power to carry out its recommendations, be an effective instrument of

reform? Salter expresses hope in that "[e]ven if the recommendations of inquiries are often ignored, the pressure to create them is a critical component within the inquiry process" (1988:3). In regard to commissions of inquiry as a tool of policy analysis, Aucoin goes a bit further. He perceives commissions as a process that allows the views of special interest groups and the public to be aired in a forum "not subject to direct government control" (1988:1), and which can be "independent and objective" (ibid.). Aucoin argues that, "the continued use of commissions is thus not only likely but an approach to governance that should be encouraged" (1988:18). Clayton Ruby, the well regarded Toronto lawyer who represented Marshall before the Commission, supports both Salter (1988) and Aucoin (1988) from a different perspective. He contends that the importance of the Marshall Commission depends upon keeping the activities of the Commission in the public eye through media exposure. He argues that pressure created by public awareness is more important in the long run than whatever recommendations the Commission might make.[19]

Those who believe in the liberal-democratic traditions of the justice system in Nova Scotia and Canada (Silverman & Teevan:1975, Linden:1987, Borovoy:1988) might ask simply if the Marshall case was an aberration in an otherwise equitable and balanced system for the administration of justice. They would argue that commissions of inquiry are a valid means of

reforming the system to make certain that the same thing doesn't happen again.

Critical analysts would suggest that the Marshall case and the Royal Commission set up to investigate it are symptomatic of larger more basic problems with the way the justice system works generally. Some like Quinney (1978), Ericson & Baranek (1982), and Ericson & McMahon (1987), dismiss reform as a sham or myth designed to obscure the efforts of those in positions of power to reestablish and/or extend their power and control. Manette, in a similar vein, argues that the Commission is an attempt to orchestrate cultural and racial hegemony which was upset because the "taken-for-granted sense of judicial impartiality, which forms the cornerstone of liberal ideology" was called into question by the Marshall case (1988:5).

Fattah distinguishes between reform, which he sees as implying a subjective judgement, and change which can be measured objectively (1987:69). He argues that activities intended as reform may have "unanticipated" results which may be either negative or positive from the perspective of those instituting the reform (ibid.:76-78). Moreover he contends that those who see reform as a myth unfairly attribute Machiavellian motives which those who advocate reform may never have had (ibid.:77).

Ratner, McMullan and Burtch focus on the notion of relative autonomy to understand "criminal justice politics" (1987:89). They argue that "Even its (the state's) repressive

component has become too complex and multidimensional to sustain interpretations of the criminal justice system as simple defender of the status quo" (ibid.:88). The public hearings of the Marshall Commission provided an apt forum in which to view the complexity of relationships between and among the various components and sub-components of the criminal justice system and the political arena in which it operates. Rather than a monolithic force operating with single minded abandon, the hearings showed a mosaic of competing interests, each seeking a measure of control and autonomy over its activities and its role within the larger context of the criminal justice system.

Chapter Seven analyzes these various theories in an attempt to provide a full understanding of the Royal Commission on the Donald Marshall, Jr., Prosecution. It follows a critical path to discern the meaning of the Commission. It explains why the theory that the criminal justice system operates within the apparatus of the state with a degree of relative autonomy best explains how the Commission was able to function as it did. It shows that the work of the Commission has achieved some measure of reform that can not simply be dismissed as illusion. Much of what has resulted from the Commission can be ascribed to the unintended consequences of attempting to reform the system, notwithstanding the purpose of the government in establishing it or the objectives sought by the Commissioners. I argue a posteriori, from the actions and effects of the Commission to

the theory of the relative autonomy of the state. From my personal experience within the criminal justice system of Nova Scotia over a ten year period and from my intimate connection with the Royal Commission before and during the public hearing phase, I gathered the information on which to base an analysis of the Commission within the criminal justice system. With this as background I began the search for a theory which would account for what I had found to be the way in which the Commission carried on its activities. This approach avoids the necessity of bending or dismissing as irrelevant certain actions of the Royal Commission which might not fit if I had begun with a theory and tried to shape the experience to fit the theory. Moreover it provides the best method of integrating empirical evidence into a theory which explains how the Canadian state operates within the context of the criminal justice system. (A more detailed description of my research methodology is contained in Appendix B).

As a capitalist state, a term which, in general, describes its present mode of operation, Canada can be distinguished from other capitalist states in a variety of ways. It is not my intention to explore these differences, merely to point out that any modern day society, such as Canada, is subject to complex and, at times, bewildering array of interactions between capital, labour, the government apparatus, the political system and innumerable organized pressure groups. While it would be fatuous to deny the

ascendent position of capital and its ability to influence and/or counteract the efforts of public and private institutions which exist, it would be equally fatuous to deny that these institutions can have an effect upon the total dominance of capital. By using the empirical evidence of actions by institutions of the state, which can be seen either to affect capital or operate outside the sphere of interest that capital occupies, we can conclude that in certain areas the state exercises a relative degree of autonomy over its activities. The extent of this autonomy may depend upon how close the activity comes to the central role of capital which is to accumulate. In as much as the Marshall case and the Royal Commission are far removed from the accumulative role of capital it provides an apt locale to examine the "tensions and contradictions pervading state/class relations as reflected within the criminal justice system" (Ratner, McMullan & Burtch:1987:89).

Chapter One Notes:

1. The Cape Breton Post and Halifax Chronicle Herald/Mail-Star provided accounts of the original trial. The Post, Herald/Mail-Star, Toronto Star and Globe and Mail covered the 1982 Reference to the N.S. Court of Appeals and the reinvestigation leading up to it extensively. The above plus the Halifax Daily News and numerous others by way of the Canadian Press Service carried daily accounts of the Royal Commission hearings. The MicMac News carried frequent reports and comments on the case. The CBC video taped the public hearings and aired excerpts on regional and national news programs. ATV and the Global network also provided nightly recaps of each days hearing. Seaside Cable in Cape Breton County used the CBC tapes each afternoon, competing successfully with popular soap operas.

2. Throughout this thesis, the terms: Commission, Royal Commission, Commission of Inquiry, Marshall Commission, and Marshall Inquiry when capitalized, refer to the Royal Commission On the Donald Marshall, Jr., Prosecution. Lower case is used when the terms: commission, royal commission or commission of inquiry refer to commissions in general except where the context makes it clear that another such body is being cited.

3. The Order in Council appointing the Royal Commission was given by The Honorable Alan R. Abraham, C.D., Lieutenant Governor of Nova Scotia, October 28, 1986.

4. Ironically, Chief Justice Hickman was called as a witness at the inquiry into alleged sexual abuse of residents at the Mount Cashel Orphanage in Newfoundland. Among other things, this inquiry is looking at the question of what happened to the original investigation conducted by police into the matter. Hickman was Minister of Justice for the Province in 1975 at the time of that investigation. One issue successfully pursued by the Marshall Commission was that Cabinet Ministers could be compelled to testify about their discussions in Cabinet despite the oath of secrecy because the public interest in discovering the truth about how the Marshall case was handled was paramount to the need for Cabinet secrecy. Hickman was thus instrumental in opening the doors of Cabinet deliberations to public scrutiny which in turn could have been used as precedent to compel his testimony about discussions in Cabinet about allegations of abuse at Mount Cashel and his part, if any, in covering up the investigation.

5. Chief Counsel, Orsborn was previously counsel to the Newfoundland Royal Commission on the sinking of the Ocean Ranger oil rig at which Justice Hickman presided.

According to Orsborn, MacDonald was chosen as Commission counsel because of his "good reputation" and because his firm, one of Nova Scotia's largest, has had no connection with the Marshall case. (Chronicle Herald December 10, 1986) Spicer was counsel for an oil company at the Ocean Ranger Inquiry and a member of the same firm as MacDonald.

6. Opening Statement by Justice Hickman, May 13, 1987 pages 4 & 5.

7. Royal Commission, Staff list, May 1987.

8. The Commission conducted five research studies:
   a. "Public Policing in Nova Scotia"
   b. "The Mi'kmaq and Criminal Justice in Nova Scotia"
   c. "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System"
   d. "Walking the Tightrope of Justice: An examination of the Office of Attorney General in Canada with Particular Regard to its Relationships with the Police and Prosecutors and the Arguments for Establishing a Statutorily (sic) Independent Director of Public Prosecutions"
   e. "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia"

   These studies became volumes 2-6 respectively in the final report of the Commission.

9. The author of this paper was hired by the Commission to prepare a daily summary of the testimony for the benefit of the Commissioners and Commission counsel. The task required attendance and substantial note taking during the hearings followed each day by intensive analysis to distill the key issues of the testimony. Reference to these notes and daily summaries will be appear throughout this paper.
   In addition, during the course of the inquiry I conducted formal interviews with eleven lawyers directly involved with the Commission. In order to secure their cooperation, I agreed to identify them only as lawyers involved in the Royal Commission Inquiry. References to information supplied by these sources will be identified as lawyers #1 thru #11 throughout the course of this thesis.

10. "A grant of 'full standing' entitles the person to cross-examine witnesses, make submissions to the Commission and participate fully in the Hearings. A grant of 'observer status' entitles the party to be present and have questions directed to witnesses through Commission counsel, and to file a written submission with the Commission at the appropriate time." (Hickman:May 13, 1987:2)

11. Urquhart was not named as a party nor considered for public funding to be represented when the Commission met to discuss that issue in May, 1987. However between then and the start of public hearings, Urquhart was added to the list and provided with counsel. Urquhart was represented by the same firm which represented his former boss, Chief of Detectives John MacIntyre. Some critics suggested that this could be perceived as a conflict of interest for the firm since conceivably Urquhart might wish to disassociate himself from some of the actions of MacIntyre and would be less able to do this with lawyers from the same firm representing them. A lawyer for the firm advised that RCMP Sergeant Wheaton who was MacIntyre's chief adversary had also sought to have the firm represent him. This was turned down as an obvious conflict of interest for lawyers within the same firm. However, he argued that there was no conflict in representing both MacIntyre and Urquhart because "their interests are identical" (lawyer #4).

12. The issue of public funding for parties with standing before the Commission will be explored in more detail in Chapter 5.

13. The Commissioners sought to compel testimony from the five Judges of the Nova Scotia Court of Appeals who ruled that no miscarriage of justice occurred in the Marshall case, in order to find out how they arrived at that ruling. Lawyers for Marshall appealed a lower court decision that Cabinet Ministers did not have to testify about specific content and source of comments made about the Marshall case during Cabinet meetings.

14. One lawyer connected with the Royal Commission told me that at a meeting of attorneys general held shortly after the Commission began its hearings, a number of officials from other provinces stated that they were watching the investigation closely and hoped to learn from it. They also expressed the opinion that they were glad it was happening in Nova Scotia and not their own provinces. Since that time commissions of inquiry aimed at the criminal justice system and its dealings with minorities have begun in Manitoba, Alberta, Ontario. As well, the inquiry in Newfoundland (see note #4 above) is also looking at the justice system in that province.

15. The Royal Commission itself confirms the dependent condition of Marshall. The Commissioners and Commission Counsel determined who would have standing, who would be heard, the procedures to be followed and the questions to be asked and in what order. Marshall was relegated to the status of observer, albeit with more effective counsel, who could only instruct counsel and hope that his interests were being best served by the proceedings.

16. Lawyer #11, who was and is closely connected with the provincial government and is in a position to speak with authority about the intentions and actions of the provincial government and the office of the Attorney General at the time, said: "It was never the intention of the government that the Commission of Inquiry undertake or conduct a full scale review of the criminal justice in the province... we wanted to have the Commission address Mr. Marshall's circumstances... we quite frankly felt that what we were asking the Commissioners to do was look at those issues and not go further afield" (Interview July 31, 1989).

17. See note #8 above.

18. Given that Commission counsel was charged with presenting all relevant evidence to the Commission, it is revealing to point out that in their opening remarks to the Halifax Session of the public hearings (January 11, 1989) they did not even refer to the academic studies. Whether this was because the studies were not to be a part of the public hearings or whether it shows an indifference to the issue on the part of counsel is only conjecture. It was not until the Commission broke for a summer recess in late June that Hickman in his closing summary had mentioned the academic studies on racism for the first time. He pointed out that "these studies may be subject to further review but will not require hearing sworn evidence from any witness" (Closing Statement June 28, 1986:2)

19. Ruby offered this remark in a meeting with media personnel at the Commission hearings in September 1987.

CHAPTER TWO

The Marshall Case Revisited

> "the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction in 1971 up to - and even beyond - his acquittal by the Court of Appeal in 1983 (Commissioners' Report:1989:15)

The Incident[1]

My purpose here is not to restate the, by now, familiar story of the murder or the details of how the case was handled by the justice system at its various levels. Harris (1986) and Donham (1989a&b) provide readable and informative descriptions which were substantially corroborated by testimony and documentation received in evidence at the hearings of the Royal Commission. But, in order to understand the role of the Commission we must look, at least briefly, at the events upon which it was formally predicated.

In the Marshall case, a chance encounter of four individuals which lasted a few minutes was the seed that blossomed sixteen years later into the Royal Commission on the Donald Marshall, Jr., Prosecution.

Donald Marshall, Jr. was with Sandy Seale in Wentworth Park in Sydney on the night of May 28, 1971. The two young men, casual acquaintances, stopped to chat. Seale was cutting through the park to catch a bus home. Marshall was heading for a dance at a local parish hall which Seale had just left. On Crescent Street, which borders the park, they met two men, Roy Ebsary and Jimmy MacNeil, who were on their way to Ebsary's house after an evening of drinking. Following a brief period of conversation and an attempt by Seale and Marshall to panhandle some money from the other pair,[2] Ebsary stabbed Seale in the stomach. As Seale fell to the ground, Ebsary slashed at Marshall, inflicting a superficial cut on the left forearm. Marshall ran off to escape the knife. Ebsary and MacNeil went to Ebsary's house which was nearby.

A couple on their way home from the dance found Seale lying in the street. Marshall, meanwhile, met a youth named Maynard Chant on the street across the park from the scene of the stabbing. He told Chant what had happened, then flagged down a car in which he and Chant returned to the scene. Police and an ambulance were called. Seale was taken to Sydney City Hospital in the ambulance. Marshall was taken to the hospital in a police cruiser, received stitches to close his wound, gave a brief description of the assailants to the

police and was allowed to go home. Police were unable to locate the pair described by Marshall. They did locate and talk with Chant who told them how he came to be at the scene. While Chant exuberantly claimed to have "seen it all", a brief chat with Detective Michael MacDonald, who was called out to oversee the investigation, revealed that Chant meant simply that he had seen the extent of Seale's wound when he stooped to check him. Chant's parents were then called to drive him home. Little if any investigation was done at the scene by the police who responded to the call or by Detective MacDonald. No one secured the crime scene. No one collected evidence at the scene. No one sought to identify the many young people coming from the dance who were gathered at the scene when the police and ambulance showed up. The description of the men given by Marshall was circulated to other officers on duty but no formal investigation in the neighborhood was conducted. It's clear as well, that Detective MacDonald did not consider Marshall a suspect in the stabbing. No warnings were given, statements requested or possible evidence, - e.g. Marshall's jacket with a slash on the sleeve and blood stains -collected from him.

Investigation

The following morning, Saturday May 29, 1971, John MacIntyre, Chief of Detectives of the Sydney City Police took over the investigation from Detective MacDonald. Seale

underwent two unsuccessful operations to repair the extensive damage inflicted by the knife and died that evening. Marshall spent all of Saturday and most of Sunday at the police station at MacIntyre's request in order to be of assistance. However, a telex sent to RCMP headquarters in Halifax early Sunday morning, before MacIntyre had interviewed any witnesses or taken Marshall's statement, reported that "investigation to date reveals Marshall possibly the person responsible..." (Harris:1986:63).

On one of his trips back to the Membertou Reserve[3] where he lived, Marshall repeated his story of the event to an acquaintance named John Pratico in front of his house near the police station.

On Sunday, MacIntyre interviewed Chant who at first, truthfully denied being in the park at the time of the stabbing. By the end of the interview, Chant had signed a statement saying that he had witnessed the stabbing. Chant described the scene as he had heard it from Marshall, adding a few details from his imagination. Marshall gave his formal statement to MacIntyre shortly afterwards. Pratico was then questioned.[4] He, at first, also denied being in the park on Friday night and then gave a statement saying he was there. Pratico described the scene as related to him by Marshall, also adding a few imaginary details.

The following Friday, MacIntyre reinterviewed Pratico who on this occasion said that he had seen Marshall stab Seale. MacIntyre then reinterviewed Chant, reasoning that if

Pratico had seen the stabbing, and Chant was also in the park as he had previously stated, he too must have seen the incident. Chant also gave a statement saying that he had seen Marshall stab Seale. Although the statements of Pratico and Chant contained a number of mutually contradictory assertions and there was no other evidence on which to base a charge,[5] MacIntyre presented these 'facts' to Crown Prosecutor, Donald C. MacNeil, and was authorized to obtain a warrant for Marshall on a charge of second degree murder. Marshall was arrested at a relative's home in Wycocomagh on Friday night, June 4, 1971 and held in the County jail until his trial in November of that year.

Between Marshall's arrest and trial, the only additional information of significance obtained by MacIntyre was a statement from 14 year old Patricia Harriss. She was on her way home from the dance when she talked with Marshall on Crescent street sometime before the incident. Harriss was interviewed on June 17 in the police station at first by Detective Urquhart, who was MacIntyre's main assistant in the investigation. Later the same evening MacIntyre took over the interrogation. In her statement to Urquhart, Harriss said that Marshall was with two men whom she described in a manner similar to that given by Marshall. Her second statement, signed about four hours later, asserted that Marshall and Seale were alone on Crescent Street when she saw them.

Legal Proceedings

The first of Marshall's many appearances before courts in this case took place on June 14, 1971 when he was denied bail by Provincial Judge John F. MacDonald. Because of the interest surrounding the case, MacDonald imposed a ban on the publication of evidence.[6]

When Marshall appeared for preliminary hearing on the morning of July 5, 1971, he was represented by Moses Rosenblum and Simon Khattar, both distinguished lawyers with long experience in criminal law practice. The defense team did not cross-examine either of the two alleged eye-witnesses nor did they offer any evidence and Marshall was committed to stand trial for the murder of Sandy Seale. Marshall's reaction to the proceedings is captured by Harris:

> "The proceedings in the hot, windowless courtroom had been incomprehensible to Junior Marshall -an avalanche of white words that had buried the truth, and, along with it, any sense of reality. He later recalled: All through the preliminary, I kept thinking about a field up on the reserve where we used to play ball - big field, no trees. I thought I'd be up there when all the talking was done. Then the cops came to take me back to jail and I said to myself, 'I won't be playing ball this summer.'

I just couldn't figure out why them guys lied" (1986:121).

Marshall's trial began in Sydney on November 2, 1971 and lasted four days. The evidence presented was essentially the same as the preliminary inquiry except that Marshall took the stand in his own defense. The first statements of Pratico, Chant and Harriss, which tended to corroborate Marshall's account of the incident, were not used in the prosecution's case. Simon Khattar, one of the two lawyers employed to defend Marshall, told the Commission that these statements were not known to the defense.[7] Likewise, statements to police from others in the park which mentioned the two men were not used by either prosecution or defense.[8] The murder weapon was not found and no evidence of motive for the alleged stabbing was offered. Khattar admitted that the defense team did no independent investigation prior to the trial, did not interview any of the crown witnesses, and did not ask for or receive statements of the crown witnesses.[9] He described the defense strategy as "hoping Marshall could come up with some leads" and "trying to weaken the evidence on cross-examination" (testimony Khattar:November 5, 1987).

Perhaps the most bizarre incident at the trial was the attempt by Pratico to recant his eye-witness statement. In the hallway of the courthouse as he was waiting to testify, Pratico told Donald Marshall, Sr. that he had not seen the stabbing. Marshall, Sr. stopped Pratico and quickly called for Simon Khattar. Pratico repeated the retraction and

Khattar called the County Sheriff to join them as a witness. As Pratico began again, the Sheriff stopped him again so that the Crown Prosecutor could be present. Shortly, Crown Prosecutor MacNeil, followed by his assistant, Lew Matheson, MacIntyre and Detective MacDonald arrived. Again Pratico denied having seen the stabbing. However, when Pratico took the stand and MacNeil began asking him about the conversations in the hall, Justice Dubinsky halted the testimony and directed MacNeil to proceed with questioning about events on the night of the stabbing. On cross-examination, Khattar was able to bring out Pratico's retraction but was prevented by Dubinsky from exploring the implications, viz, that Pratico lied at the preliminary hearing and why he had done so.[10]

The alleged eye-witness testimony of the Chant and Pratico, supported by Harriss' evidence that Marshall and Seale were alone moments before the stabbing apparently carried more weight with the jury than the strategy of the defense. The jury spent less than four hours deliberating and returned with a verdict of guilty. After thanking the jury and commending the counsel for their fine work, Dubinsky immediately pronounced the sentence of life imprisonment in Dorchester Penitentiary.

Appeal

Within a few days of the conviction, Jimmy MacNeil came forward and told MacIntyre that he had been in the park with a man named Roy Ebsary on the night of the stabbing. MacNeil claimed Ebsary was the assailant of Sandy Seale. Because Crown Prosecutor MacNeil out of town, his assistant Lew Matheson was called in to deal with this new development. Matheson contacted Robert Anderson the lawyer in the Attorney General's office in Halifax who was in charge of criminal investigations. Between them they agreed that the RCMP should handle the matter to avoid any appearance of conflict of interest on the part of the Sydney Police who had been responsible for charging Marshall with the offense.
RCMP Inspector A.E. Marshall was sent from Halifax to conduct the investigation into the allegation make by Jimmy MacNeil. Inspector Marshall testified (November 18, 1987) that the investigation consisted of a quick review of files given to him by Detective MacIntyre and polygraph examinations of MacNeil and Ebsary. MacNeil's polygraph was deemed inconclusive and Ebsary's was judged to be truthful by Cpl. Smith, the RCMP polygraph operator (testimony January 11, 1988). Inspector Marshall admitted that he relied on MacIntyre's analysis of the case, and the assessment of Ebsary's polygraph as truthful to reach his conclusion that there was no substance to Jimmy MacNeil's allegation.[11]

At the same time that MacNeil came forward to claim that

another person had committed the murder and Inspector Marshall was conducting his investigation, attorney Moses Rosenblum was pressing an appeal of Marshall's conviction to the Nova Scotia Court of Appeals. Neither Crown Prosecutor MacNeil or his assistant Lew Matheson nor officials in the Attorney General's office told Rosenblum about this new information (testimony Khattar:November 9, 1987) which supported Marshall's defense and would likely have resulted in a new trial being ordered (testimony Archibald:November 18, 1987). Nor was the departmental attorney handling the appeal on behalf of the Crown made aware that Jimmy MacNeil had come forward with information that supported Marshall's story (testimony Veniot:January 12, 1988)[12] and Marshall's conviction was sustained on appeal.

As the year 1971 drew to a close, Donald Marshall Jr., began the first of his eleven years in prison for a crime he knew he did not commit. The brief description provided above highlights numerous instances where the criminal justice system failed in Marshall's case. But the question we must ask is why the system failed.

Conclusion

It would be easy to point the finger of blame at Detective John MacIntyre for Marshall's plight. Clearly, the investigation which he directed was inept at best and criminal in the worse analysis. But whether his work was simply incompetent (testimony Wright:November 16, 1987),[13] an

error of judgement caused by tunnel vision (testimony Wheaton:January 19, 1988), or a deliberate attempt to get something on Marshall (testimony Clemens:October 27, 1987), the fact remains that the criminal justice system permitted it to happen. Moreover, the system compounded MacIntyre's error of arresting an innocent man, by processing him into and through a series of alleged safeguards for the protection of the innocent, which in the end had the opposite effect.

From the time he was dragged into the criminal justice system, Marshall became almost totally dependent upon the people, practices and procedures of the system (Ericson & Baranek:1982).

When Marshall with a few friends went in search of his assailant the morning after the incident, he was picked up and taken to the police station (testimony Gould:October 29, 1987). Although he was considered a suspect by MacIntyre as early as Saturday morning (Donham:1989a:178), and although he voluntarily spent Saturday and Sunday at the station to be of assistance to police in the investigation (Harris:1986:59), no one bothered to tell Marshall that he was a suspect or to warn him of his rights to remain silent or seek counsel. As I showed previously, when he was arrested almost a week later he was placed in jail and denied bail while waiting trial. Given that the strategy of his defense counsel was "hoping Marshall could come up with some leads" (testimony Khattar:November 5, 1987), he was, to say the least, in an unfavorable position to assist in his own defense. Saddled

with two lawyers who doubted his innocence (testimony Veniot:January 12, 1988 & Khattar:November 5, 1987), and who spoke in a legal jargon he could scarcely understand (testimony Francis:November 2, 1987), Marshall had little opportunity to make "choices that might potentially serve his own interests" (Ericson & Baranek:1982:3). When the forum moved to the courtroom, Marshall became a mere spectator, "mute while the crown attorney and his own lawyer talk around him,... treating him like a dependent child who is to be seen but not heard" (ibid.:181). Coming, as he did, from an Indian reserve, where he had grown up culturally distinct from the white society of Sydney (Manette:1989:4, Henderson:1989:30 & testimony Francis:November 2, 1987), Marshall's social status made him even more dependant (see Chapter Six).

Marshall's arrest and conviction can be seen as the result of a bungled police investigation coupled with a justice system which placed him in a dependent position from which he was unable to mount an effective defense. However, this does not explain why the system failed to detect and rectify the error made by MacIntyre when he focused the investigation upon and arrested Donald Marshall, Jr. In Chapter Three I examine the events that led to Marshall's release and exoneration, describe the total failure of the safeguards of the criminal justice system, and argue that the inability of the professionals in the system to detect that failure was due in large measure to their belief that the criminal justice system could not and did not fail.

Chapter Two Notes:

1. This summary account was compiled from testimony and documents introduced at the Commission hearings, newspaper accounts of the events, Harris (1986), Donham (1989) and interviews with lawyers and principals during the course of the hearings. As well I relied heavily on my personal notes taken during the course of the hearings. (see note #9, Chapter One)

2. The attempt to obtain money from Ebsary and MacNeil became the basis of what was commonly referred to as the Robbery Theory. Was a robbery or mugging in progress when Ebsary, the victim, used his knife to drive off his assailants? Marshall has consistently denied the allegation (testimony:June 28, 1988). MacNeil claimed that his arm was being twisted behind his back by Marshall when the stabbing took place (testimony: September 11, 1987). Ebsary argued self-defense in his three trials but denied stabbing Seale in his testimony before the Commission (September 9, 1987). Marshall's failure to disclose the alleged robbery attempt to police was offered by the Nova Scotia Court of Appeals as one of the reasons they found him partly responsible for his own predicament. And, the Royal Commission listened to many hours of testimony directed to the issue. While no one who testified at the hearings could cite a legal obligation for Marshall to admit to an attempted robbery, many argued that the investigation of the stabbing would probably have proceeded differently if Marshall had done so.

3. Marshall is the son of Donald Marshall, Sr., who was then and still is the grand chief of the Micmac nation. Membertou is a reserve which lies within the limits of the city of Sydney, a short walk from the scene of the stabbing.

4. Pratico was known to the police as a person who hung out in the park with Indians, however, testimony at the hearings provided no insight into the reason why MacIntyre chose to bring Pratico in for questioning. In his first statement to Police, Pratico said he was not in the park at the time of the incident. He learned of the stabbing from his mother the following morning.

5. In fact, there was evidence to support Marshall's story of the two men in the park. Two independent witnesses, George and Roderick MacNeil had come forward as a result of a radio appeal for information from people who were in the park on the night of the stabbing. They described two men they saw in the park shortly before the stabbing. This description was similar to the one provided by Marshall for the assailant and his companion.

6. The ban on publication of evidence was another factor that adversely affected Marshall's defense. Barbara Floyd another of the teen agers at the dance told the Commission that she saw John Pratico in the parking lot at the church hall at the time he said he was in the park observing Marshall stab Seale. Floyd did not learn that Pratico was a witness against Marshall until the conviction was reported in the newspaper. She said that she called Rosenblum's office with this information at that time and was told that it was too late to do anything (testimony Floyd: October 26 1987).

7. Khattar also said he was sure that Moe Rosenblum, the other defense attorney, was also unaware of the statements. The issue is confused, however, because in an affidavit prepared for the reference to the Court of Appeals, Khattar stated that he was aware of details and had seen statements by Pratico, Chant and Harriss. But, in his testimony before the Commission Khattar said he had never seen and was not aware of details contained in any statements made by the three. Rosenblum was interviewed by Commission counsel but died before he could be called as a witness at the hearings. The lawyers for parties to the hearings agreed in advance with a Commission counsel that the only the information obtained at the hearings themselves would be used for purposes of cross-examination. Therefore whatever Rosenblum might have added to resolve the confusion - e.g. whether he sought disclosure - remains undisclosed at this time.

8. MacIntyre testified that he gave all the information and statements he had taken including the earlier contradictory statements of Chant, Pratico and Harriss to Crown Prosecutor D.C. MacNeil, and had no further input into which, if any, of the statements MacNeil used. He did not recall being asked any questions about them by MacNeil. Khattar testified that he was unaware of any statements not introduced at the preliminary or trial and did not conduct any independent investigation or interview any of the witnesses.

9. The issue of how much disclosure of evidence by crown counsel was required then as opposed to now, and how much might have been made by MacNeil occupied a considerable time at the hearings will little certainty resulting.

10. Bruce Archibald, professor of law at Dalhousie Law School was enlisted by the Commission as an expert to offer an opinion on the evidentiary rulings of Justice Dubinsky. Archibald testified (November 18, 1987) that Dubinsky's rulings about the admissibility of hearsay evidence and limitations on cross-examination of key witnesses were wrong and that the rulings excluded evidence which tended to show Marshall was innocent. He

said the errors were substantial enough that they should have been apparent to the Appeal court even if they were not raised by either the crown or defense. The Commission did not call Justice Dubinsky as a witness.

11. Testimony of A.E. Marshall, November 18, 1987 and E. Smith, January 11, 1988. Insp. Marshall was unable to recall whether or not MacIntyre had given him a complete file of the case including all the statements made by the witnesses. Ironically, Marshall was the only justice system representative who admitted any failure during the course of the hearings.

12. M. Veniot, the attorney handling the appeal testified that he was not aware of the RCMP investigation of Jimmy MacNeil's accusation of Ebsary. Veniot said he had no conversation with D.C. MacNeil, the Sydney prosecutor about the case (testimony Veniot:January 12, 1988). Khattar said he had no part in appeal but believed that Rosenblum, who pressed the appeal had no knowledge of Jimmy MacNeil's statement. (testimony Khattar:November 9, '87)

13. In another of the many ironies of Commission, Wright, a former RCMP officer who worked with MacIntyre, was called to testify at MacIntyre's request as a witness to his professional ability. On cross-examination by Marshall's attorney Clayton Ruby, Wright was forced to admit that a litany of examples from the Marshall investigation were incompetent even by police standards in 1971.

CHAPTER THREE

The Exoneration of Donald Marshall, Jr.: Dependency, Ethnocentrism and Discretion in Criminal Justice

"Each day passes like a record stuck in a groove: shower, breakfast, work, lunch, work, supper, recreation, and lockdown, a hypnotic pattern that both dulls and drags out the tedium of doing time" (Harris:1986:242).

"...too fuckin' dangerous, too depressing" (Marshall, in Harris:1986:251).

Reinvestigation

By August of 1981 Marshall had already spent more than ten years (counting remand time) behind bars for a crime he did not commit. Throughout his incarceration he continued to assert his innocence and urged his family and friends to continue to search for the identity of the real killer of

Sandy Seale. Marshall's insistence that he was not guilty of the crime for which he had been convicted was viewed unfavorably by correctional officials. "An inmate who does not accept responsibility for his offense is considered a poor risk for a release program... admission of guilt is generally the first step in an inmates progress toward rehabilitation" (testimony, McConkey:May 30, 1988).

Marshall occasionally got out of prison under escort to take part in sports events, but:

> "His requests for unsupervised leaves of absence, the next step in the gradual process that leads to a prisoner's release, met consistent rejection - partly on the grounds that his refusal to admit guilt made him an escape risk" (Donham:1989b:87).

In September 1979, eight years after his conviction, Marshall managed to escape from his guard during a wilderness expedition but was recaptured two days later at the home of his girl friend Shelly Sarson (Harris:1986:1-14). Although the escape was short lived, the relationship with Sarson continued. She visited Marshall in prison regularly over the next two years. When Sarson went to visit on August 26, 1981 she was accompanied by her brother Mitchell. In the course of their conversations, Mitchell remarked that when he lived in Sydney a few years previous, he stayed with a man named Roy Ebsary. Sarson said that one night Ebsary told him he had "killed a black guy and stabbed an Indian in the park in

1971" (Harris:1986:305 & Donham:1989b:88). Marshall immediately informed his friend Roy Gould who set in motion a chain of events that led to another investigation by the RCMP (testimony Gould:October 29, 1987).

This second reinvestigation of the case by the RCMP determined that Chant, Pratico and Harriss had given perjured testimony at Marshall's trial. Further, each claimed they gave their statements and testified as they did because of pressure from Detective MacIntyre. The reinvestigation exonerated Marshall and resulted in charges being brought against Ebsary.[1]

Release

Marshall was released on parole to the Carlton Center in Halifax in March 1982 and was subsequently granted bail while waiting for a special reference to the Nova Scotia Court of Appeals (Harris:1986:352). Federal Minister of Justice Jean Cretien formally referred the case to the Nova Scotia Court of Appeals for a rehearing in June 1982 (testimony Rutherford:March 8, 1988), but because of legal wrangling about the proper section of the criminal code under which to proceed, it was not until December that the court met to hear the "new evidence"[2] in the Marshall case (testimony Aronson: March 15, 1988). Finally, on May 10, 1983, the Nova Scotia Court of Appeals ruled that there was insufficient evidence to warrant a conviction of Marshall and found him not guilty. In its decision, however, the court ruled that no miscarriage

of justice had occurred. They blamed Marshall for his own conviction because, they said, he lied to police and his lawyers. "By hiding facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defense available to him, namely that during a robbery Seale was stabbed by one of the intended victims" (Judgement of the Nova Scotia Court of Appeals, May 10, 1983).

This brief description of the events of 1982 raises a number of important questions about the criminal justice system and the state apparatus in which it functions. First of all, why did it take eleven years for the system to discover its mistake in convicting Donald Marshall, Jr. for the murder of Sandy Seale? Secondly, why did the Court of Appeals feel it necessary to rule that no miscarriage of justice had occurred and at the same time blame the Marshall for his own misfortune?

System Failure and the Dependency of the Accused

A simple explanation for Marshall's arrest, conviction and eleven years in jail is that the criminal justice system failed totally and completely. The Police investigation was incompetent (testimony Wright:November 16, 1987). Either MacIntyre failed to turn over all the evidence he had collected, including that favorable to Marshall's defense, to Crown Prosecutor MacNeil[3] or, if MacNeil was aware of evidence supporting Marshall's story, he failed in his duty to disclose it to defense counsel (testimony Gale:June 7,

1988). In turn, the defense counsel did no independent investigation on behalf of Marshall and did not seek disclosure of information from the Crown Prosecutor (testimony Khattar:November 5, 1987). During the trial, the judge ruled wrongly about the admissibility of evidence and limited cross-examination of key witnesses which tended to show that Marshall was innocent (testimony Archibald: November 18, 1987). Justice Dubinsky also failed to direct the jury properly about some evidence harmful to the defense which was admitted in testimony (ibid.). The Court of Appeals failed to detect the errors committed by the trial judge, although the legal expert[4] retained by the Royal Commission to review the evidence testified that the errors were substantial enough to have been apparent to the court even though they were not raised by either Crown or defense (ibid.). The RCMP failed to do a thorough reinvestigation of the case in 1971 when the new evidence of Jimmy MacNeil was presented to them (testimony Inspector A.E. Marshall: November 19, 1987). The Attorney General's Department and/or Crown Prosecutor MacNeil did not advise Marshall's attorneys of the evidence of Jimmy MacNeil even though it came to light as the defense was pursuing an appeal of the conviction (testimony Khattar:November 5, 1987 & Veniot:January 12, 1988). This was a breach of their duty to disclose (testimony Gale:June 7, 1988). The Sydney police failed again in 1974 when they refused to follow up on information that Donna Ebsary had seen her father washing blood off a knife on the

night of the murder (testimony Ratchford:November 4, 1987 & Green:January 12, 1988). To cap the litany of failure, the Court of Appeals, twelve years after the incident found that no miscarriage of justice had occurred (Judgement, May 10, 1983).

Even with this partial list of failures it is clear that Marshall was the victim of a miscarriage of justice by the criminal justice system of the province of Nova Scotia. From the point of his arrest Marshall became a dependent in the criminal process (Ericson & Baranek:1982). Chambliss and Seidman (1982) show how the language of the legal process works to exclude the uninitiated and create a dependence. Thacher (1986) documents the powerlessness of Native peoples in Canada. Dahlie and Fernando (1981) point out the systemic bars to equal participation by minority groups. Manette (1989) and Henderson (1989) describe the cultural segregation and consequent dependency of the Mi'kmaq people. Anderson (1986) and Taylor (1980) describe the difficulties faced by groups that seek to reduce their condition of dependency. These studies show that the way in which the criminal justice system operates and the way in which those who operate it carry out their functions create a situation wherein the accused has little choice by to rely upon the agents of the system (Ericson and Baranek: 1982). For Donald Marshall, Jr., this dependence resulted in eleven years of wrongful imprisonment.

Marshall's dependency upon the agents of the system continued while he was in prison and was heightened by the conundrum that he was innocent but was required to admit guilt before he would be given the opportunity to participate in programs leading toward release. This supports Ratner's analysis of the way in which the Correctional System uses Parole to maintain control over inmates in the system:

> "an undignified 'rehabilitation' is extended to those who surrender to the dominant hegemony; surveillance and continued persecution remain the lot of those who resist incorporation on unilateral terms" (1986:211).

The question remains, however, why did the system failure remain unnoticed for so long? The reverse side of the dependency of the accused in the criminal process is the ascendency and power of the system itself. In general, the system is seen as having three major components: police, courts, and corrections. While each component of the system has a degree of autonomy in its day to day functioning (Ratner, McMullan & Burtch:1987:109-114), they are at the same time interrelated and interdependent. The prosecutor relies upon the police to collect evidence of an offence and lay charges. The judge depends upon the crown and defense lawyers to present the facts for adjudication and corrections depends upon the police, crown and judges to provide inmates

for its jails. Moreover, they share a common goal, variously defined as upholding the law, or more grandly, ensuring justice in society.

A variety of rites and rituals portray the unity of the criminal justice system. Deference to the Judge, traditional costume, the physical trappings of the court room with barricades which separate spectators from those in the system, elaborate procedures, and language which only the initiated can understand, all form external reminders of the special status claimed by or accorded to the criminal justice system (Ericson & Baranek:1982:179-181, see also, Diamond: 1978, Chambliss:1986, Chambliss and Seidman:1982) As I point out below, the testimony of witnesses at the Marshall Inquiry showed that the professionals in the criminal justice system not only worked together and relied upon one another, but also that they believed the system could not fail. Earlier I described this belief as an ethnocentric bias of the criminal justice professionals (Wall:1988). I argue that this bias was in large measure responsible for inability of the system professionals to detect the errors in the Marshall case for eleven years.

Ethnocentrism

The concept of ethnocentrism was first coined by the American Sociologist William Sumner in 1906. He defined it as "the technical name for this view of things in which one's own group is the center of everything, and all others are

scaled and rated with reference to it" (in Reminick:1983:12). The concept has been used for such widely diverse purposes as explaining why American foreign policy may not work in the third world and why American social science research may be flawed and have no relevance to the rest of the world (Wiarda:1985). Another definition of ethnocentrism is provided by Reynolds: "a tendency to be unaware of biases due to one's own make-up and the culture of one's own group and to judge and interact with outsiders on the basis of those biases" (1987:4).

One such bias of the criminal justice professionals is a belief in the efficacy of the system. Examples of how the belief that the system worked properly affected the course of the Marshall case were scattered throughout the testimony. Inspector A.E. Marshall did not do a more thorough investigation of the allegation of Jimmy MacNeil because he respected MacIntyre's opinion and because he did not believe that the system - i.e. police, grand jury, preliminary inquiry, trial, good lawyers, a good judge, - could get the wrong man (testimony November 18, 1987). Khattar still believes that cross-examination in the adversarial setting of the court room is an important and effective tool for arriving at the facts (testimony November 5, 1987). McConkey did not believe that Marshall could have been convicted if he were not guilty (testimony May 30, 1988). Anderson believed that Crown Prosecutor MacNeil would have informed Marshall's lawyers about the allegations of Jimmy MacNeil (testimony

Anderson:February 3, 1988). Wheaton was only going through the motions of a reinvestigation when he met a repentant Maynard Chant who confessed his perjury. Wheaton, too, believed it unlikely that the system could fail (testimony January 18 & 27, 1988). These justice system professionals told the Commission that they failed to consider Marshall's claim of innocence seriously because they believed that the system could not get the wrong man and that if it did, the error would be discovered and rectified. Reasons & Chappell (1985) in their study of deviance in the legal profession point out some of the causes that underlie the commonality of vision about the system: class bias in the opportunity for legal education; a monopoly over the practice of law; over-representation by dominant ethnic groups; and, freedom from state control which allows the profession to govern itself. Martin (1986) describes the process of appointing judges to the bench in Canada as form of political patronage with the only qualification being that the appointee be a member of the bar for ten years. MacKay and Kimber (1989) echo this assertion as it applies to judges in Nova Scotia. Logically then, judges could be expected to have the same characteristics, beliefs and practices as the group from which they come. And because of these shared beliefs and their dependence upon one another, the lawyers, prosecutors, and judges were not aware of a bias in favor of the system nor that it affected their work. The result was that they

could not see the shortcomings of the system in Marshall's case and he was forced to spend eleven years in jail before he could win his freedom.

When the weight of the evidence gathered in the 1982 RCMP reinvestigation proved that Marshall was not guilty of the crime for which he had been incarcerated, the highest court in the province chose to blame him, and exonerate the system. The denial of miscarriage of justice by the Court of Appeals is a further example of the ethnocentric attitude of the justice system professionals. They did not believe the system had failed. They believed it worked. When confronted with evidence that in this case something had gone wrong, they sought the cause in some factor outside the system, namely Marshall. Indeed, the belief that the system had not been at fault, and that things would have gone differently for Marshall if he had confessed to police that he was involved in an attempted robbery was a consistent theme of justice system witnesses at the Marshall Commission (testimony, MacIntyre: December 8, 1987, Khatter:November 5, 1987, Matheson:November 9, 1987, Edwards:May 18, 1988, Walsh:September 19, 1987, How:March 22, 1988, Herschorn:May 16, 1988, Coles:June 20, 1988).

While this testimony showed how the system operated in Marshall's case, it also disclosed that the witnesses believed that they could have done things differently. This raises two very important points about the criminal justice system and the way it operates in the political system of

Canada: the autonomy that individuals in the system can exercise, and the need to legitimate their actions.

<u>Autonomy</u>

Although criminal justice is a system of interconnected parts, in the day to day operations, these parts or components operate with a relative degree of autonomy in carrying out their functions (Ratner, McMullan & Burtch:1987). Just as MacIntyre could choose to focus his investigation on Marshall to the exclusion of other possible suspects in the stabbing, police in a more general sense can decide which offenses to investigate and which to allow to pass uninvestigated. This exercise of autonomy is often called police discretion and can be seen in police decisions to crack down on drugs or drinking drivers at various times (Ericson:1982). MacLean (1986:1) provides a more extreme example of police discretion in his description of three London police officers mistakenly shooting an innocent man without warning. More recent but no less dramatic is the example of the Quebec police storming the barricades of the Mohawk Indians at Oka.

The crown prosecutor has discretion about which charges to prosecute and which to drop (testimony Edwards:May 30, 1988; Herschorn:May 16, 1988; Gale:June 7, 1988). In cooperation with defense counsel, prosecutors can agree to reduce the severity of charges or drop charges altogether in return for a guilty plea on other charges (testimony

Pink:September 20, 1988). Judges have wide latitude in conducting the proceedings in their courts (testimony Archibald:November 18, 1987), and an even wider latitude in the process of sentencing (Canadian Sentencing Commission:1988). Appeal courts can uphold or strike down decisions of lower courts (Gibson & Murphy:1984). Corrections determines how the sentence imposed by the court is to be served. The place where the sentence is served, the degree of security imposed, and conditions for release programs are all established by the correctional arm of the criminal justice system (Ekstedt and Griffiths:1988). Politics plays a role as well in that crown prosecutors, judges and parole board members are appointed by the government in power, often because of their political connections (MacKay and Kimber: 1989). Similarly, the government controls the funding of legal aid programs that determine, for example, the number of legal aid attorneys available to defend indigent accused[5] (Poel:1983).

The autonomy of the different components and sub-components of the criminal justice system can be seen in a number of instances in the Marshall case, particularly in the 1982 reinvestigation and negotiations surrounding the reference to the Nova Scotia Court of Appeals. Here we see, for example, one police agency, the RCMP, pressing for an investigation of another police agency, the Sydney police (testimony Wheaton:January 19, 1988). In another instance, Frank Edwards, Crown Prosecutor in the 1982 reference to the

Nova Scotia Court of Appeals, insisted that he would join Marshall's lawyer in arguing that Marshall was not guilty and should be set free. Deputy Attorney General Gordon Coles, Edwards' boss, was equally insistent that Edwards should take no position on Marshall's guilt or innocence, remain neutral and allow the court to decide. Edwards won (testimony Edwards:May 24, 1988; Gale:June 7, 1988 & Coles:June 20, 1988. See also Donham:1989b:182-184). In yet another example, the Court of Appeals overruled federal lawyers, the Crown Prosecutor, and officials of the Nova Scotia Department of Attorney General about which section of the Criminal Code should be used to handle Marshall's reference to the court (see Chapter Five). As I also show in Chapter Five, the Royal Commission exercised autonomy to expand its mandate from an inquiry of one isolated case, i.e. Marshall, to a wide ranging investigation of the criminal justice system in the province. These examples show that components of the criminal justice system not only believe that they have autonomy to operate in a manner not controlled by the an overriding interest of the state, but also that they exercise this autonomy in their day to day operations. The significance of this activity with regard to the functioning of the criminal justice system within the state apparatus is described in Chapter Seven.

Legitimacy

Another aspect of the criminal justice system and the state apparatus in which it operates is the need to present an aura of legitimacy. Panitch (1977) notes that the role of the state is to mediate between the conflicting classes of capital and labour. He argues that a key function in the mediation process is "legitimation", which he defines as "those activities of the state that are designed to maintain and create conditions of social harmony" (1977:3-4). Social harmony is disrupted when agents of the state are seen as acting in an arbitrary manner. Manette conceptualizes the Marshall case as "ideological disruption in that it throws into confusion the taken-for granted sense of judicial impartiality" (1988:5). The old saw that justice must not only be done, but must be seen to be done, is one of the bulwarks of liberal-democratic ideology that permeates the criminal justice system not only in Nova Scotia but in Canada and North America generally (Cain:1988, Carnoy:1984). In the Marshall case, the 1982 RCMP reinvestigation disclosed that the system had failed. Understandably, residents of Nova Scotia wanted to know why it failed and what was being done to see that it didn't happen again. In this sense, the justice system was being asked to restore the confidence of the people of the province in the integrity or legitimacy of the system. The Court of Appeals, on the other hand, wished to deal with the Marshall case by itself and not as part of the larger question of the way in which the justice system

functioned in general. This focus is consistent with what Cain describes as professionalized justice, which she asserts "has until now monopolized the language of legitimacy, to the extent that it has become synonymous with the concept of justice itself" (1988:66). Professionalized justice insists that cases be dealt with on an individual basis. Rules of evidence used by the courts define the incident to be examined and thereby "constitute it as an occasion without a relevant past, as unique, and as complete unto itself" (ibid.:67).

Crown Prosecutor Frank Edwards testified that he wished to argue before the Court of Appeals that Marshall was not guilty because of a miscarriage of justice. In this way he hoped to have the Court look at the actions of the Sydney police and the cause of the perjury by the three teen-aged witnesses (testimony Edwards:May 25, 1988). The Justices of Nova Scotia Court of Appeals, however, refused to look beyond the evidence as it related directly to Marshall's guilt or innocence. The court heard evidence from only seven witnesses: Marshall and Jimmy MacNeil, who testified that Ebsary stabbed Seale; Ebsary's daughter and son, who told of Ebsary's actions on the night of the stabbing and afterward; RCMP fibers expert Adolphus Evers, who found fibers from Seale's clothing on a knife belonging to Ebsary; and, Maynard Chant and Patricia Harriss, who admitted their perjury in the original trial.

Had the court gone further and inquired into the reasons behind the perjury and how it had managed to go undetected for eleven years, they would have had to deal with the failures noted previously, which would have threatened their belief in the integrity of the system. By focusing on the single issue of the guilt or innocence of Marshall, they could right the scales of justice by simply finding that there was insufficient evidence to convict him of the crime. Then, instead of trying to rationalize the mistakes of the entire justice system of the province, they needed to explain only one facet, namely, why the police got the wrong man. This they did by blaming Marshall for misleading the police by lying about his intentions on the night of the stabbing. The "miscarriage was more apparent than real" the judges concluded (Judgement, May 10, 1983).

This attempt by the Court of Appeals to restore the aura of legitimacy was short lived as I show in the following chapter. The decision that the system was blameless and the fault lay with Marshall left the question of why the witnesses perjured themselves unanswered and clouded the issue of when and how much compensation Marshall would receive for his eleven years of wrongful imprisonment. The task of restoring legitimacy now passed to the political arena.

Chapter Three Notes:

1. An unrelated, but significant, incident took place in early December 1981. Ebsary stabbed a man named "Goodie" Mugridge in an apparently unprovoked attack while the two were drinking at Ebsary's apartment in Sydney (Harris:1986:307). This gave credence to the stories which the RCMP investigators were to hear about Ebsary's penchant for knives and spontaneous violence.

2. As I have already shown in Chapter Two, the evidence which named Ebsary as the killer of Sandy Seale was not new. It was disclosed to the Sydney police by Jimmy MacNeil within ten days of Marshall's conviction in 1971. The term 'new evidence' in this instance was a legal fiction needed to allow the Court of Appeals to hear a case which had previously been dismissed on appeal.

3. What information was given to Crown Prosecutor D.C. MacNeil by MacIntyre is still a moot. MacIntyre testified that he gave all the information and statements he had taken to MacNeil, and had no further input into which, if any, of the statements MacNeil used. He did not recall being asked any questions about them by MacNeil (testimony MacIntyre:December. 9, 1987). MacNeil died in the late 70's prior to the RCMP reinvestigation which exonerated Marshall. Lewis Matheson, assistant to MacNeil, testified that issues such as the prior inconsistent statements of Pratico, Chant and Harriss were discussed between himself and MacNeil. He was unable to recall if he was aware of other statements which placed the two other men, described in a fashion similar to that provided by Marshall, in the park (testimony Matheson:November 9, 1987).
However, its clear that in 1982, MacIntyre was reluctant to provide the RCMP with all the statements in the file (testimony Wheaton:January 18, 1988; Scott:February 3, 1988; Edwards:May 18, 1988).

4. The use of "expert testimony" by the Royal Commission provides another of the interesting side issues that occurred throughout the hearings. While Archibald can be seen as an expert in the traditional sense of someone who provides informed opinion about a matter being heard by a court, other witnesses, called simply to testify about their role in the Marshall investigation, were allowed to give what amounted to "expert" testimony.

5. The Native Court Worker Program and the funding for special constables for Native reserve, both programs that depended for their continued existence on special funding from the government of Nova Scotia came under scrutiny during the Royal Commission hearings.

CHAPTER FOUR

Political Obstacles, Political Scandals and the Creation of the Royal Commission of Inquiry

> No criminal justice system is, or can be, perfect. Nevertheless, the manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured.
> (Report on Miscarriages of Justice (1989) The British Section of the International Commission of Jurists)

The decision to find out what went wrong with the criminal justice system was not made easily or quickly. The RCMP reinvestigation, which disclosed that critical testimony at Marshall's trial was perjured, took place in early 1982. Four and a half years elapsed before the Commission was announced and another year passed before the Commission began public hearings in September, 1987.[1]

In order to understand the Commission itself, we must look at the circumstances that caused it to come into being. In addition, we must ask why so long a period of time was allowed to pass before it was established.

In a city the size of Sydney,[2] the fact that the RCMP was looking into the decade old Marshall case was quickly a topic of discussion and comment (Harris:1986:344). Journalists, anxious to learn if and when Marshall might be released and who would be charged with the offense, dogged the steps of the investigating officers (testimony Wheaton: January 18, 1988) and frequently called Crown Prosecutor Frank Edwards (testimony May 18, 1988) to learn the latest developments in the case.[3] In an attempt to keep a lid on the investigation, Edwards and Wheaton agreed to limit the sharing of information with the press (testimony Edwards:May 18, 1988). But upon his release at the end of March, 1982, Marshall was immediately the focus of national media attention. He was an instant celebrity. Batteries of cameras and tape recorders stalked his movements. Jack Stewart, director of Carlton Centre where Marshall went on Day Parole to await the action of the Nova Scotia Court of Appeals, told of using disguises and back doors to get Marshall past the mob of reporters who clustered around the entrance of the centre (testimony Stewart:May 31, 1988). "Drawn by the story of a man who had served eleven years in prison for a crime he might not have committed, the curious media quickly made the 29-year-old Micmac the most sought-after interview in the

country" (Harris:1986:351). But, two questions frequently asked in the media could not be answered by Marshall: What had gone wrong and what was the government going to do about it?

Between the time that the RCMP learned that three witnesses gave perjured testimony at Marshall's trial and the eventual establishment of the Royal Commission in 1986, a number of occasions came and went when an inquiry into the cause of Marshall's wrongful imprisonment could have taken place, if the government of the province had wished. Instead, evidence adduced at the Commission hearings, pointed to agents of the Attorney General's office as being either directly or indirectly involved in preventing or delaying an inquiry in at least three of these occasions (testimony Wheaton:January 19, 1988; Aronson:March 14, 1988; & Cacchione:May 17, 1988).

1982 RCMP Reinvestigation

The first opportunity to look at the reasons behind Marshall's wrongful imprisonment was during the 1982 RCMP reinvestigation itself. It would have been both timely and logical for the RCMP to extend the reinvestigation to include the circumstances of the original investigation by the Sydney City Police. The incident was already eleven years in the past. Further delay could mean that memories faded, documents were lost or misplaced and potentially vital witnesses died.[4] The revelation that three witnesses told the RCMP

investigators that they committed perjury because of pressure from Sydney Police was sufficient reason to inquire into the circumstances of the original investigation.

Wheaton, the RCMP officer in charge of the case, testified that in 1982 he recommended an investigation of MacIntyre and his force but was told to "hold (the investigation) in abeyance" until further notice. Wheaton said he felt there was sufficient evidence at that time for a prima facie case of obstruction or suborning perjury (testimony January 19, 1988). The fact that MacIntyre went to Halifax on April 15, 1982 and complained to Gordon Gale (Director, Criminal Investigations in the Attorney General's department) about the conduct of the RCMP investigation, led Wheaton and Edwards to suspect that MacIntyre was trying to enlist officials in the Attorney General's office to prevent an investigation of his actions (testimony Wheaton:January 19, 1988; Edwards:May 24, 1988). On April 19, 1982, Edwards told Gale that the investigation "should now focus on the city police" (Donham:1989b:174). Later, Mike Whalley,[5] Sydney City Solicitor and a long acquaintance of MacIntyre, visited Deputy Attorney Gordon Coles to report that "no one was looking after the interests of the police," and to suggest that Edwards be replaced by another prosecutor because "he was going along with Wheaton's opinion of the police" (testimony Whalley:March 24, 1988). Edwards testified that he deferred to the "hold in abeyance" order expecting that it would be rescinded as soon as the Marshall and Ebsary matters

were resolved (testimony May 18, 1988). The "hold in abeyance" order and its meaning were the subject of considerable testimony, dispute and uncertainty at the inquiry. Whether it was intended to mean, hold off only until the investigation of Marshall and Ebsary were complete as Gordon Gale, who gave the order, testified (testimony June 7, 1988), or whether it was interference and an attempt to cover up wrongdoing by MacIntyre and officials in the Attorney General's department (testimony Wheaton:January 19, 1988) is unclear. However, the result of the order was that the opportunity to resolve the issue of why Marshall was wrongly convicted passed and a seed of doubt about the desire of provincial officials to look into the matter was planted. Neither Gale nor anyone else in the Attorney General's office rescinded the order or instructed the RCMP to conduct a formal investigation of MacIntyre or the Sydney police (Donham:1989b:174).

Nova Scotia Court of Appeals

The Nova Scotia Court of Appeals which heard the special reference that resulted in Marshall's acquittal could also have elicited testimony about the police investigation and conduct of the trial but chose not to do so. As soon as the RCMP investigation made it clear that Ebsary and not Marshall had stabbed Seale, consultations began between the federal Justice Department, provincial Attorney General's office and Steve Aronson, Marshall's lawyer, about what to do with

Marshall (testimony Aronson:March 14, 1988).

Aronson (ibid.) favored a free pardon under section 683 (3) of the Criminal Code of Canada (CCC): "Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted." Although this would have been the quickest and cleanest option, it did not offer any scope to look at why Marshall had been convicted (testimony Rutherford:March 8, 1988; Aronson: March 14, 1988; Edwards:May 24, 1988).

Instead of a free pardon, the parties decided to handle the matter under a section of the criminal code which defines the powers of the federal Minister of Justice. Section 617 CCC gives the Minister three options "upon an application for the mercy of the Crown" (CCC:1982:290): (1) order a new trial, (2) refer the matter to the Court of Appeals as if it were an ordinary appeal, or (3) refer a specific question or questions to the Court of Appeals for an advisory opinion, after which the federal Minister of Justice could issue a free pardon. After negotiations, the parties agreed to proceed under the third section because it offered the widest scope of inquiry and left the ultimate decision in the hands of the federal Minister of Justice (testimony Rutherford:March 8, 1988).

As a courtesy, an aide of federal Justice Minister Jean Cretien telephoned the Chief Justice of the Nova Scotia Court of Appeals, Ian MacKeigan, to tell him about the decision

before it was made public (Donham:1989b:175). Harris says simply that "...members of the Nova Scotia bench demurred. They argued that if they were going to hear an appeal of the original conviction, they also wanted the power to make a ruling in the case" (1986:359). Donham names MacKeigan as the one directly responsible for the change of plans. "MacKeigan took strong exception to the proposal... [and] without consulting the province or Marshall's lawyer, the federal bureaucrats deferred to MacKeigan's wishes" (1989b:175). MacKeigan wanted to handle the case under paragraph (2) of section 617 (CCC) which meant that the case would be treated as any normal appeal to the court. MacKeigan's intervention had two significant effects for Marshall. First, it put the burden of the case on his shoulders which meant that he went on trial again even though there was no evidence to support a charge. Secondly, Marshall bore the cost of the appeal rather than the provincial government (testimony Aronson March 14, 1988). Then the Attorney General of the day (Ron Giffin) refused to give Aronson access to the reports and files compiled by the RCMP (testimony Aronson: March 15, 1988; Giffin:March 17, 1988). Nor would the province agree to pay for Marshall's legal bills in compiling his case.[6]

MacKeigan's reason for choosing 617(2) was to allow the introduction of new evidence (Donham:1989b:175). However because the case was handled like a normal appeal, the Court retained the power to decide which witnesses it would hear. It did not call MacIntyre or any police witness, nor did it

inquire into the cause of the perjury and other critical issues in Marshall's conviction (ibid.).

The expectation that the Court of Appeals would look at all issues including alleged police misconduct, reasons for the perjury, and compensation for Marshall was not fulfilled (testimony Rutherford:March 8, 1988; Aronson:March 14, 1988; Edwards: May 24, 1988). MacIntyre, who at the time still believed Marshall was guilty, was surprised and angered that he was not allowed to testify at the reference (testimony MacIntyre:December 9, 1988). The result was that an opportunity to investigate the reasons for Marshall's wrongful conviction passed and the questions remained unanswered. And, as in the RCMP reinvestigation, agents of the Attorney General's office and the criminal justice system appeared to be working to prevent an inquiry into the causes of the miscarriage. Without examining witnesses who might have explained what went wrong, the Court of Appeals ruled that the miscarriage was more apparent than real and that Marshall was responsible for his own predicament (Judgement May 10, 1983).

Compensation Commission

For almost a year after the acquittal, the provincial government refused to order an inquiry into the causes of Marshall's conviction, nor would they respond to requests by Marshall's lawyers for negotiations about compensation for his years spent in prison (testimony Aronson:March 14, 1988;

Cacchione:May 17, 1988). Then a one-man commission to look into the issue of compensation was announced by the government on March 5, 1984. It provided a third opportunity for a broader inquiry into the case. But this Commission, called the Campbell Commission, was restricted by its mandate to the issue of compensation rather than a broader look at all the circumstances of the case. The mandate directed Justice Campbell to consider only the period of incarceration after conviction (testimony Giffin:March 16, 1988). By drafting the mandate in this fashion, the government excluded the events surrounding Marshall's wrongful conviction in 1971. Felix Cacchione (now a County Court Judge), who took over Marshall's case from Aronson, saw the appointment of the Commission with its limited mandate as a move to reduce public pressure on the provincial government for a public inquiry (testimony Cacchione:May 17, 1988). The Campbell Commission never actually held hearings because Marshall's lawyers agreed to negotiate a settlement on the compensation issue with the province. But again the testimony revealed a reluctance on the part of the provincial government and the Attorney General's office to direct an inquiry into the causes of Marshall's wrongful imprisonment.

Civil Suit

Shortly after the decision of the Court of Appeals, and before the Campbell Commission was announced, Aronson filed a civil suit for damages against MacIntyre and the City of

Sydney. Aronson testified before the Royal Commission that he filed the suit at Marshall's request in order to provide a venue for an inquiry into the actions of MacIntyre and the police (testimony Aronson:March 14, 1988). The civil suit provided another opportunity to explore the full details of the case. Such a suit would have focused directly on the investigation conducted by MacIntyre and whether or not there was culpable negligence in his handling of the case. Using Civil Procedure rather than Criminal Procedure would have allowed Marshall's attorney to interview and take sworn depositions from other members of the Sydney Police Department as well as the teen age witnesses. MacIntyre would have been in the role of the defendant in the suit and thereby forced to justify his actions in the face of the allegation that he had pressured the witnesses to commit perjury. At issue was not whether Marshall could have won damages against MacIntyre and the City of Sydney, but rather that the suit would have provided a forum for the investigation of the matter.

Cacchione, however, dropped the suit in January of 1984 because he was told by the Attorney General that the action was an impediment to any inquiry or compensation by the provincial government (Harris:1986:388). Cacchione testified that Marshall was more interested in a full public inquiry than in compensation or winning a damage suit against the City of Sydney. Cacchione felt that he was being

"stonewalled" by the Attorney General and dropped the suit so it could not be used as an excuse to avoid an inquiry (testimony May 17, 1988).

MacIntyre Suit

A fifth opportunity to look at the reasons why Marshall was arrested and convicted arose in November 1983 when Sydney Police Chief John MacIntyre launched a libel action against the CBC and Journalist Parker Donham. A CBC Sunday Morning broadcast questioned MacIntyre's handling of the original investigation of Marshall during which three teen-aged witnesses later alleged they were pressured to commit the perjury. The legal action by MacIntyre was expected to cover the same ground as would a public inquiry into Marshall's conviction. The suggestion was raised that it would be prejudicial to conduct an inquiry while this suit was in progress. Lawyers for the contending parties spent almost two years taking pre-trial depositions before MacIntyre dropped his suit in late 1985 on the eve of the trial. Donham and a lawyer closely connected with the case[7] said that MacIntyre's decision to drop his action came when RCMP Sgt. Harry Wheaton came forward the day before the trial and agreed to testify. Wheaton's evidence was apparently strong enough to convince MacIntyre that he could not win the suit in court. The result of dropping the action, however, was a renewed call from Donham and other commentators for the public inquiry that had

been denied because MacIntyre had backed down on the eve of the public trial.

As each opportunity to investigate the causes of Marshall's wrongful imprisonment passed without action by the provincial government, opposition politicians, members of the media, Native and Black organizations, members of the legal community and individual citizens repeated calls for a public scrutiny of the Marshall case and the functioning of the criminal justice system in other matters.

Opposition politicians quickly raised the issue in the provincial Legislature to embarrass the government Ministers. The opposition federal Conservatives chastised federal Liberal Ministers for not helping to compensate Marshall. Federal Liberals, in turn, used the issue to discredit the Provincial Tories and threatened to investigate the justice system of the province if local officials would not (Harris:1986:394-397).[8]

The Union of Nova Scotia Indians, at odds with the provincial government over a number of other issues,[9] was understandably strident in its calls for an investigation. The Black United Front, angered by this and other cases where it alleged racism in the criminal justice system,[10] joined the list of organizations demanding an inquiry. Private citizens, angered by the situation, eagerly contributed to a fund to compensate Marshall which had been set up by United Church Minister Robert Hussey (Harris:1986:394-395).

Each event was fodder for an eager media. Marshall's release and the discovery that his conviction resulted from perjured testimony, allegedly caused by pressure from Sydney Police officers, began the call for an inquiry into the criminal justice system of the province. The decision of the Court of Appeals, exonerating the system and blaming Marshall again sparked calls for a full inquiry (testimony, Aronson: March 14, 1988). Ebsary's trials, appeals and minimal sentence compared to Marshall's eleven years of wrongful imprisonment all added to the outcry for an inquiry.[11] The discovery process for MacIntyre's civil suit against CBC and the journalists provided additional information for stories in the media.[12]

Debate about the possibility of a free vote in the House of Commons on the issue of capital punishment added to the frenzy of interest in Marshall. Although Marshall had not been convicted of a capital offense, the growing awareness that he had been wrongfully convicted of murder was sufficient to bring his name into the debate and keep his case alive in the media.

Compensation for Marshall's eleven years in jail added another issue for discussion. While compensation was on the back burner during the initial period of his release, it was not far from the fire. As Marshall in the Globe and Mail noted in a mood of frustration: "I don't want their money. All I want is what belongs to me, my freedom" (quoted in Harris:1986:353-354).

In summary, from the time of the RCMP investigation which exonerated Marshall in early 1982 until the eventual announcement of the Royal Commission in October 1986, officials of the provincial government offered a variety of reasons why it could not, or would not hold public hearings concerning the circumstances of Marshall's wrongful conviction and imprisonment. In 1982 it asserted that the matter was subject of an ongoing investigation by the RCMP. In early 1983, it was awaiting the decision of the Court of Appeals. For the rest of 1983 and on to September 1986, the trials and appeals of Roy Newman Ebsary (see note 11) were underway.

<u>Further Obstacles: The Ebsary Prosecution</u>

The government officials argued that a public inquiry into Marshall's arrest and conviction would prejudice the prosecution of Ebsary. While on the surface, this appears reasonable, an analysis of the case against Ebsary shows it to be a hollow claim.

None of the three witnesses, Maynard Chant, John Pratico or Patricia Harriss, who committed perjury because of alleged pressure by Detective MacIntyre had any role in the prosecution of Roy Newman Ebsary. Pratico and Chant were not even in Wentworth park at the time of the assault. Neither knew Ebsary or could tell anything about his actions on the night of the stabbing. Harriss could only say that she had seen two other men in the park, one of whom matched the

description given by Marshall. She was gone from the scene before the stabbing took place (testimony Chant:September 15, 1987; Pratico:September 23, 1987; Harriss:October 7, 1987). Nor were MacIntyre or other members of the Sydney Police Department essential to Ebsary's prosecution except to testify to the fact of the stabbing and death of Seale. MacIntyre, in fact, never testified in any of the three Ebsary trials (testimony Edwards:May 18 & 19, 1988). The evidence collected by Wheaton and Carroll, the RCMP officers who handled the investigation consisted in the eyewitness testimony of Marshall and Jimmy MacNeil, a taped confession by Ebsary to the RCMP, "three verbal confessions to three different people, a letter from Ebsary strongly suggesting that he had stabbed Sandy Seale, strong circumstantial evidence from three members of the accused's family, and compelling physical evidence from a forensic specialist linking one of Ebsary's knives to the clothing of the victims of his knife attack" (Harris:1986:380-81).

The details of the Marshall investigation and the way the case was handled by the police, prosecution, and court were entirely separate and distinct from the Ebsary case except for the fact that both were charged with the same crime. By 1982 it was clear that Marshall had not committed the offense. By May 1983 he had been exonerated by the Nova Scotia Court of Appeals. An investigation of how Sydney police conducted themselves in their investigation of Marshall had no bearing on the case against Ebsary except

that it ruled out Marshall as the assailant which was not an issue in the Ebsary prosecution.

Compensation, Civil Suits and the Movement for a Public Inquiry

The civil suit for damages launched in 1983 on Marshall's behalf against the City of Sydney and John MacIntyre was cited by provincial officials as an impediment to a public inquiry (testimony Cacchione:May 17, 1988). By 1983 Marshall had amassed almost $80,000 in legal fees fighting for his freedom and seeking compensation (Harris: 1986:400; Donham:1989b:187). More than a year passed from the time that the Court of Appeals found Marshall not guilty before the Attorney General appointed a one man Commission to examine the limited issue of compensation. During that year public and private pressure for an inquiry continued to grow. An editorial in the Halifax Daily News shortly before the announcement of the Campbell Commission on compensation for Marshall captured the spirit of outrage at the provincial government's handling of the case:

> "It's time the spotlight was turned up brighter on the Nova Scotia Officials who are covering up in the Marshall case.
>
> Why has Marshall's lawyer Felix Cacchione twice been denied access to Marshall's file?
>
> Why is the provincial government putting up a phony excuse about not compensating Marshall

yet because it would affect the Roy Ebsary appeal of his murder conviction?

What the hell has that got to do with it? More important, why doesn't the government have the guts to admit there was a miscarriage of justice, deliberate or not?

The handling of the Marshall case has been clumsy at best, not to mention racist and deceptive. It has a bad odor and the longer the delay in giving this man his due compensation the worse it will get..."

(February 24, 1984 in Harris:1986:394)

At the same time, contributions to Hussey's trust fund for Marshall grew to more than 45 thousand dollars (Harris: 1986:395 & testimony Cacchione:May 17, 1988). In Halifax, the "Committee of Concerned Nova Scotians for Justice" paid for a series of open letters published in local newspapers demanding that Premier Buchanan hold a public inquiry (Harris:1986:395). Donham points out that this group, "A non-partisan delegation of distinguished Nova Scotians, including a former Cabinet Minister and the Dean of Dalhousie Law School, met Premier John Buchanan privately and urged him to act" (Donham:1989b:186) Harris notes further that "Prisoners' Rights Groups, the Federation of Labour, the Union of Nova Scotia Indians, the Moderator of the United Church, the Dalhousie Law Students Society and a string of federal Members of Parliament and Senators joined in the demand that

Junior Marshall be dealt with swiftly and fairly" (Harris: 1986:395).

These public calls for an inquiry and compensation for Marshall may have embarrassed the provincial government to take action, but when it came, the response was only on the issue of compensation. A broader inquiry that might show misconduct on the part of agents and officials of the Attorney General's department would enhance Marshall's claim for substantial damages for the wrongful imprisonment. This concern was never directly alluded to by provincial officials but the media speculated that this factor might be a reason for the delay (Harris:1986:394). At first, provincial officials contended that compensation should be a federal responsibility. They argued that Marshall, as a Native person, was not the responsibility of the province; that he had been convicted of an offense against the Criminal Code of Canada in a court with a federally appointed judge; and, that he had been incarcerated in a federal institution for most of the eleven years. This argument was quickly rejected by federal authorities who pointed out that the administration of justice is clearly a provincial responsibility.[13]

Former Attorney General Giffin defended the delay in awarding compensation and ordering an inquiry when he testified at the Royal Commission (testimony March 16,1988). He lumped the Ebsary trials and the civil suit against MacIntyre and the City of Sydney together when he testified that both were "reasons for caution" because "inquiry into

compensation could prejudice a matter before the courts" (ibid.). Giffin denied that it was his intention to get Marshall to drop the civil suit (ibid). He also denied any knowledge of a lengthy document prepared by a researcher in his department which discussed the issue of civil liability of police under the Police Act of Nova Scotia (testimony Giffin:March 17, 1988).

The claim that Marshall's civil suit against the City of Sydney and its police officers or MacIntyre's libel action against journalists and the CBC might be affected by a public inquiry was undoubtedly true. Many of the same issues would arise in either of these suits as would be present in a public inquiry. However, again the issues can be clearly distinguished. Neither civil suit afforded the scope to look beyond the specific issues at law, i.e. whether there was misconduct on the part of police in the Marshall case, or whether the journalists libelled MacIntyre in their report. Moreover, where the public interest in the administration of justice is concerned, other cases, notably the Grange Inquiry into the infant deaths at the Sick Children's Hospital in Toronto, and the Mount Cashel Inquiry into physical and sexual abuse at the Newfoundland orphanage have been conducted while police were still involved in ongoing criminal investigations. Given the importance of the question of how the wrong man went through the system with all its alleged safeguards for the protection of the innocent and was convicted and imprisoned for eleven years, the province

could, had it been interested in doing so, convened an inquiry as soon as it was determined that an error had been made.

Political Scandals, Legal Wrangling and the Creation of a Public Inquiry

Taken as a whole, the collection of assertions offered by the province makes it appear that the government wanted to avoid an inquiry or delay it as long as possible. This leads to the conclusion that, initially at least, the Royal Commission did not grow from a sincere desire on the part of the provincial government to understand what went wrong in the Marshall case. Nor was it intended as a springboard for a broader look at the operations of the criminal justice system. It is equally apparent that the officials of the province did not believe that a Royal Commission would exonerate the system and support the contention of the Court of Appeals that "any miscarriage of justice was more apparent than real". Had any of these reasons been behind the decision to appoint the Commission, there would have been no reason to delay its establishment for years.

If the motivation for establishing the Commission was to find scapegoats and thereby deflect criticism from the justice system as a whole and from the political system in which it was ensconced, it would have been more advantageous to start as early as possible and avoid the appearance that a cover up was taking place. The longer the government delayed

airing the causes of Marshall's plight, the more it appeared that the government itself and the entire justice system had something to hide. This appearance fueled media speculation. From the moment it was learned that the Marshall case had been reopened by the RCMP, the media dogged the investigators, the Crown Prosecutor, and the officials in the Attorney General's office.[14] The allegations of police misconduct, racist motives, interference by officials of the Attorney General's office and a political cover up were frequent fare in the press (Harris:1986:394-396).

To understand why the provincial government was reluctant to set up an inquiry into the criminal justice system we must look at some other events that happened around the same time. A number of incidents involving prominent politicians fuelled public speculation that the criminal justice system did not operate the same way for all citizens of the province. The politicians seemed to be getting preferential treatment by the Attorney General when allegations of misconduct arose against them.

In 1980, provincial Minister of Development Roland Thornhill was allowed to settle large outstanding loans to four chartered banks in the province for 25 cents on the dollar. An RCMP investigation found reason to proceed against Thornhill for accepting a benefit (section 110 (1)(c) CCC) (testimony Feagan:September 12, 1988). Before the investigation could be carried further, Attorney General Harry How issued a press release saying that he accepted the

opinion of his deputy Gordon Coles, that Thornhill's settlement did not constitute criminal wrongdoing (Thornhill Documents:1988:43).

In 1983, an audit of the expense claims of Members of the Legislative Assembly found serious irregularities in the claims of six members,"2 of which appear to be fraudulent" (MacLean Documents:1988:5). A preliminary RCMP inquiry found that irregularities in the expense claims of "Billy Joe" MacLean, Minister of Culture and Recreation "appeared to be criminal in nature" (ibid.:14). A year passed during which the Attorney General's office looked into the matter before deciding that it was "more accounting irregularities rather than such as to warrant any further criminal investigation" (ibid.:35).[15] When no action was taken against MacLean, the Leader of the Opposition laid a complaint which was investigated and resulted in charges being brought. MacLean subsequently pled guilty to a number of fraud charges and was expelled from the Legislature when he refused to resign his seat.

These and other examples which appeared to be preferential treatment for politicians by the Attorney General's office added to the public feeling that there was one system justice for politicians and another for ordinary citizens like Donald Marshall. In view of the publicity surrounding these incidents, it is safe to conclude that the impetus for a public review of the Marshall case resulted primarily from pressure exerted by the media, Native and

Black organizations, private citizens, and opposition politicians both federal and provincial. By the time the government reluctantly agreed to allow a public airing of the Marshall case, the concerns being expressed went far beyond the details of one investigation that seemed to have gone wrong. The government and the Attorney General's office were being accused of meddling in the affairs of the criminal justice system to cover up political wrongdoing. The system was portrayed as overtly racist, and plagued by a growing list of alleged scandals involving Ministers of the government. The announcement of the Royal Commission, then, can be seen as an attempt at damage control by the government. The Campbell Commission on compensation and the paltry sum finally awarded to Marshall had failed to stifle the public outcry for a full inquiry into what when wrong with the justice system. What was needed was a public relations gesture that would appear to deal with the problem. The Royal Commission on the Donald Marshall, Jr., Prosecution was intended as that gesture. As Kavanagh points out, "throughout his tenure in office Buchanan has always identified issues then ordered studies and then considered action, based at times on the studies and at times on other information" (1988:95).[15] Salter notes that the use of inquiries "to delay, obfuscate and defuse political controversy" is little more than "conventional wisdom about inquiries". (1988:1)

A Royal Commission has the aura of independence and impartiality needed to present the appearance that something is being done without the necessity of a government actually doing anything (Aucoin:1988). By 1986, when it had run out of excuses for delaying an inquiry, the provincial government needed an instrument that would convince the people of the province that it was in control of the alleged problems of political interference, cover-ups, and racism in the criminal justice system. An internal investigation would not have had the prestige to convince a wary press and public that something meaningful would take place. What was needed was a prestigious panel of respected members of the criminal justice field who could be seen as independent of the political structures of the province which were under attack. The Royal Commission, headed by three distinguished jurists from outside the province, provided the vehicle which the government hoped would restore confidence in the justice system. By providing a body that could focus its attention on the events surrounding the stabbing of Sandy Seale in 1971, the government could effectively divert the media from digging more deeply into the ongoing problems of the government and at the same time appear to be responding to the call for an investigation of the entire system. As I show in the next chapter, the mandate of the Royal Commission on the Donald Marshall, Jr., Prosecution was written to focus on the past rather than look at the present situation of the criminal justice system.

Chapter Four Notes:

1. In July 1990, as a result of the recommendation from the Commission that the province recanvass the adequacy of compensation paid to Marshall (Recommendation #8 Commissioners' Report:1989:148), a mini commission, headed by Justice Evans held hearings to determine an appropriate amount and type of compensation for Marshall. Marshall was then awarded almost a million dollars in the form of a $200 thousand dollar lump sum payment plus an annuity for life. The announcement of the compensation was made on the nineteenth anniversary of his first appearance before the court on the charge of murdering Sandy Seale (Chronicle Herald July 6,1990).

2. The population of Sydney in 1981 as 29,444 according to Census Canada.

3. Alan Storey, Atlantic representative of the Toronto Star in conversation, September 9, 1987.

4. At the time of the RCMP investigation I was working at the University College of Cape Breton in Sydney on a program which included in-service police training. One segment of the program was called "Writing for Effective Policing". Six senior constables from the Sydney Police force participated in this program wherein we discussed and critiqued their note books and written reports. Among the participants was Cst. Leo Mroz, the first officer on the scene of Seale's stabbing. Mroz frequently referred to his original notebook from that night. As well, Mroz was a valuable source for Harris (1986). This notebook, along with others he had saved over the years, was destroyed by his wife when Mroz died. Consequently the notebook was not available to the Commission. Marshall's defense attorney Moe Rosenblum also died before he could be called to testify. The other defense counsel, Simon Khattar testified (November 9, 1987) that when he looked for his notes on the case he could not find them. He believed that they were lost when he moved his office, but admitted that most of his other files had survived the move intact.

5. The City of Sydney Police Commission sought and received standing and Whalley was listed as its counsel. However, Whalley only showed up at the public hearings once at an early sitting and did not appear again until he was called to testify.

6. Both Harris (1986) and Donham (1989) have extensive accounts of the problems faced by Marshall and Aronson as a result of the provinces refusal to assist with the investigation or finances. Testimony by Aronson:March 14 &15, 1988; Edwards:May 24, 1988; Gale:June 7, 1988 &

Coles:June 20, 1988 all confirmed the facts as described although each had a different analysis of the reasons behind the actions. Edwards assisted Aronson by giving him copies of Wheaton's report of the investigation (testimony Edwards:May 24, 1988). When Coles learned two years later that Edwards had helped Aronson he became angry and suggested that some action should be taken against Edwards for releasing the file without authorization (ibid.).

7. Lawyer # 10.

8. Even Brian Mulroney, then running for the Pictou County seát vacated by Elmer MacKay jumped on the bandwagon. He advocated a million dollars as compensation for Marshall and promised that he would push for an investigation of the matter if he were elected (Harris:1986:400).

9. Notably the Simon case which reached the Supreme Court of Canada and ruled that provincial restriction of the hunting and trapping rights of natives was superceded by the treaty rights established in a 1752 treaty. This dispute continues to plague the provincial government. Most recently the provincial Department of Lands and Forests signed a one year agreement with Nova Scotia Micmacs to allow them to hunt without licenses or bag limits on Crown lands (Chronicle Herald:October 14, 1989). However, the agreement does not affect the status of those previously charged by Lands and Forests with violation of provincial moose hunt regulations. A trial of 14 Micmacs arrested during an "illegal" moose hunt in October 1988 was still in the courts in November 1989 (Mail Star, November 7, 1989).

10. Notably the Weymouth Falls case where a white man was acquitted by an all-white jury in the shooting death of a black man (Atlantic Insight, April 1986).

11. Ebsary's first trial ended on September 13, 1983 with a hung jury. The second trial resulted in a manslaughter conviction and Ebsary was sentenced on November 24, 1983 to five years in prison. Ten months later the conviction was overturned on Appeal and a new trial ordered. The third trial also ended in a conviction on January 17, 1985 and Ebsary was given a sentence of three years. This conviction was upheld on appeal but the sentence was reduced to one year. A final appeal to the Supreme Court of Canada was denied in September 1986, one month before the announcement of the Royal Commission.

12. Conversations between the author and journalists Donham and Storey during the Fall of 1987.

13. Despite asserting it was not responsible for compensating Marshall, a little over a year after Marshall received $270,000 from the province as compensation, the federal government quietly reimbursed the province for half the payment (testimony, Giffin:March 21, 1988). The fact of the federal cost sharing of Marshall's compensation was raised but not pursued at the Royal Commission hearings owing in part to the agreement between the Commission and the federal government not to extend the inquiry into areas of federal jurisdiction. The details of this agreement were never made public but only alluded to when lawyers for the federal government who had standing at the Commission raised objections to certain lines of inquiry.

14. Alan Storey told me that he made it a practice to call at least once a week seeking information and updates from the attorney general's office. Peter Cotter, a reporter for CJCB radio news (a private radio station in Sydney) told me that it was a rare month when he didn't have an item on the progress of the Marshall case.

15. Kavanagh (1988) provides an interesting and informative account of the list of scandals which beset the Buchanan government.

16. The forestry, fishing, health care, education and uranium mining among other topics have been selected for provincial royal commissions during Buchanan's tenure (Kavanagh:1988:93-99).

CHAPTER FIVE

The Marshall Commission and its Mandate

> "Royal Commissions of Inquiry are generally set up to address an urgent public concern that is almost certainly politically sensitive" (Grenville:1988:1).

> "Inquiries play a pivotal role in the delineation of public issues and public debate, even when their recommendations are not implemented" (Salter:1988:1).

While these citations express what Salter (1988) defines as "conventional wisdom" about inquiries, they miss the underlying reason for the establishment of the Marshall Commission. As I demonstrated in Chapter Four, a variety of politically sensitive situations resulted in public concern and pressure for an inquiry into the justice system in the province of Nova Scotia. The handling of Donald Marshall, Jr. by the justice system was sufficient in itself to warrant

an inquiry, but it was not until political scandals involving government ministers reached the point where they threatened to topple the government, that officials reacted by setting up the long promised look at the Marshall case (Kavanagh: 1988:152-153). The Royal Commission on the Donald Marshall, Jr., Prosecution was set up to deflect public concern away from, rather than toward, the politically sensitive issues that troubled the criminal justice system. MacKay and Kimber describe the political climate of the province as:

> "Incestuous, good-old-boy politics and justice that depends too much on connections and not enough on principles" (1989:6).

The Commission, they said:

> "offered convincing evidence of just how cynically those systems sometimes function. Indeed, the public were made painfully aware of how frequently powerful figures in the political and legal establishments were figuratively in bed together" (ibid.).

The Marshall Commission did delineate public issues and provide a setting for public debate, but this occurred in spite of, rather than because of, the aims of provincial officials in establishing the Commission. In order to pursue these broader issues in the operation of the criminal justice system, the Commission abandoned the tight strictures of the mandate handed to it by the provincial government and embarked on a trail of its own.

The Role of Commissions

Grenville identifies two kinds of inquiries: one which tries to uncover facts and determine whether any law was broken, he calls a "quasi-judicial investigation"; one which analyses opinion and makes policy recommendations, he designates a "consultative inquiry" (1988:1). He notes that each is different in the way that it is organized and operates and, when one Royal Commission combines both functions, "it faces some interesting problems"(ibid.).

Sopinka points out that, "In 1979 the Law Reform Commission of Canada estimated that there have been 400 full-blown public inquiries and close to 1500 departmental investigations held since Confederation" (1988:1). He and Aucoin (1988) agree that commissions of inquiry can be useful when public policy is the subject being examined. But Sopinka warns that, when the task of the inquiry is to examine the conduct of individuals, it can take on the appearance of a trial without the usual safeguards for individual rights because it operates "under the full glare of media attention" (1988:1). Salter (1988), on the other hand, describes inquiries as "almost always" like trials that look at the issues of wrong doing and who is responsible. At the same time, she argues that all inquires have a dual function of fact finding and policy recommendation. In this regard, she sees the ambiguous relationship between the inquiry process and the legal process as a contradiction that affects the way inquires function. She contends that "the

characteristics of inquiries have a profound influence on how information is used within them and how inquiries can and will be used by their participants" (Salter:1988:3). Indeed, the lawyers involved in the Marshall Inquiry offered differing opinions about the purpose of the Commission. One saw it as an attempt to find someone to blame for what happened to Marshall.[1] Another described it as a political cover-up for the inadequacies of the justice system in the way that it deals with minorities.[2] A third argued that it was simply an elaborate trial without a defendant and that his role was simply to defend the interests of his client against any possible harmful consequences.[3] A fourth saw it as a public forum in which the media coverage was more important than what happened before the Commissioners.[4] A prime consideration for the lawyer representing the Department of Justice Canada and Department of Solicitor General Canada was to ensure that the Commission did not exceed its mandate and delve into areas of federal rather than provincial jurisdiction.[5]

These divergent interests of the participants form a backdrop against which we must view the intent of the provincial government in establishing the Commission and the manner in which the Commissioners sought to carry out their mandate.

Mandate

The clearest expression of the purpose of a commission is contained in the mandate because it defines, in advance, the tasks, powers and responsibilities given to the commissioners by the government which sets up the inquiry (Salter:1988).

Since the apparent purpose of the provincial government in establishing the Marshall Commission was to deflect attention from a raft of scandals and defuse a political crisis rather than to open the criminal justice system to a wide-ranging examination (see Chapter Four), it was important that the mandate prepared for the Commission be specific about what it could and should examine. When an inquiry is established to examine policy issues, control over the terms of the mandate reflects Aucoin's warning that:

> "the executive appointment of commissions... presents an opportunity for partisan considerations to undermine objective and independent policy analysis. At issue here is not so much the partisan affiliations of commissioners, although this factor should not be ignored, but rather the willingness of commissioners to undertake their assignment in a manner that sets them apart from the partisan interests of the governing party. A

> failure to do so makes such commissions little more than executive task forces, a result that constitutes an "abuse" of the commission form" (1988:15).

The government went outside the province to find a panel of judges to become Commissioners. This was essential to convince the public that the Commission would not be controlled by the political power structure. In Nova Scotia, "many lawyers run for political office and former politicians become judges... the pervasiveness of patronage appointments ... goes a long way to explaining why the legal system has been reluctant to displease the government of the day" (MacKay and Kimber:1989:7).

As Aucoin (1988) points out, however, control of the terms of the mandate provides a powerful lever to direct the course of investigations carried out by a commission. The Marshall Commission had a very limited mandate. It was set up to find out what happened in the case of Donald Marshall, Jr. The mandate directed the Commissioners very specifically to the "event" of May 28th-29th 1971 and what grew out of that "event". The Commission was established:

> "with power to inquire into, report your findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sanford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr., with

that death; the subsequent conviction and sentencing of Donald Marshall Jr., for the non-capital murder of Sanford William Seale for which he was subsequently found to be not guilty; and such related matters which the Commissioners consider relevant to the Inquiry;" (Order in Council, October 28, 1986).[6]

The Marshall Commission was asked to find our **how** things were done rather than **why** they happened the way they did. While the terms of the mandate did include a directive to report "findings and recommendations in the matter of their Inquiry to the Governor in Council" (ibid.), the construction indicates that it was set up as a fact-finding or quasi-judicial inquiry rather than a consultative inquiry whose purpose was to formulate broad policy directives for the criminal justice system of the province. The Commission was not mandated to find the motivations or the socio-economic conditions behind the treatment Marshall received. Nor was it ordered to look beyond this one case into the plethora of alleged incidents of political interference in the system. Its job was to look at how the system had treated one individual and suggest changes to the criminal justice system based on what went wrong in that single case.

Cain notes that the insistence on treating an incident "in isolation... as an occasion complete in itself" (1988:67) is a characteristic of professionalized justice which dominates contemporary liberalism. Ratner (1984) says that

a focus of attention on an individual offender is one of the main features of liberal-progressive criminology. He argues that this concentration on events or incidents has the effect of diverting criticism from the broader aspects of the social structure that underlie the issue. In this case, by providing a mandate limited specifically to Marshall's arrest and conviction, the government can be seen trying to deflect public concern from what many perceived as a general malaise of the justice system.

The mandate directed the Commission to inquire into four things. First was the investigation of the death of Sandy Seale. Since the investigation of the death was conducted by the city of Sydney police force, this allowed the Commission to look at the how one particular police force functioned when it investigated the stabbing incident.

The second item was the charging and prosecution of Marshall with Seale's death. Under this heading they could examine the role of the Crown Prosecutor in reaching the decision to prosecute Marshall for the offense; how the charge (i.e. non-capital murder rather than murder or manslaughter) was selected; and, how the prosecution was carried out in the courtroom. This implied as well, the relationship of the Crown to the Sydney police force and in particular Detective Sergeant MacIntyre. In addition the efforts of the defense lawyers could come under scrutiny. How they carried out their functions and their relationship to the Police and Prosecutor were central to the issue of

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charging and prosecuting Marshall, especially the question of whether the Crown disclosed the existence of witness statements favorable to the accused.

Third was the subsequent conviction and sentencing. This permitted a look at the trial procedure, the evidence introduced, the testimony of the witnesses, the actions of the lawyers and judges, and the process by which the conviction was reached and the sentence imposed.

The fourth clause was the kicker. "And such other related matters which the Commissioners consider relevant to the Inquiry" (Order in Council, October 28, 1986). This gave the Commissioners the discretion to include or not include a wide range of items. It is on this clause that an inquiry into the system in general, could be justified if the Commissioners deemed it so.

The intent of the government to limit the scope of the inquiry can be inferred from number of significant aspects of the Marshall case itself which were not mentioned in the mandate. It contained no reference to the appeal process; jury selection and function; subsequent RCMP investigations; role of the Attorney General's office; years spent by Marshall and his treatment while in prison; circumstances surrounding the "reference" to the Nova Scotia Court of Appeals and its decision that any miscarriage of justice was more apparent than real; treatment of Marshall subsequent to his release from Dorchester and prior to his exoneration by the Court of Appeals; manner in which compensation was

awarded; or the issue of what role racism may have played. Having yielded to the pressure for an inquiry, the government offered a mandate which would focus attention on the justice system as it was in 1971 and away from what it was in 1986. If, the Royal Commission followed the mandate as written, the government would be rid of the long-standing complaint that something was being covered up in the Marshall case and could claim to be working toward reform of the criminal justice system. The key, of course, was how the Commission did its job and how closely it followed the script provided in the mandate.

Forum

The Order in Council appointing the Royal Commission did not direct the manner in which the inquiry should be conducted. The Commissioners were ordered to:

> "adopt such rules, practices and procedures for the purposes of the Inquiry as they, from time to time, may consider necessary for the proper conduct of the Inquiry, and may vary such rules, practices and procedures from time to time as they consider necessary and appropriate for the purposes of the Inquiry". (Order in Council, October 28, 1986)

Not surprisingly, the Commissioners, who are all judges, chose a quasi-judicial forum in which to hear the evidence of witnesses. The various rooms in which the public hearings

were held were laid out like courtrooms. The Commissioners sat in comfortable upholstered chairs behind a draped table at one end of the room. A table and chair for the witness was placed at one side. A clerk to administer the oath to the witness, supply copies of documents for the judges and witness, and mark items of evidence sat nearby. The Executive Secretary to the Commission and the firm hired to transcribe the proceedings occupied tables along one side wall. Tables for Commission counsel and lawyers representing various parties filled the center of the room in front of the Commissioners. Behind the lawyers, space was reserved for media representatives. In the back of the room, rows of hard wooden chairs served the public for whom the spectacle was ostensibly staged.

Although the first round of public hearings was held in the basement of a church hall in downtown Sydney rather than a more formal atmosphere, the trappings of the courtroom were never far below the surface. "All Rise" sounded over the loudspeaker as the Commissioners moved to their seats. Witnesses were summoned and sworn in by the clerk. The examination by Commission counsel and cross-examination by lawyers for parties with standing cited page and verse from the statements made by the witnesses in previous court appearances or depositions. Volumes of trial transcripts, affidavits, formal statements to police, and collections of notes and government correspondence filled the tables in front of the lawyers.

Except for the TV cameras and kleig lights, and the presence of three judges rather than one, the scene was reminiscent of a typical courtroom. An opening to an adjacent kitchen through which the spectators could purchase coffee and snacks from parish volunteers afforded the only touch of informality.

Expanding the Mandate

At the outset, the Commission stated its intention to look beyond the events of 1971. The Attorney General, however, wanted to keep the reins on the Commission. As one lawyer, who occupied a position of authority in the Attorney General's department said, "it was never the intention of the government that the Commission of Inquiry undertake or conduct a full scale review of the criminal justice system in the province".[7]

The first skirmish between the Royal Commission and the government was about who would pay for the lawyers of those given standing as parties to the Inquiry. Marshall hired prominent Toronto lawyer Clayton Ruby to represent him and Attorney General Ron Giffin hinted that the province would not pay the $400.00 per hour fee that Ruby charged. Giffin suggested that the $175.00 paid to senior counsel in Halifax should be sufficient for Ruby as well. "I don't want to cause a controversy, but we're not handing out blank cheques... We want to make sure we have some cost control" (Cape Breton Post, November 27, 1986). Then he implied that the province

would pay for Marshall's counsel only during the time that he was actually testifying and that the counsel employed by the Commission would adequately represent Marshall's interests at other times (Cape Breton Post, January 9, 1987). A rash of newspaper articles and editorials suggested the problem was not money but a "smokescreen" by the government to prevent a full hearing of the details of the case. A Cape Breton Post editorial called the "Legal fee dispute tacky" and warned that "the credibility of the inquiry must not be compromised by nickel-and-diming" (ibid.). Journalist Stephen Kimber opined in the Halifax Daily News that "the province's nit picking and niggling over Marshall's legal fees appears - to be charitable about it - small-minded and picayune" (January 13, 1987). Negotiations between Deputy Attorney General Coles and Ruby resulted in an agreement that allowed Ruby to be present on Marshall's behalf throughout the course of the hearings. In return, Ruby agreed to accept the going rate for senior lawyers in the province.[8] Meanwhile, the Commission went about its job of preparing for the public hearings and announced a May 1987 start-up date.

In early April, however, other parties given standing by the Commission, led by John MacIntyre,[9] the police officer who headed the investigation that resulted in Marshall's conviction, petitioned the province to pay their lawyers. fees (Cape Breton Post, April 8, 1987). Terry Donahoe, who replaced Ron Giffin as Attorney General, said that he could not promise to help anyone but Marshall himself (Cape Breton

Post, April 9, 1987). Donahoe then began what was to become a regular complaint: the Commission was going beyond its mandate and it was costing too much. "I believe the taxpayers of Nova Scotia are anxious to have that Commission get on with its work, **conduct the inquiry it was called upon to conduct** (my emphasis) and make its assessments and judgements" (Cape Breton Post, April 16, 1987). The Commission responded by announcing that the scheduled start of public hearings in May would instead be used to hear arguments from the parties on the issue of payment for their lawyers.

Even before the fee dispute was settled, however, it became clear that the Commission intended to use a broad brush on the clause, "and other such related matters which the Commissioners consider relevant to the inquiry" (Order in Council, October 28, 1986). In his opening statement to the May hearing about lawyers fees, Chief Justice Hickman announced that the events of May 28-29, 1971 would be just the starting point of the inquiry. First, he added six items relating directly to the Marshall case that were not included in the mandate: the conduct of his appeal (1971); years in prison (1971-82); eventual acquittal by the Nova Scotia Court of Appeals (1983); the process of compensation(1984); and the two RCMP reinvestigations (1971 & 1982).

Then Hickman showed how far afield he planned to carry the mandated work of the Commission:

> "It is not enough to examine minutely one incident, and from that to expect to suggest changes within a complex system of administration of justice. In order to develop meaningful recommendations, the most important part of our mandate, all contributing or potential contributing factors must be carefully reviewed within the context of the current state of the administration of justice in Nova Scotia" (Hickman:May 13, 1987:3).

With this statement Hickman jumped from an analysis of an historical event to an examination of present practice in the justice system of the province. To understand present practice, Hickman said the Commission would:

> "examine the role of the Attorney General as a member of Cabinet in criminal prosecutions, the relationship between prosecutors, defense counsel and the police (both Provincial and R.C.M.P.), who makes decisions to prosecute and how and on what basis these decisions are made, the organization of police forces in Nova Scotia and how they interact with the communities they police" (ibid.:4).

In addition, Hickman noted that the Commission would look at the claims of the Black United Front and the Union of Nova Scotia Indians that minorities were treated unfairly by

the justice system. MacKay and Kimber describe this problem as a "chummy network [that] makes outsiders - the poor, minorities, women, children - vulnerable at virtually every level... [and] that those inside the system, from local police officers to crown prosecutors and judges, accept the view that what's best for the insiders is also what's right for everyone" (1989:7). The effect of the commission's decision to grant standing to the Black United Front and Union of Nova Scotia Indians and to explore the issue of racism in the criminal justice system of the province is examined in detail in Chapter Six.

This opening statement took the Commission outside the system of professionalized justice that insists on looking at cases in isolation (Cain:1988) and inside the contradiction that "lies in the potential of inquiries to incorporate radical debate, while maintaining an orientation to the very limited and pragmatic policy goals" (Salter: 1988:2).

Some lawyers[10] supported the Commissioner's decision to move beyond the simple facts of the Marshall case. The lawyer for the Black United Front wanted the Commission to examine the way in which Blacks were treated by the justice system.[11] The lawyer for the Union of Nova Scotia Indians wanted the Commission to look into the refusal of the government of Nova Scotia to recognize the decision of the Supreme Court of Canada in the Simon case as precedent for the right of natives to hunt and fish without interference.[12] Marshall's lawyer wanted the Commission to reopen the question of

compensation.[13] Other lawyers,[14] including the Attorney General, held that the phrase "relevant to the Inquiry" referred only to the system at the time and place of the specific offense and was limited by the construction of the first three clauses of the mandate. "What is being looked at is the administration of justice in the province of Nova Scotia at the relevant time" (Attorney General Terry Donahoe, Cape Breton Post, April 15, 1987).

Concerning the fee issue, Donahoe proclaimed that he didn't believe it was "any of the commission's business as to what happens to legal fees" (Cape Breton Post, May 19, 1987). Hickman's opening statement, however, served public notice that the Commission had its own agenda and was willing to confront the Attorney General and the government of the province about who would control the course of the Inquiry and what would be examined. In this first confrontation between the Commission and the government of the province, Hickman showed that he was willing to embarrass the government, if necessary, to assert his authority. He said that if the province would not pay so that other parties, as well as Marshall, were adequately represented, "the Commission will have to reevaluate whether it can carry out the job it has been assigned to do" (Hickman, during the hearing on fees for parties, May 13, 1987). This thinly veiled threat to resign, again forced the Attorney General to back down. Within hours of the Commission's recommendation that the province pay the legal costs of other parties,[15]

Donahoe announced that officials from the Attorney General's office would meet with the Commission counsel to work out the details of the arrangement (Cape Breton Post, May 16, 1987). The fee dispute, however, delayed the start of public hearings until September 1987, almost a year from the date when the Commission was established.

Beyond the Mandate

Of importance is the fact that the Royal Commission did decide to look beyond the specifics of the Marshall case at the justice system itself and beyond into the political arena.

The first foray came with Commission counsel's request for the files in the Attorney General's office concerning two Members of the Legislative Assembly, Rolland Thornhill and William (Billy Joe) MacLean (see Chapter Four).[16] Both had been publicly accused of wrongdoing involving finances and both were publicly exonerated by the Attorney General of the day. In both cases allegations were made that partisan politics were behind the decision not to prosecute. Concerning MacLean, Opposition Leader Vince MacLean (no relative) complained: "Where you really hurt the system is when you have a system of justice for friends of the government, and another system for the rest of us... [the Attorney General] got politics mixed up with his job". (Chronicle Herald, May 1, 1986) In the last days of the Commission hearings Thornhill sent his lawyer to admit that

he received special treatment "Mr. Thornhill acknowledges that, based on the evidence, the handling of his case by the Attorney General's Department could be described as showing an advantage or favouritism" (Chronicle Herald, November 4, 1988). However, Thornhill denied any personal involvement in the decision (ibid.). The Commission sought the files to examine the treatment received by politicians and how it compared with the way in which ordinary citizens (i.e. Marshall) were treated by the system. The question asked was whether there was a different standard of justice for politicians than for ordinary citizens. The Attorney General at first refused to release the files, and sought a court order to quash the Commission's subpoena (Halifax Mail-Star September 4, 1987), The Attorney General's affidavit argued that "the material sought contains nothing relevant to the mandate of the Commission" (ibid).[17] Then it was learned that the Thornhill files had been shredded during a routine house cleaning operation (Chronicle Herald, April 16, 1988). However, the Commission was able to construct the substance of the Thornhill file from existing RCMP files. The documents concerning MacLean were then furnished 'voluntarily' by the lawyer for the Attorney General along with a statement of his sincere desire to assist the Commission in its work.[18]

Obtaining the relevant documents concerning the Thornhill and MacLean matters constituted a significant victory for the Commission. Moreover, because both men were Cabinet Ministers and therefore colleagues of the Attorney

General, the suggestion was raised that the matters might have been the subject of discussions in Cabinet. Both the Premier and Attorney general admitted that Thornhill had been consulted when the Commission filed its subpoena in August, 1987 to obtain "any and all documents, reports, materials of any sort whatsoever" relating to Thornhill's finances from January 1979, to date (Chronicle Herald, September 4, 1987). Attorney General Donahoe went farther, saying, "The government makes the decision ultimately, and this is a Commission of Inquiry established by the government by a Cabinet Order, and he's (Mr. Thornhill) a member of the Cabinet and the Cabinet will make the decision" (whether to release the documents) (Mail Star, September 4, 1987). As well, a 1983 RCMP report noted that the Auditor General briefed both the Premier and Attorney General about a possible investigation of MacLean for expense account irregularities (MacLean Documents:1988:19-20).

This raised the question that, if potential investigations or charges against Ministers of the government were discussed in Cabinet, was the Marshall case also discussed there? When former Attorney General Ron Giffin came before the Commission on March 16, 1988, Commission counsel sought an answer to this question. In particular, Giffin was asked if there was any discussion of the Marshall case in Cabinet prior to the reference order of June 16, 1982. Giffin's lawyer objected to the question citing the confidentiality of communications within Cabinet. The

Commissioners ruled that Giffin must answer but need not say which person in Cabinet made any particular statement about the case. The lawyer for the Attorney General responded by going to the Nova Scotia Supreme Court to obtain a ruling on whether the Commission could compel the witness to violate his oath of Cabinet secrecy. As in their attempt to quash the subpoena for the Thornhill and MacLean files, the Attorney General's lawyer argued that the Commission was exceeding its mandate (see note #17). They argued that the oath of secrecy taken by Cabinet members superceded the Commission's power of inquiry.[19]

Justice Glube of the Supreme Court of Nova Scotia, Trial Division ruled that the Cabinet Ministers must testify, and also relate the specific details of who said what.[20] The Attorney General appealed the decision. A specially appointed appeal panel upheld Glube's decision that the Ministers must talk, but stuck down the part of her decision which required that they disclose the identity of speakers or specific content of conversations.[21] Although the Commission had won another battle with the Attorney General, it was a hollow victory. When the ministers trooped back to the stand, the only Cabinet conversations they could recall concerning Marshall had to do with approving the amount of his compensation settlement, which was properly a Cabinet matter (Testimony Giffin & Donahoe: November 1, 1988).

The last major battle of the hearings pitted judge against judge. The Commission asked the judges of the Nova Scotia Court of Appeals who sat on Marshall's reference in 1982-83 to submit to an interview by Commission counsel. When the judges respectfully refused, the Commission issued a subpoena to compel their attendance. The judges went to court to quash the subpoena. In this case, Glube held that absolute immunity applied to the judges. She ruled that they could neither be subpoenaed nor could they appear voluntarily.[22] When the Nova Scotia Court of Appeals upheld Glube's decision, the Commission carried their own appeal, joined by Marshall's lawyers, to the Supreme Court of Canada in a move that can only be described as shocking to the brethren of the bench.[23] On October 5, 1989, the Supreme Court of Canada dismissed the appeal, thereby upholding the principle of judicial immunity. In the same decision they ruled that Marshall's lawyers could not expand the questioning of Cabinet ministers to include details of conversations in Cabinet about Marshall (Daily News, October 6, 1989). This decision marked the final page in the public hearing phase of the Royal Commission on the Donald Marshall, Jr., Prosecution.

Summary

In essence, the Commissioners took a very limited mandate and, in the face of the obvious displeasure of provincial officials and other judges, expanded it to include

a wide range of political and social issues never intended for scrutiny by the government.

This brief look at the manner in which the Marshall Commission functioned raises the more important question of whether or not the maverick appearance of the Commission has any meaning. Salter (1988), Grenville (1988), Sopinka (1988), and Aucoin (1988), have argued that a government which establishes an inquiry is free to ignore the recommendations which result. So, at this point we are unable to tell whether the 82 recommendations made by the Commission (Commissioners' Report:1989) which were accepted in principle by the provincial government (Halifax Daily News, February 8, 1990) will actually be implemented. But I argue (See Chapter Seven) that the work of Commission can be seen as significant in itself. By exercising autonomy over the course of the Inquiry, the Commissioners publicly exposed the extent to which "the political and legal establishments were figuratively in bed together" (MacKay & Kimber:1989:7). The provincial government and the justice system were forced to react to limit the damage to its reputation caused by the Inquiry. The Attorney General and the judges of the Nova Scotia Court of Appeals were put in the embarrassing position of resorting to court challenges to control the Commission. These events in turn provided additional information and media attention. If knowledge is power, those who have followed the course of the Commission in the media are in a better position to understand and deal with the

discrimination in the workings of the criminal justice system. But perhaps as important is that the Inquiry has provided material on which the role of the state in the criminal justice system can analyzed and assessed.

Manette (1988) analyzes the Marshall Inquiry from the perspective of "Everyday Culture and State Intervention". She posits that the impetus for the Commission:

> "came from within the state: lawyer advocates, opposition parties, disaffected bureaucrats and police investigation. In this way, the Marshall Inquiry emerged more as an interesting exercise in jurisprudence, than as an expression of culture conflict" (1988:8).

From this starting point, Manette suggests:

> "that the Marshall case, and ensuing Inquiry, is a particularly cogent expression of the exercise of cultural hegemony, and the accommodation of dissent" (1988:10).

And, speaking of inquiries in general, she argues:

> "we may understand them as well-rehearsed and routine maneuvers through which the state provides direction, authoritatively" (1988:13).

My own analysis of the government's and the Commission's dealings with the issue of racism (See Chapter Six), leads me to agree with Manette's conclusion that:

> "the Inquiry's reconstruction negates the possibility of revealing and understanding

> connections between it and the societal culture of racism which enervates the culture of the everyday" (1988:31).

However, I disagree with the logic by which she arrives at her conclusion. As I showed in Chapter Four, the impetus for the Commission came from external pressure rather than from "within the state". The family and friends of Donald Marshall, Jr., the Union of Nova Scotia Indians, the Black United Front, Reverend Hussey's public solicitation of money to compensate Marshall, the Halifax "Committee of Concerned Nova Scotians for Justice", individual journalists, and the media coverage afforded to these individuals and groups created and fostered the external pressure for a public inquiry. Opposition politicians only used the issue after it had been raised repeatedly in the media. Lawyer advocates, Aronson and Cacchione, were content to play the government's game behind closed doors, emerging only afterwards to speak in favor of a public inquiry. Disaffected bureaucrats never spoke out until they were subpoenaed by the Commission. And, the results of the police investigations were hidden until enterprising journalists, like Donham, Harris, and Storey dug them up. From the time of his release, Marshall was a rallying point for those who saw his treatment as symptomatic of the way in which the criminal justice system treats those in society who are powerless. The media reported and encouraged their outcry until the opposition politicians joined in and forced a reluctant government to establish the

Inquiry. In this way, at least, the Marshall Inquiry is more an expression of culture conflict than merely an interesting exercise in jurisprudence, although it is certainly that as well. On one side of the conflict were a large number of ordinary people in the province who saw Marshall's wrongful conviction as an example of their powerlessness. On the other side was the criminal justice system supported by the bureaucratic and political power structure. The Marshall Commission was established by the political power structure to defuse the conflict by focusing attention on an event in the past.

If the Commission had stayed within the confines of the limited mandate offered by the government, we could conclude that it was simply an example of the accommodation of dissent, as suggested by Manette (1988). But by choosing to take its own path, the Marshall Commission became an anomaly like the Berger Commission which was set up to choose between two competing routes for a pipeline through Alberta and ended by delaying pipeline development for ten years. The government of Nova Scotia received little solace from the methods chosen by the Commission. As Kavanagh notes:

> "For the next sixteen months the Buchanan cabinet awoke to daily newscasts and front-page headlines dragging justice in Nova Scotia into very murky waters and this was

before the inquiry had turned its attention to the cases of Billy Joe MacLean and Rollie Thornhill" (1988:152).

The Commission was not a partner of the provincial government in defusing dissent against the criminal justice system. Rather, the Commission defined it's own objectives and pursued them. In doing so it provided more public ammunition for attacks against the system and the state apparatus in which it functions. In this sense, we can argue that the Commission exercised a relative degree of autonomy to investigate and confront other components of the criminal justice system and the government of the province (Ratner, McMullan & Burtch:1987). In next chapter I show how this decision of the Commissioners to exercise autonomy and thereby open the inquiry to an investigation of the politics of the criminal justice system had the unanticipated result of forcing it to look into the issue of racism.

Chapter Five Notes:

1. Lawyer # 3. Interview, December 21, 1987 (see note #8 Chapter One)

2. Lawyer # 7. Interview, March 2, 1988.

3. Lawyer # 8. Interview, March 10, 1988.

4. Lawyer # 1. Interview, November 16, 1987.

5. Informal conversations with Lawyer Al Pringle, during the course of the public hearings. Neither Pringle nor James Bissell who represented the RCMP would agree to be interviewed formally, citing lack of authority to agree to such an interview. A letter directed through them to their respective superiors requesting permission for such an interview went unanswered.

6. Terms of Reference of the Order in Council appointing the Royal Commission given by The Honorable Alan R. Abraham, C.D., Lieutenant Governor of Nova Scotia, October 28, 1986.

7. Lawyer #11. Interview July 7, 1989.

8. Ruby's fee was never publicly specified but Kavanagh (1988b) contends that Ruby settled for the $175.00 offered by the province. As an aside he suggests that the fee dispute resulted in a sense of "Hometown versus Outsider" among the lawyer corp at the Commission hearings, then chides Ruby for not living up to his reputation as the "big Toronto lawyer".

9. MacIntyre's claim that he could not afford the fees for a lawyer was less than convincing in view of the fact that he footed the bill to pursue his libel case against the CBC for almost two years before backing out on the night before the case was scheduled to go to court.

10. Lawyers # 1, November 16, 1987; #5, January 20, 1988; #6, February 2, 1988; #7, March 2, 1988; #9, April 5, 1988; #10, March 7, 1989.

11. Conversation with Black United Front lawyer Anthony Ross, September 11, 1987.

12. Conversation with Union of Nova Scotia Indians lawyer Bruce Wildsmith, September 14, 1987. (See note #9, Chapter Four re Simon case)

13. Conversation with Marshall's lawyer Clayton Ruby, September 10, 1987.

14. Lawyers # 2, December 18, 1987; #3, December 21, 1987; #4, January 14, 1988; #8, April 7, 1988.

15. The Commission made the following recommendations to the Governor in Council:
"1. That , consistent with the foregoing principles, public funding for legal counsel be provided John F. MacIntyre, the Union of Nova Scotia Indians, the Black United Front, the Estate of Donald C. MacNeil, Q.C., and Oscar Nathaniel Seale;
2. That no funding be provided by the Province of Nova Scotia for Adolphus James Evers, Gary Green, R.A. McAlpine, Herb Davies, H. Wheaton and D. Scott; (these were all RCMP officers able to receive funding from that organization for their legal representation).
3. That any accounts rendered for participant funding be reviewed (taxed)..." (Decision on the Matter of Applications for the Provision of Funding for Legal Counsel, May 14, 1987).

16. Commission lawyers sought for four months to get the MacLean and Thornhill files from the Attorney General's office (Halifax Chronicle Herald September 4, 1987). John Buchanan The Art of Political Survival by Peter Kavanagh contains an interesting and informative analysis of the Thornhill and MacLean affairs.

17. The other grounds: "disclosure is protected by Crown privilege an/or solicitor client privilege"; and "The Crown cannot be compelled by a Commission to attend, testify or disclose information" were raised again later when the attorney general sought to prevent the Commission from asking about discussions in Cabinet.

18. Lawyer #11, Interview July 7, 1989.

19. Marshall's lawyers joined Commission counsel but wanted the court to go further and rule that the witnesses could also be compelled to identify who said what in the cabinet discussions. Justice Glube ruled that cabinet ministers must answer the questions of Commission counsel about the general content of Cabinet discussions, she also held the specific questions of Marshall's lawyers were reasonable in the context of the Commission. The Special Panel of the Novas Scotia Court of Appeals upheld her decision on the right of the Commission to question the cabinet ministers, but reversed her on the right of Marshall's lawyers to probe into specifics of Cabinet conversations. Marshall's lawyers appealed to the Supreme Court of Canada which upheld the Court of Appeals thereby preventing Marshall's lawyers from asking which minister in Cabinet said what in the course of discussions of the Marshall case.

20. Decision of Justice Glube in the Supreme Court of Nova Scotia, Trial Division, March 22, 1988.

21. Decision of the Nova Scotia Court of Appeals, October 15, 1988

22. Decision of Justice Glube in the Supreme Court of Nova Scotia, Trial Division June 22, 1988

23. During informal conversations at the Commission on Commissions at Dalhousie Law School, in June 1988, before Justice Glube issued her decision, Justice Grange and former Justice Estey both spoke disparagingly of the efforts of the Marshall Commission to compel the attendance of the Appeal Court Judges. Justice Grange remarked jokingly that if people start looking into judges minds to find out how they arrived at their decisions, "they probably won't find much of interest there anyway."

CHAPTER SIX

The Marshall Commission and Racism

"The human killed was a "black" man; the innocent human who was originally convicted of the homicide was an "Indian" man, and the person who was finally convicted of the act was a "white" man. To determine whether Nova Scotia criminal justice applied the laws correctly and uniformly, the Commission had to consider the possibility of racism in the application of the criminal law" (Henderson:1989:3-4).

"Institutional racism is less difficult to prove than personal prejudice, because the former can be measured in objective terms, such as ghetto schools, minority slums, infant mortality rates, school drop-outs of minorities, etc" (Adams:1985:65).

The statements of Henderson and Adams, above, while compelling, rely upon a set of suppositions that the Marshall Commission apparently did not share. Henderson assumes that facts somehow confer an obligation to look beyond the facts. Adams, on the other hand, (ignoring the implicit tautology of his argument) presumes that someone is trying to prove the existence of racism. Unlike recent inquiries in Ontario[1] and Manitoba,[2] the Marshall Commission was not given a specific mandate to look at racism, either in the form of individual prejudice or systemic discrimination. The Nova Scotia government, instructed the Commission to look at a single event which took place in 1971. However, the Commissioners redefined the mandate and exercised autonomy over the direction of the Inquiry. They chose to examine the Marshall case in the light of wider and current practices in the administration of justice in the province.

Racism was, at the outset, an incidental side issue for the Commission. The mandate directed the Commission to ask how the Sydney police got the wrong man and how that error went unnoticed through a preliminary inquiry and trial by judge and jury. The target of the Commission's work was to be the inner workings of the criminal justice system in 1971; the working relationship between police, prosecutor, defense and the court. When the Commission expanded the mandate in order to look at the present day working of the criminal justice system, an unexpected consequence of this action was that the issue of racism was forced onto the agenda. Once

raised, it became a major factor in the deliberations and a constant problem for the Commissioners in trying to control the course of the hearings. This chapter traces the progress of the battle to have the Commission reach beyond the "facts" of the Marshall case to investigate racism in the criminal justice system of the province.

I examine the way in which the Royal Commission dealt with this issue; what obstacles the issue of racism caused for the Commission in its deliberations; how they resolved the problems; and, how their decisions about what testimony to allow or not allow affected the course of the inquiry.

Putting Racism on the Agenda

It could be argued that the formal mandate of the Commission and, in particular, the phrase "and such related matters which the Commissioners consider relevant to the Inquiry" (Order in Council, October 28, 1986), allowed the Commission to ask if racism was a cause of Marshall's arrest and conviction. The fact that Marshall is a Micmac, Sandy Seale was Black and Roy Ebsary is White is sufficient, in itself, to create a basis for the question (Henderson:1989). Even before Marshall was arrested there was evidence of racist sentiment in Sydney. As Donham notes, "Pressure for an early solution to the murder took on racial overtones. The Marshalls received so many threatening phone calls that Donald Marshall, Sr., moved his family to a relative's house in Whycocomagh, 70 miles from Sydney" (1989a:181; see also,

Harris:1986:67). According to police testimony at the hearings, a road block was set up at the entrance to the Membertou Reserve where the Marshalls lived because of rumors of possible retaliation against Indians by the black community (testimony MacDonald:September 17, 1987). Harris notes the some Micmacs felt the white community considered Marshall guilty even before his trial. "Already upset by the fact that Donald MacNeil, who had been censured for discrimination against Indians, was conducting the prosecution, the Micmacs were livid" about an item in the Cape Breton Post a month before the trial that praised MacIntyre for his work on the Seale murder case (1986:129-130). And an academic study conducted in Sydney shortly before the event suggested that race relations were a problem in the city.[3] The study found that Blacks were confined to the Whitney Pier section of the city and were harassed and refused service in stores and restaurants in downtown Sydney. Indians complained of similar treatment when they left the Reserve and further that the city did not provide the same level of service to the Reserve, i.e. no water, sewer, paved streets, or sidewalks, although the Reserve was within the boundaries of the city.

With this background, it is not surprising that native and black groups wanted a chance to be heard if the Marshall Commission planned to look into the issue of racism in the criminal justice system. In response to advertisements by the Commission (e.g. Cape Breton Post February 4, 1987), the

Union of Nova Scotia Indians and the Black United Front applied for standing. Both groups indicated in their applications that they considered the treatment of visible minorities by the criminal justice system in Nova Scotia a significant item that should be explored by the Commission. Justice Hickman made it clear in his opening statement that he was aware of this problem:

> "Standing has been granted to the Black United Front and the Union of Nova Scotia Indians. Both of these groups state that minorities in the Province are not treated fairly or equitably by the justice system, and suggest that racism and discrimination may have contributed to the conviction of Donald Marshall, Jr. These charges must be investigated and examined to determine if these factors play any part in the administration of justice in Nova Scotia" (May 13, 1987:4).

Moreover, despite the objection of the Attorney General (see Chapter Five) the Commission recommended that public funding be provided for legal counsel for both groups[4] because, "we believe that the public interest requires... that the point of view of organized and affected minority groups be appropriately represented and articulated" (Decision on Funding for Legal Counsel, May 14, 1987:4).

The Commission crossed the first hurdle by putting the question of racism on the agenda. However, the text of the opening statement suggests that racism was not yet a full and equal partner with the other issues the Commission intended to consider. The statement was specific about aspects of Marshall's treatment by the criminal justice system, beyond those contained in the mandate, which it intended to review. (Hickman:May 13, 1987:3) The opening statement was also precise about the administration of justice issues it intended to examine (ibid.:4). But, with regard to the allegations of discrimination and racism raised by the Black United Front and Union of Nova Scotia Indians, it could only say:

> "These charges must be investigated and examined to determine if these factors play any part in the administration of justice in Nova Scotia. It should be apparent, therefore, that the activities of individual people, and of various authorities are to be reviewed and questioned, and that extremely important public issues will be considered by the Commission"(ibid).

The contrast in tone and content suggests that the Commission had very definite plans and priorities about the political and legal issues it wanted to examine but only a vague idea of where the allegations of racism might lead.

Racism made it on the agenda but it still faced a number of obstacles before it could become a serious part of the deliberations of the Commission.

Obstacles to Dealing with the Issue of Racism

Difficulties in determining the "facts" of the Marshall case were commonplace in the course of the hearings. The event which caused the Inquiry was seventeen years old. Long periods between an event and the time it is examined in court are not unusual, but seventeen years is at the extreme end of the spectrum. To complicate matters and as noted, many of the principals in the original investigation and trial died in the intervening years (see Chapter Four). Memories which fade quickly at the best of times were opaque and had to be probed and refreshed with media accounts, old documents, and notes. Ambiguity, uncertainty and lack of recollection were the hallmarks of the evidence.[15] The problem of memory, or lack thereof on the part of Sydney police officers testifying before the Royal Commission was captured in this pseudonymous poem found pinned on the wall in the media room:

MEN IN BLUE

Men in blue with minds of glue
    will not tell us what they do.
With visage creased, they pause, reflect
    and say, "I do not recollect."
When asked ten ways, they don't recall
    the words they said in court that fall.

Things they did those years ago
now, alas, they do not know.
Surely, though they talked a lot,
statements made are now forgot.
Facts from them will be quite few,
men in blue with minds of glue.
Why did I write this viscous verse?
My answer true is very terse.
I do not think I thought at all,
and if I did, I don't recall.

Psittacus 22/09/87.

No one was able to recall with any certitude how often John Pratico, for example, had been interviewed by Crown Prosecutor MacNeil, nor how often and when he had been taken to Wentworth Park to fix the scene in his mind. Practices and procedures of the police and justice system, long since abandoned, were resurrected and scrutinized.[6] Incidents and conversations unconnected with specifics of time and place were added into the testimony.[7] On top of all this, the issue of racism - not only the specific allegation of a particular racist action, but the suggestion that "racial ideologies are part of the institutional practice" (Bolaria and Li:1985:8) - was said to be an unstated structuring factor.

To ignore the possible contribution of racism to the plight of Donald Marshall would have opened the Commission to charges of fronting for the system, covering up or whitewashing the whole affair. The Commission was determined

that their examination of all the issues would be marked by autonomy and integrity. "The Commission and its employees must be, and must be perceived to be, impartial and unbiased in their treatment of the issues and in their dealings with witnesses. Anything that indicates that an employee of the Commission has a particular view of the evidence or of witnesses may have a negative impact on the public perception of the Royal Commission."[8]

The problems encountered by the Royal Commission in dealing with the issue of racism can be grouped in four areas: the mandate; the quasi-legal forum; the professional background of the legal community; and, the conflicting goals of the parties to the inquiry. Although these areas flowed together in day to day proceedings, for the sake of analysis I will treat each of them separately.

<u>Mandate</u>

Since the government of Nova Scotia did not order the Commission to investigate racism in the criminal justice system directly, the mandate itself became one of the obstacles for the Commission.

Two recent statements by Ministers of the government of Nova Scotia illustrate the deep politics of denial and refusal that characterizes public life in province.

After fighting erupted between black and white students at a Halifax area high school, the MLA for the area, Health Minister David Nantes announced to the media: "There's no

problem with racism in the educational system. It simply doesn't exist" (Chronicle-Herald, January 27, 1989).

A few days later, fights between black and white inmates at the Halifax County Correctional Center led to some of the inmates being transferred to other locations. The Solicitor General, Neil LeBlanc asserted that, although the fights did involve groups of black and white inmates, it was not a racial incident (Mail-Star, February 15, 1989).

If one black person were fighting with one white person, there might be pause to question whether the fight could be termed "racial" in nature. In the same way, a claim of racial harmony in a society would be suspect if it were based on one inter-racial marriage. But the official denials of racism were symptomatic of the refusal by officials of the Attorney General's office to admit that racism may have played a role in the wrongful imprisonment of Donald Marshall, Jr. or that it might be a factor in the day to day operations of the criminal justice system. The school incident was called rowdy behavior occasioned by a snowball fight, which could happen in any school. The incident at the jail, was described as the type of thing that takes place in correctional facilities. Prisoners commonly fight with one another. So also, what happened to Marshall was viewed simply as a failure of some part or parts of the justice system. This inability to look beyond an incident and examine the factors which may have provided grounds for it was a particular myopia of the provincial government officials. It is,

however, consistent with professionalized justice which dominates Canadian juridical practice (Cain:1988). By defining an incident narrowly, class bias is hidden from view and the event can be processed through the system as an isolated case with an individual subject and opponent, restricted by internal rules and the official definition of the incident (ibid.). Thus it fell to the Commissioners to determine whether and to what extent racism would be explored in the course of the hearings. Their decision to include racism as a topic for consideration depended upon their understanding of the term and upon how relevant they considered it to be in assessing the facts of the Marshall Case.

In this light, the mandate, itself, became the first obstacle for the Commission to deal with in deciding whether or not to examine racism as a factor in the Marshall case.

The mandate pointedly directs the Commission to turn its attention to the events of 1971; the stabbing of Sandy Seale, the charging and prosecution of Donald Marshall, Jr., and his subsequent conviction and sentencing. Racism would only be an issue for consideration by the Commission if it could be shown to be related to one of the circumscribed issues.

This relevancy requirement was fulfilled by the applications for standing offered by the Union of Nova Scotia Indians and Black United Front. But, as Salter (1988) notes, the government to whom the final report must be addressed acts as a silent partner in deliberations by a

commission. "What the government will want to hear" or "what the government will buy" becomes a factor in where a Commission will concentrate its efforts. The Marshall Commission viewed the development of meaningful recommendations as the most important part of its mandate (Hickman:May 13, 1987:3). Salter argues that "the pressure to produce them [recommendations] exerts a powerful control upon the commissioners, and forces even the most forward thinking inquiries to be pragmatic and reformist" (1988:11). The mandate told the Commissioners what the government wanted them to inquire into. The mandate appointed three judges whose expertise lay in the criminal justice system. The Commissioners willingly battled to extend the mandate in areas of their expertise (See Chapter Five). The public statements of two government Ministers, made near the end of the public hearings, that racism was not a problem in the province, simply reaffirmed what the Commissioners already knew, i.e. what the government did not want to hear. As noted the Commission bucked the government in the funding argument, in seeking politicians' files and cabinet conversations, and in trying to compel the judges of the Court of Appeals to appear. In planning their strategy for the hearings, they chose to leave the issue of racism - an area outside their expertise - to the academics and thereby still maintain their autonomy and integrity. Moreover, their strong desire to wage the battle on the political front left them little energy to open another campaign on the issue of racism. Systemic racism

was too broad and undefined an issue for the Commission to handle even with its liberal view of what was allowed in the mandate. As Justice Hickman remarked, "We can't solve all the problems of the world".[9] The result was that where racism was concerned, the Commission accepted the mandate provided by the government and initially, at least, only wanted to hear evidence of racism if it could be shown to be directly relevant to the fact that Marshall was charged and convicted. Their decision was consistent with the practice of professionalized justice which operates as a "state authorized institution, restricted by internal rules and a narrow definition of the incident" (Cain 1988:65). The Commissioners' reluctance to inquire into the general climate of racism in the province, however, brought them into conflict with the lawyers for Black United Front and Union of Nova Scotia Indians who saw the hearings as a forum to explore not only individual racist behaviour but the concept and practice of institutionalized racism. Marshall's lawyers also accepted this situation and explored racism as an issue only in the context of their client's direct interests. However, it was clear that the lawyers for Marshall were actively cooperating with and supporting the efforts of the lawyers for the Black United Front and Union of Nova Scotia Indians to expand the vision of the Commissioners about systemic racism.

<u>Forum</u>

The time honored tradition of the courtroom has well defined rules of procedure. The object of the procedure is to present facts on which the judge or jury can base a verdict of guilt or innocence. Motive, the reason why a crime was committed, is also sought in the courtroom. But the reason why a person does an action is more difficult to determine than the fact of what was done. Motive is most often arrived at by implication. The weight of facts is used to imply the reason why an act was committed. Generally speaking, racism is not a "fact"in so far as the legal system is concerned. It is an attitude, sometimes obvious, sometimes covered with layers of tradition and propriety. Even when institutional practices point to racism, as with the fact that there has never been a Native person on the payroll of the City of Sydney (testimony Whalley:March 24, 1988), courts are reluctant to look beyond the "facts" to describe the systemic condition. Witness testimony and other forms of evidence presented in a court of law are sometimes sufficient to determine what was done but they are less able to offer any certainty about why it happened the way that it did.

A quasi-judicial forum like that of the courtroom was the vehicle chosen by the Commissioners to inquire into the Marshall case. So the forum itself became one of the obstacles which faced the Commissioners in their attempt to deal with the issue of racism.

Lawyers closely connected with the Commission expressed doubt when asked whether racism could be adequately explored

in the context of a quasi-judicial public hearing. One said:

> "The answer is, I don't know. Nobody has ever tried to bring out racism in a forum like this. And I suspect, my feeling is, it's not very good for it. I think I have more confidence in the academic studies that are going to be commissioned. And the academics are going to do things that we would regard as being unacceptable from the lawyer's point of view and probably not very hard science in that they are just going to walk around and talk to people; granted their years of training and experience. And that too is a very subjective process. So it can be attacked. But I think I would rely on it more than I would rely upon what we see here. Particularly when you're dealing with a culture that you don't understand and I don't understand native culture."[10]

Another stated:

> "When you bring in the issue of racism, it really clouds that first issue (police procedure in the investigation) to some degree... It becomes a very difficult thing to get a handle on if you decide that you're going to have that as an issue. You really open up the field of questioning because if you ask somebody if they're a racist they're going to say no. So, what you have to be able to

demonstrate are that by certain acts or things they've said they really are in fact racist. So it becomes a very difficult thing."[11]

The rules of procedure used in the courtroom put limits on what can be asked of a witness. The limits are designed to bring out what the witness knows of his own knowledge and exclude opinion or supposition. This traditional approach made it difficult to pursue a line of questioning which was directed at the attitude of individual witnesses toward minorities or racial groups. Lawyers were chastised when they tried to raise the issue of racism as opposed to "issues of fact" (Cape Breton Post, September 11, 1987).

These examples point out that the choice of the courtroom-like forum with its formal trappings and ritualistic procedure caused additional difficulty even when parties tried to explore the extent to which racism was a factor in the ordeal of Donald Marshall, Jr.

The quasi-judicial forum caused two types of problems in dealing with the issue of racism. The more general and less problematic was the physical surroundings. The Commission set out to hold public hearings and insisted that the hearings be held in surroundings where the public might feel more comfortable than in a formal courtroom. In addition they planned for local cable networks to carry the proceedings for those who could not attend in person.

Although they imported some of the formal trappings of the courtroom into the church basement in downtown Sydney,

the Commissioners managed to create an atmosphere of informality which drew a faithful audience of ordinary people from the city. While the lack of wheel chair access caused one protest, and a persistent loudspeaker problem made it hard for the public at the back of the room to hear, in general, the comments of those who attended reflected favorably upon this attempt to make the public a partner in the hearings. The Commissioners passed through the public area on their way to and from the dais and developed a pattern of friendly chatter with some of the regulars.

The cable coverage, according to one media representative was even more popular than the afternoon soap operas.[12] Unfortunately, technical problems limited the viewing audience to those living outside the City of Sydney proper.

When the hearings moved to Halifax in January 1988, the informality of the cozy, sometimes uncomfortable, church basement was lost. The ballroom of the Lord Nelson Hotel, the cramped, albeit new and modern, rooms of the International Trade Center and the plain but serviceable St. Thomas Church Hall never achieved the popularity of the first location. Cable coverage also ceased, for reasons that were never explained.

The attempt to provide an informal and open setting for an inquiry creates other problems. Sopinka (1988) argues that individual rights which are protected by formal trial procedures can be lost when an inquiry becomes the center of

media attention. Grange (1988), although he favors television in the courtroom, feels that the media tends to overemphasize the sensational aspects of public inquiries in order to pander to the lowest common denominator of their audience.

London supports the idea of the public judicial inquiry system but warns that allegations made at an inquiry may unfairly jeopardize the character or reputation of individuals because the testimony is:

> "inherently less reliable than that in a courtroom trial because normal legal protections, like the rule against hearsay evidence, are not observed in the inquiry process" (1989:35).

During the course of the Marshall Commission hearings, numerous allegations of racist attitudes arose. Bernie Francis, a former Native Court Worker, cited a number of examples of prejudicial behaviour toward Micmacs in the criminal justice system. He recalled in particular a comment which he attributed to Provincial Court Judge John F. MacDonald that "they should put a fence around the reserve to keep the Indians where they belonged" (testimony Francis: November 2, 1987). Tom Christmas, a Native and friend of Marshall, testified that Indians were often chased out of Wentworth Park by Sydney police and that on one occasion he (Christmas) was chased, caught and beaten with a club by Officer Wyman Young (testimony Christmas:November 3, 1987). Eva Gould, an associate of Francis in the Native Court Worker

program, confirmed that Judge MacDonald made the statement about a fence around the reserve and added that Assistant Crown Prosecutor (now Judge) Lew Matheson concurred with MacDonald (testimony Gould:June June 2, 1988). Catherine Soltesz, a non-Native teenager who hung around with Indians in 1970-71, told how the police took her name and then went to her home and reported to her parents that she was associating with bad company (testimony Soltesz:October 27, 1987). Emily Clemens, mother of a girlfriend of Marshall in 1971, testified that she 'believed' that MacIntyre was out to get something on Marshall (testimony Clemens:October 27, 1987). Felix Cacchione, Marshall's lawyer during the 1984 compensation proceedings (now a County Court Judge), told how Judge Robert Anderson advised him, "don't get your balls caught in a vice over an Indian". Cacchione testified that at the time he considered it a racist comment, but he has since changed his mind and no longer considers Judge Anderson to be a racist (testimony Cacchione:May 17, 1988).

The Commission, in fairness to the individuals so named, provided time for them to respond to the allegations. Judge John F. MacDonald, and Police Officer Wyman Young were added to the witness list of the Commission solely to respond to the specific allegations of racism. Lew Matheson spent a large part of his two and a half days of testimony refuting the charge that he showed bias against Indians and the Native Court Workers in the court or outside (testimony Matheson: November 9, 10, 16, 1987). Judge Anderson likewise suffered

through an uncomfortable hour trying to explain away the apparent racism in his remark (testimony Anderson: February 3, 1988). The many hours of testimony spent refuting the specific allegations of racist comments or behaviour diverted the Commission from its goal of looking at the politics of the justice system and extended the time of the hearings. The forum, then, because of its informality, made it easier for witnesses to inject personal beliefs and opinions into the proceedings and open the discussion to areas beyond what the Commission intended.

The second and more difficult problem for the presentation of the issue of racism came from the procedures which were part of the quasi-judicial forum.

Commission counsel had the job of calling every witness to be heard by the Commission (Hickman:May 13, 1987:4-5). In most cases[13] Commission counsel interviewed each prospective witness before hand and gave other counsel a summary of the anticipated testimony. This summary, however, could not be used by a lawyer on cross-examination to impeach a witness if the actual testimony differed from what appeared in the summary.[14] Commission counsel decided what questions would be asked on direct examination. Since cross-examination is ordinarily limited to what the witness said under direct examination, this practice gave Commission counsel control over the range of questions that could be asked by the Black United Front and Union of Nova Scotia Indians lawyers.

This problem arose with the first witness, Roy Ebsary, the person who stabbed Sandy Seale. Allegations had been made that it was an unprovoked attack motivated by Ebsary's racist attitude toward blacks and natives. Commission Counsel did not raise the allegation of racism. When Black United Front lawyer Tony Ross tried to question Ebsary about the issue, he was ruled out of order (see testimony, Ebsary: September 10, 1987). Bruce Wildsmith, representing the Union of Nova Scotia Indians, likewise sought to question Ebsary about his attitude. He was told that the matter was not relevant (Cape Breton Post, September 11, 1987). When Wildsmith respectfully dissented and objected to the ruling he was informed that the reason for having Ebsary as a witness was to get at the facts of the incident and that the issue of racism would be explored in the studies planned by the research arm of the Commission (ibid.). These studies and their results would then be examined in more depth when the Commission entered the second phase of its hearings (Micmac News, September, 1987).

This scenario was repeated when Maynard Chant, one of the two teenagers who gave perjured testimony in Marshall's original trial was on the witness stand. Chant said in passing that after he testified against Marshall, he (Chant) developed a paranoia about Indians and felt they were looking for an opportunity to get revenge on him for his part in Marshall's conviction (testimony Chant:September 15, 1987). Even with this opening in the testimony Wildsmith was not

allowed to pursue the issue of racism or racist attitudes which might have been prevalent in Sydney at the time (testimony Chant:September 16, 1987). Wildsmith chafed publicly at the restriction, saying, "my impression is that the Commission hasn't demonstrated it understands the definition of racism and discrimination and doesn't want to give it the same weight as evidence relating to Marshall" (Chronicle-Herald, September 17, 1987).

The problem was partially resolved after a private meeting between Commission counsel and lawyers for the parties, when Commission counsel agreed to ask questions about racial attitudes in the direct examination and more leeway was "granted to lawyers to pursue the racism issue with witnesses" (Cape Breton Post September 19, 1987). But on a number of occasions Wildsmith and Ross were again cut off in their questioning because their attempt to expand on the testimony was viewed by the Commissioners as needlessly repetitious (see for example, testimony A. MacDonald: September 17, 1987 and Walsh:September. 21, 1987).

It was ironic that Ross and Wildsmith who represented visible minority groups were located at the rear of the ranks of lawyers. Also, they were last in line to cross-examine witnesses. Frequently their turn did not come until late in the day when witness and listeners alike were reaching a low level of energy and enthusiasm.

Although loosening the limits of cross-examination did result in some potentially valuable testimony about racial

attitudes of individual witnesses, it stopped short when attempts were made to introduce the broader concept of institutional racism. Black United Front and Union of Nova Scotia Indians lawyers were reminded that issue was more properly the subject of the academic studies which had been ordered by the Commission. In denying the application of Black United Front to present testimony about a study they had conducted about the deaths of five black men, including Sandy Seale, Hickman cited one reason for the denial as "racism cannot be proven in a legal forum such as the Inquiry and that witness testimony was not the best way to present the evidence" (Chronicle Herald, September 22, 1988).

In a very real sense racism had been relegated to second class status as an issue before the Commission. Whether this was due to a lack of understanding of racism on the part of the Commissioners as suggested by Union of Nova Scotia Indians lawyer Bruce Wildsmith, or a genuine belief of the Commissioners that they would learn more and better from the academic studies is a question that may be answered by an in depth study of the Commission's recommendations. While such a study is beyond the scope of this thesis, the continuing demands for another royal commission to investigate racism indicates that the recommendations offered by the Commission have not served to satisfy Blacks and Natives that their concerns have been heard and acted upon. (Mail Star, March 17, 1990, Daily News, March 22, 1990) However, it is clear that the quasi-judicial forum, selected by the Commission as

its mode of operation, was itself a significant obstacle for the Commission in coming to an understanding of racism during the public hearings.

Personnel

It is common knowledge that the ranks of Judges and lawyers in Nova Scotia and the Atlantic region generally are drawn primarily from the middle to upper class white, anglo-saxon population. Indeed, there is only one native and a handful of blacks admitted to the bar in Atlantic Canada.[15]

Conversely, when blacks or natives appear in a courtroom, it is safe to say they are most often present as the accused, the victim or as witnesses in the criminal proceedings. A plethora of studies in the last twenty years has shown that natives and blacks are over-represented in the courts and jails relative to their percentage of the population (See for example:Hylton:1983; Lock:1988; Friedenberg:1985; Anderson:1986; Thacher:1986).

Because racism, both directly and institutionally was suggested as a factor in the wrongful imprisonment of Donald Marshall, Jr., we might ask whether judges and lawyers are the most suitable personnel to assess this issue.

Neither by training, nor by experience are judges and lawyers specially equipped to deal with this sensitive issue. On the contrary, they are often viewed as a part of the problem.[16] In the Manitoba Native Jusitce Inquiry, witnesses from Northern regions complained about the practice of

judges, prosecutors and defense lawyers flying together into remote settlements. They argued that the these outsiders were ill equipped to understand Native language or customs and provided little chance for preparation of an effective defense for those accused of crimes (Toronto Globe and Mail, October 19, 1988). Provincial Court Judge Lewis Matheson and County Court Judge Robert Anderson were both accused of making racist comments (Daily News, March, 9, 1988). And Appeal Court Judge Leonard Pace who sat on the reference panel in the Marshall case was accused of bias (Testimony, Marshall: June 28, 1988 & Giovanetti:May 30, 1988). The comments of lawyers connected with the hearing (see above), point to their own uncertainty about whether judges and lawyers are the best choice to look into the question of racism in the criminal justice system. Other lawyers echoed that concern. Said one:

> "There may be some merit to that (the academic studies) because there may be people who think much differently than legal counsel do about these kinds of things, psychologists and so on. But, that's not my field, a normal lawyers kind of field, to go into that sort of thing. And I suppose you'd have to have some people who trained in that subject to come and give evidence."[17]

Another added:

> "It may be difficult for all of us because all of us are a product of our background. Parker (journalist Parker Donham) said somewhere, "how can you expect three white pillars of a community to understand?" And he may have been saying it disparagingly, I don't know, but there may be some truth in that. It may apply to all of us, all of us with the exception of Tony (Black United Front lawyer Tony Ross) are white. All of us approach the thing from our own background and so we may not see it at all. And so it may be difficult for the Commissioners to see it, maybe."[18]

These comments express what the lawyers themselves saw as a difficulty which the legal community and the Commission faced in trying to sort out what effect racism may have had in the Marshall case and in the administration of justice generally.

Dealing with cultural baggage of which we may be totally unaware is never an easy task. It requires an open mind and a willingness to examine and question the beliefs as we come to recognize them in ourselves. The lawyers connected with the Commission whom I interviewed presented a mixed bag of responses when asked about institutional racism and the difficulty of presenting such a concept to a mainly white, middle to upper class group of professionals.

One said:

> "I'm probably the least prejudiced guy you'll ever meet in your life, but I suppose that somebody else might say I am. ...but you see, it's easy for me to say because I'm white. But it's, like we say, we don't see prejudice. But I suppose if you spend the whole day seeing nobody but white people, of course you're not going to see prejudice and you're not going to think it exists."[19]

Another expressed the keen difficulty of overcoming one's personal prejudice:

> "Even as a lawyer who tries to be progressive you get caught up in that (institutional racism). It's very hard not to be, how might I express it... you enter this sort of priesthood. I think it becomes very hard to become sufficiently critical of the system because you're part of it. And the only really effective criticism would be to get out of it."[20]

Another had reached his own conclusion about the impact of racism even before the Commission moved to Halifax where it promised to look at the issue more closely:

> "I would suggest that the Commission, on the basis of the evidence we have now will dismiss that (racism) from their deliberations as a

reason for Donald Marshall, Jr. being charged and convicted... that racism was not the issue or the underlying feeling in the community which got him convicted. There's no evidence of that... that racism was something... how do you find that?"[21]

But the Commissioners themselves gave every indication of listening carefully to some of the testimony about institutional racism and its effects. When former Native Court Worker and linguist, Bernie Francis testified about the effects of racism for an Indian growing up on the Membertou reserve in Sydney and the problems of understanding the English language when Micmac may be the only language heard at home, the Commissioners plied him with questions, requested further information and clarification and ended by offering him thanks for the informative nature of his testimony (testimony, Francis: November 2, 1987). Similarly, the Commissioners asked probing questions of Eva Gould about the progress and problems of the Native Court Worker Program in which she worked for four years (testimony Gould:June 2, 1988). These examples indicate that the Commissioners used their stockpile of experience to seek an understanding of institutional racism even though it was not a priority on their agenda. One lawyer, who was initially skeptical of the Commission's handling of the racism issue, became more hopeful that the message was reaching the Commissioners:

> "I'm still optimistic. I think the whole process has raised the profile of this kind of issue... But I think the Social Science study is going to be very important... And if the Commission accepts even to the point of saying, 'look, there are problems, we don't have the answers, but there are problems that probably need to be addressed,' that's going to be a major accomplishment."[22]

Another, however, remained staunchly critical:

> "It's quite clear that on the racism issue, they're hopeless. They're sixty, seventy-five year old men who grew up in a generation that had certain views about Indians. And those views are ingrained in them and it's a struggle for them to try to come to any other view. And you can watch them struggling. But I have no illusion that people open up at age seventy very easily."[23]

Lawyers' Roles

On an average day, a dozen or more lawyers occupied the tables in front of the three Commissioners. Each had a specific role to play in the hearings. The three Commission colunsel had to present all relevant evidence, obtain experts, do research on the legal issues and present opinions to the Commission (Hickman:May 13, 1987).

In addition, each of the parties granted full standing was allowed to have legal counsel "to present their point of view or protect their interests during the proceedings." These counsel were entitled "to cross-examine witnesses, make submissions to the Commission and participate fully in the Hearings" (ibid.).

This meant that after the Commission Counsel finished direct examination wherein, presumably, "all relevant and necessary evidence" was drawn from the witness for the benefit of the Commissioners, as many as a dozen other lawyers might take a turn at examining the witness.

In most of these cross-examinations, the role of the lawyer was to highlight the evidence most favorable to their individual client's point of view and soften or play down evidence which might cast their client in a bad light. The "art" of cross-examination in the court room is designed to test the credibility of the witness. But this technique can sometimes cause confusion instead of clarity. One lawyer described the process in this way:

> "As to the technique of examining witnesses on the stand, I guess I think that it's a useful thing. And I guess I think that it's important that peoples' views be subject to cross-examination. On the other hand, lawyers do have a tendency to want witnesses to tell the story that they want the witness to tell, rather than the story the witness

wants to tell. In other words, lawyers, as part of their professional technique, not to distort or pervert the testimony, but nevertheless put a slant on the testimony out of the persons own mouth that conforms to what the lawyer wants the person to say. And sometimes that can have an impact of leaving the testimony unsettled at the end. So all of these techniques of persuasion are brought into play and may cloud it."[24]

Another lawyer defended the process and felt it would not cause difficulty for the Commissioners when it came time to sort out what happened and why:

"There is no truth, there is only truth as so and so sees it... bear in mind that this is an age old process that has proved its effectiveness in terms of finding facts in spite of the subjectivity of observation. And these three judges have got a lifetime of working in that system and are probably pretty damn good at sorting out the obfuscations and figuring out what is the likeliest and best explanation of what really happened."[25]

Whichever of these two views one prefers, it is clear that the conflicting roles of the lawyers, presents a difficulty for the Commission in reaching conclusions. In the best scenario, the judges will see through the fog of

"client-serving" questions and come to the right conclusions. In the worst case, the skill of the lawyers in fulfilling their role will leave the judges lost in the clouds.

The adversarial roles of the various lawyers for the parties with standing took up a large portion of the public hearing time. Except for the efforts of the lawyers for the Black United Front and Union of Nova Scotia Indians to clarify the issue of racism for the Commissioners, it appeared to be more an exercise in lawyers trying to justify their fees than a process that brought enlightenment on any other issue.[26] Commission Counsel were for the most part able to elicit the bulk of the information from the witnesses. One lawyer described his input to the process as "more like filling a few pot holes and painting lines on the road, than providing direction for the travel".[27]

The Commissioners seemed to view the whole process with benign condescension, perhaps because of their long experience as criminal court judges where vigorous cross-examination of witnesses is the lawyer's bread and butter. And the lawyers recognized that their efforts to promote their clients' interests or soften the effect of an adverse witness might help clarify a point for the Commissioners but wasn't likely to have too severe an effect on the findings of fact that they might reach:

> "While they may not accept everything that I want to urge on them, for example, I think they're going to do a pretty good job of sorting

> out the facts. When I'm obfuscating... they spot it most of the time. Occasionally I'll put one over on them and occasionally someone else will put one over. But by and large that process clarifies rather than obfuscates.[28]

Because the lawyers representing the Black United Front and Union of Nova Scotia Indians, in trying to raise the larger issue of racism in society generally, were not attacking any specific party, their attempts to educate and inform the Commissioners were not met with a direct attack from other lawyers. For this reason, the adversary role of the lawyers did not cloud the issue of institutional racism. Rather, given the commission's obvious desire to have the issue of racism confined to the academic studies, the lack of adversarial conflict had the effect of aiding the Commissions plan.

Academic Studies

The four areas examined in this chapter, mandate, forum, personnel and lawyers' roles, are the framework in which the Commission dealt with the issue of racism in public. The academic studies ordered by the Commission, on the other hand, two of which concern racism, were not a direct concern of the Commissioners until the after the public hearings were complete. They were conducted separate and apart from the public hearings. The Commission decided what would be studied. The researchers decided how the studies would be

conducted. Peer reviews of the studies were held behind closed doors, by invitation only, away from public and media view.[29] What, then do these studies, "The Mi'kmaq and Criminal Justice in Nova Scotia" and "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System"[30] tell us about the way in which the Royal Commission functioned?

The decision to conduct academic studies served at least five distinct purposes for the Commission. First, and most obvious, it provided a body of information from reputable sources which the Commission could use to make their findings and formulate their recommendations. Second, it showed the integrity of the Commissioners' commitment to look "all contributing or potential contributing factors... within the context of the current state of the administration of justice in Nova Scotia" (Hickman:May 13, 1987:3). Third, it allowed the Commission to exercise autonomy over the focus and content of their work without coming into public conflict with the provincial government as they did in the issue of funding for parties and their request for files in the Attorney General's office about politicians (see Chapter Five). Moreover, the academic studies could not be challenged by government officials as exceeding the mandate because it "direct[ed] the Commissioners to retain the services of legal counsel and such other technical... personnel who, in the opinion of the Commissioners are required for the purposes of the Inquiry" (Order in Council, October 28, 1986). Fourth, as I showed above, the existence of the academic studies allowed

the Commission to avoid testimony in the public hearings about systemic racism or specific allegations of racism which were not directly related to the Marshall case. Fifth, the academic studies provided a private forum for gathering information about racism in the province. Persons who might wish to offer information could do so away from the intimidating glare of the media and without the ordeal of public cross-examination.

From the outset, however, the academic researchers were saddled with obstacles. Time and money were but two of the problems they faced. In the study of Blacks for example, the research team was assembled late in 1987[31] and required to deliver its research for peer review in June 15, 1988. Included in this scant seven month period were the research design, selection of interviewers, the interviews, other data collection, collation and the actual writing of the report. Objection to the process was so marked at the peer review that one of the main researchers removed his name from the draft working paper.[32] Blacks from the community were also unsatisfied with the scope of the research. As a result, near the end of the public hearings, Lawyer Tony Ross submitted a formal request for the Commission to call as a witness a researcher who had conducted a separate study for the Black United Front.[33] This study looked at five specific cases which the researcher intended to present as evidence of the continued discrimination against Blacks by the criminal justice system in the province. This event occurred after the

peer review of the academic study on Blacks and was prompted by dissatisfaction on the part of the Black United Front that these cases had not been investigated in the academic study. Justice Hickman denied the request saying, in effect, that the Commission had received enough information from the academic study they had ordered and that "viva voce" evidence was not necessary on the issue (September 12, 1988). A comparison of the Draft Working Paper of the study of discrimination against Blacks in Nova Scotia with the version that became Volume 4 of the Commissioners' Report (February, 1989)[34] shows that they are essentially similar so we may conclude the private research effort did not make its way to the Commissioners for their consideration either in the public hearings or in the findings of the academic research.

A second problem was money. While I do not argue that dollars spent reflects directly on the quality of academic research, lack of money to conduct research does limit what could be done in the short space of time allotted to the studies. The Supplement to the Public Accounts Committee (page 104-105) tabled in the Nova Scotia Legislature in April 1989 shows that Wilson Head received $5,414.25 for his work. This contrasts with $64,071.50 for transcription service during the Sydney phase of the public hearings and $215,585.66 paid to the lawyers for John MacIntyre and William Urquhart. Even if, for the sake of argument, the money paid to Wilson Head represented only ten percent of the

actual cost of the research study, it would still be indicative of where the greater degree of emphasis was placed by Commission.

The private nature of the academic research had two effects. First, the media, and therefore the public was not made aware of the specific issues and individuals being examined by the researchers. Second, unless they were contacted by the researchers, most people were unaware that this avenue existed for them to present information to the Commission. In fact, the draft working paper (September, 1988) of the study on discrimination against Blacks was marked "Confidential, For Discussion Purposes Only Not for Citation or Attribution".

A significant difference, however, between the studies concerning racism in the criminal justice system and the other academic studies ordered by the Commission was that only where racism was concerned did the Commissioners use the existence of the studies as a reason to avoid or defer testimony at the public hearings. The topics of the three other research efforts order by the Commission, policing, the Office of Attorney General and its relationship to police and prosecutors, and the role of prosecuting officers were all explored at length in "viva voce" testimony. Police officers, Crown Prosecutors, Attorneys General, Judges, lawyers, bureaucrats, and present and former RCMP officers testified in detail and offered opinions about the subject matter of the three studies. While the academic research may have

served the other four purposes listed above, they were not used to avoid or defer testimony about the state of policing, the office of the Attorney General or the role of Crown Prosecutors.[35] Only where racism was the topic under discussion was the existence of the academic studies cited as a reason for not exploring the issue in the public hearings.

This shows that, in effect, if not in intent, the Commission functioned differently in its examination of the issue of racism. Even if we accept the best intentions of the Commissioners in placing the examination of racism in the hands of experts, we are left with the question of whether this provided the Commission with sufficient information to form appropriate recommendations to eliminate racism as a factor in the present day criminal justice system.

Conclusion

From this analysis of the framework, plus the use of the academic studies, a number of conclusions can be drawn about the manner in which the Commission dealt with the issue of racism. But each of the conclusions raises its own host of questions.

First, the government of Nova Scotia, in agreeing to a public inquiry of the Marshall case and drawing up the mandate for the Royal Commission, did not intend it to be an examination of the issue of racism. It is safe to suggest that they saw the Commission as merely a way of settling troubled waters and diverting attention from other problems.

Given the government's apparent desire to have a narrowly focused inquiry why were they unable to find some reputable judges who could lend the proper amount of prestige to the exercise while still keeping it within the confines of the mandate? Why was the mandate drawn so loosely? Why was a Royal Commission selected as the vehicle rather than a less formal inquiry? What kind of negotiations preceded the choice of the Commissioners? What was their understanding of the government's reasons for setting up the Commission? Or, given the Nova Scotia government's previous successful experience of "stonewalling" sensitive issues (e.g. the Thornhill affair and the embarrassment of Billy Joe MacLean), why did they set up the inquiry in the first place?

Second, the Commission ignored the limitations written in the mandate and cast a far wider net than the government wanted. Some criminologists might cite this an example of the Commission exercising a degree of relative autonomy because of their unique position in the criminal justice system (Ratner, McMullan & Burtch:1987). But the broadening of the mandate was selective. It did not extend to all the issues raised by the Marshall case. For example, a learned law school professor was invited to analyze the evidentiary rulings of the judge who presided at Marshall's trial (testimony Archibald: November 18, 1987). But the Judge Dubinsky, who presumably would have been able to provide information no longer available because of the death of Crown Prosecutor MacNeil and defense counsel Moe Rosenblum,[36] was

not called as a witness. Another example is the jury system. Information available before the hearings began suggested that the selection of jurors, both at the time and in the present, systematically discriminated against blacks and natives. Yet the Commission steadfastly refused to address the jury selection process. So we might ask, why, having decided to broaden the mandate, did the Commission reject these issues? Why did they choose the issues they did? Who made the choices and what criteria did they use to make their selection? Did the Commission counsel make the choices or was it the Commissioners themselves? Why the emphasis on the political arena to the exclusion of factors more directly connected to the Marshall case?

Third, the Commission did decide to explore the issue of racism, including the amorphous concept of institutional racism. They gave full standing and supported funding for the Black United Front and the Union of Nova Scotia Indians. But they balked when these parties pursued an examination of the issue. Why did the Commission agree to include racism in it's investigation? And then, why did they give it a lesser role? The difficulties experienced by the Commission in controlling the hearings where the issue of racism is concerned, suggests that they intended to limit questions concerning racism to the academic studies. Why then did they give full standing to the Black United Front and Union of Nova Scotia Indians? Was it done to accommodate the black and native communities?

Or, was it a necessary step to include the political issues favored by the Commission?

And, Fourth, the issue of racism continued to cause difficulties for the Commission up until the very end of the hearings. But it was also obvious that the Commissioners, through the persistent efforts of the counsel for the Black United Front and Union of Nova Scotia Indians, and to a lesser extent Marshall's lawyers, did reach a greater understanding of racism and the role it plays in the criminal justice system. So why didn't the Commission shift gears when they recognized the difficulty of dealing with the issue in the format they had chosen? Allowing racism and its possible effects in the administration of justice in Nova Scotia into the hearing was a pandora's box for the Commissioners. Once opened, it forced them to consider far more than how one Indian was treated by the system in one case. Unlike Pandora, curiosity did not impel them to raise the lid too far. Rather they struggled to keep the lid on the box; to keep the issue within the fact finding format of the legal system. Racism may be a fact of life but it was not the type of fact that the legal system usually wants to consider. Experts appeared before the Commission for other reasons, so why was it not also possible to bring in experts on racism and have them testify in the open hearings?

Or, why didn't the Commission convene informal public meetings on native reserves like those which proved so

beneficial to Justice Berger in his inquiry into the impact of the gas pipeline on natives in Northern Alberta.

Unfortunately, the Commission did not choose alternatives which might have enabled them to come to a better understanding of the impact of racism on Donald Marshall, Jr., the criminal justice system or the province as a whole. As a result they are left to struggle with what they got, in the way they got it. As a result, pressure has been building for another inquiry into allegations of racism in the province (see for example: Chronicle Herald, September 22, 1989 and September 28, 1989; Dalhousie News, September 27, 1989; Daily News, October 1, 1989; Atlantic Insight, September, 1989; Mail Star, February 17, 1990: Chronicle Herald, July 21, 1990). But because the Commission did, on the surface at least, include racism on the agenda, and because it has now offered recommendations about the issue, the provincial government will be able, if it wishes, to point to those recommendations as a reason to deny any further investigation of the problem. An editorial in the Halifax Daily News (November 16, 1989) warned that people should not delude themselves into believing that current inquires in Nova Scotia, Manitoba and Alberta will resolve native issues because the "inquiries can lead us to assume something is being done." The increasing militancy of Native groups across the country indicates that they are not hopeful that recommendations like those produced by the Royal Commission will result in any significant change.

In the next chapter I will examine how the Royal Commission's examination of the issue of racism along with the issues just raised, can be best explained as an example of the relative autonomy of the criminal justice system within the context of the Canadian State (Ratner, McMullan & Burtch:1987).

Chapter Six Notes:

1. Ontario established a task force on policing and race relations in response to the controversy generated by the fatal police shootings of two Toronto-area black people in 1988. (Toronto Globe and Mail February 20, 1989)

2. The two judge inquiry in Manitoba was established in 1988 after intense pressure from native groups who were angered by the provincial justice system and its handling of two controversial cases. In one case, a native leader was shot by a police bullet. In the other, the murder of a native woman went unsolved for 16 years. (Toronto Globe and Mail Jan. 21, 1989)

3. As part of a panel discussion titled "Ethnocentric Social Formation: Perspectives on the Donald Marshall Enquiry" at the annual conference of the Atlantic Association of Sociologists and Anthropologists, March 10, 1988, Dr. Harold McGee discussed the work (unpublished) he conducted in Sydney in 1969 and 1970.

4. The Commission also recommended public funding for legal representation for John MacIntyre, the Estate of Donald C. MacNeil, Q.C., and Oscar Nathaniel Seale. (Decision on Legal Funding May 14, 1989)

5. To relieve boredom, media representatives at the hearings started a pool based on the number of times police witnesses would use the phrase "I don't recall" or some variant thereof in responding to the questions of the lawyers. See, for example the testimony of A. MacDonald, September 17, 1987; M. MacDonald, September 21-22, 1987; and MacIntyre, 7-11, 1987.

6. Testimony of A. MacDonald:September 17, 1989; Walsh: September 17, 18, & 21, 1987; and M. MacDonald:September 21-22, 1987 focused in large measure on the inadequacies of the police investigation of the stabbing.

7. The testimony of Sydney police officer J. Butterworth, on September 23, 1987, pertained to an unrecorded conversation with John Pratico which took place somewhere on Charlotte Street in Sydney sometime during the Summer of 1971, after the stabbing and before the Marshall's trial. The substance of the alleged conversation was that Pratico admitted that he had seen the stabbing.

8. Letter of Susan M. Ashley, Commission Executive Secretary to the author while employed by the Commission, November 25, 1987. Apparently this policy had some exceptions. Stephen Kimber, hired by the Commission as Editor of the Commissioners' Report (1989) was also the co-author of a scathing article on the state of the

justice system in Nova Scotia which appeared in the December 1989 issue of Atlantic Insight a month before the report was released to the public.

9. During the course of the public hearings in Sydney, the Commissioners (except Justice Evans who favored the sauna and whirlpool) and Commission Counsel relaxed at the end of the day by playing table tennis in the game room at the Holiday Inn. The author was allowed to join them during these sessions and this quote comes from one of the informal conversations held during this time.

10. Lawyer #1, interview November 16, 1987.

11. Lawyer #2, interview December 18, 1987.

12. Roger Bill, Maritime regional correspondent for the CBC Sunday Morning Radio program offered this reflection after visiting homes in the towns surrounding the city of Sydney while preparing a documentary on the effect of televising the proceedings.

13. Some witness, notably Wheaton, Carroll, and Marshall, himself refused to take part in the pre-interview by Commission counsel. When these witnesses took the stand, counsel introduced the questioning by informing the Commissioners of this fact as an explanation of the more halting flow of the questions occasioned by the lack of preparation.

14. This procedure was revealed to me by lawyer #7, Interview, March 2, 1988.

15. Interview, Lawyer #5, January 20, 1988 and #7, March 2, 1988

16. The administration of justice including the conduct of judges and lawyers as well as the police are under scrutiny in the Ontario and Manitoba inquiries. (see Notes 1 & 2, above).

17. Lawyer #3, interview December 21, 1987.

18. Lawyer #4, interview January 14, 1988.

19. Lawyer #6, interview February 2, 1988.

20. Lawyer #9, interview April 13, 1988.

21. Lawyer #3, interview December 21, 1987.

22. Lawyer #5, interview January 20, 1988.

23. Lawyer #1, interview November 16, 1987.

24. Lawyer #5, interview January 20, 1988.

25. Lawyer #1, interview November 16, 1987.

26. Lawyer #6, interview February 2, 1988.

27. Lawyer #7, interview March 2, 1988.

28. Lawyer #1, interview November 16, 1987.

29. Although I was not invited to attend the peer reviews, I showed up, took a seat and made copious notes on the sessions devoted to the Blacks and Natives, June 15 and 16 respectively. The following work day, I was called on the mat by the Commission Executive Secretary and Commission counsel George MacDonald who chastised me for attending without their permission and informed me that I would not be allowed to attend the peer review sessions of the other three studies.

30. These studies became volumes 3 and 4 respectively in the Commissioners' Report. (December, 1989) It is not my purpose here to analyze the content of the studies nor examine them in detail to see which recommendations of the studies made it into the final report of the commission. Rather, my purpose is to show how they influenced the way in which the Commission treated the issue of racism and what we can learn from this about the way in which commissions function within the context of the state.

31. Conversation with John Briggs, Director of Research, at the annual conference of the Atlantic Association of Sociologists and Anthropologists, March 10, 1988.

32. Professor Don Clairmont, Department of Sociology and Anthropology, Dalhousie University complained that the time allotted was not sufficient for him to properly review the working paper by the time of the peer review session on June 15, 1988.

33. Conversation with BUF lawyer, Tony Ross and Rocky Jones who conducted the study on behalf of BUF immediately following the incident described, September 12, 1988.

34. The studies on racism in the criminal justice system, Volumes 3 & 4 of the Commissioners' Report (December, 1989) are dated (February, 1989). Given that the research did not get underway until the spring of 1988 (Briggs, March 10, 1988), it would not be inaccurate to describe the academic research on racism in the criminal justice system as hasty and pressured.

35. I am asserting a negative in this case and cite as my reference my own attendance, close attention and notes on the proceedings as proof of the assertion.

36. Rosenblum was the son-in-law of Justice Dubinsky who presided at Marshall's trial. Whether this influenced the course of the trial was a frequent source of speculation in the media room at the public hearings and among some lawyers in Sydney. It was suggested that Dubinsky would not want to appear to favor Rosenblum and also once he made a decision would not have wanted to back down from Rosenblum. Rosenblum's reputation as the 'smart lawyer' in town may have caused Dubinsky to hold fast to a ruling rather than back down and lose face. On the other hand, Rosenblum's failure to raise Dubinsky's erroneous evidentiary rulings about Pratico's testimony and the faulty instructions to the jury in the 1971 appeal of Marshall's conviction, were suggested by some wags as deference to Dubinsky by Rosenblum. Although this is at best gossip, it would be consistent with the pro forma appearance of the appeal and the obvious belief of Rosenblum that Marshall was guilty.

CHAPTER SEVEN

The State, Criminal Justice Politics, and the Royal Commission on the Donald Marshall Jr., Prosecution

> "In the legal thinking that dominates our image of law, ...law is seen as something that operates outside of particular interests for the good of the whole society. At best this is a naive conception of law. But it is also dangerous, in that it would have us live according to a myth" (Quinney:1978:41).

> "...the law is not impartial when a poor man meets a rich one. The law reflects not justice, but power. Laws are made by those who have the power to enforce them" (Cameron:1977:87).

Royal Commissions of Inquiry are frequent (Sopinka:1988) yet anomalous and contradictory bodies (Salter:1988). They are not an ordinary part of the criminal justice system, yet to a large extent they employ the procedures and practices of that system to carry out their work. In outward appearance

they are like a trial, but one in which no one goes to jail (ibid.). They are usually about politically sensitive matters (Grenville:1988) but function with an aura of independence from the political body which sets them up (Aucoin:1988, Salter:1988). They have wide ranging powers to conduct the inquiry, but little power to enforce the results of their deliberations (ibid.). The Marshall Commission had these contradictions and many more.

Throughout this thesis I have argued that an empirical analysis of the volumes of information provided by the Royal Commission on the Donald Marshall Jr., Prosecution is useful because it demonstrates the complex interaction of the various levels of the criminal justice system and the concomitant political and social conflicts which were at work in the case. Moreover I have suggested that the convoluted actions of the criminal justice system of Nova Scotia in its handling of the Marshall case and setting up the Commission can best be understood by applying the theory of the relative autonomy of the state (Ratner, McMullan & Burtch:1987).

Before discussing what the Royal Commission tells us about the way the criminal justice system functions within the context of the state, it is appropriate to review the arguments made thus far.

Chapter Two asked why Donald Marshall, Jr. was arrested, tried, convicted and imprisoned when he was not guilty. It described the circumstances of the stabbing of Sandy Seale in 1971, the police and RCMP investigations of the event and

Marshall's arrest, trial and conviction. It concluded that Marshall was the victim of incompetent police investigations compounded by failure of every step of the justice system designed to protect the innocent. Throughout, Marshall was totally dependent upon the criminal process, such that he was powerless to protect his own interests (Ericson and Baranek: 1982).

Chapter Three asked why the criminal justice system failed and how it responded when the failure was discovered. It described the series of failures in the criminal justice system which reaffirmed Marshall's dependency in the criminal process (ibid.), pointed out the cultural blindness of the professionals in the criminal justice system that prevented them from seeing Marshall's innocence (Wall:1988), and noted areas where components of the criminal justice system displayed a degree of autonomy in dealing with the effects of the system failure (Ratner, McMullan & Burtch:1987). The chapter concluded that the justice system's actions amounted to a denial of responsibility for the failure and an attempt to restore its aura of legitimacy (Panitch:1977) by blaming the victim, Marshall.

Chapter Four asked why the government of Nova Scotia established the Royal Commission on the Donald Marshall, Jr., Prosecution. It examined other opportunities when such an inquiry could have taken place, analyzed the reasons why these opportunities were not used and noted how the refusal of the provincial government to order an inquiry created

additional public pressure for an investigation of the justice system. Chapter Four concluded that a royal commission with the appearance of independence and impartiality (Aucoin:1988) was the political response (Kavanagh:1988) of the government of Nova Scotia to public and political pressure, and was designed to defuse the controversy (Salter:1988). By mandating the Commission to look into the past the government could create the appearance of doing something without actually having to take any action (Aucoin:1988).

How the Royal Commission functioned was the question raised in Chapter Five. It analyzed the mandate given to the Commission by the provincial government, examined the way in which the Commission changed the mandate, and showed the conflicts between the Commission and the government of Nova Scotia that resulted from the change. Chapter Five concluded that the action of the Royal Commission provided yet another example of the relative autonomy of the components and sub-components of the criminal justice system (Ratner, McMullan & Burtch:1987), that the goal of the Commission was to bring about reform in the relationship between politics and the criminal justice system of the province, and that the attempt to bring about reform had the unanticipated result (Fattah: 1987) of forcing the Commission to examine the issue of racism in the criminal justice system.

Chapter Six asked how the Commission dealt with the issue of racism. It described the obstacles faced by the

Commission in trying to reach an understanding of the complexities of the issue, showed how the Commission tried to keep the topic confined to the academic studies which the Commission ordered and how this resulted in conflict between the Commission and lawyers for the Black United Front and Union of Nova Scotia Indians. Chapter Six concluded that the government of Nova Scotia did not want an examination of racism by the Commission, that the exercise of autonomy by the Commission to widen the mandate brought racism on the agenda as an unintended consequence which generated further problems, that the Commission's decision to treat racism as a peripheral matter, was itself a cause of conflict throughout the course of the public hearings, and that because of their decision, the Commission missed the chance to deal effectively with this important public issue (Salter:1988).

The question for this chapter is what does the empirical analysis of the work of the Royal Commission on the Donald Marshall, Jr., Prosecution, contained in the first six chapters, tell us about the way in which the criminal justice system operates and about its relationship to the state.

To answer this question I use a critical approach in the sense that I look beyond what happened and ask why it happened the way it did. To understand the workings of the Royal Commission it is not sufficient to ask simply how the Commission functioned. It is also important to reach an understanding of why the Commission acted in certain ways and not in others. As we saw in Chapter Five, the Commissioners

could have confined the investigation and inquiry to the events of 1971. Similarly, we saw in Chapter Six that they could have chosen a number of different ways to examine the issue of racism. The critical question, then, is why the Commission chose to carry out its function in the way that it did and what this can tell us about the relationship between the criminal justice system and the state in which it operates.

Until recently, sociologists approached the study of crime, deviance and social control from a functionalist perspective (Brickey:1978). In this view, law was simply the codification of social values and served as the expression of the common opinions and commitments of members of society (Chambliss:1969). The law and legal order were independent of the vested interests of any particular group. As well, the political and legal systems were seen as separate, with the legal machinery as a "neutral enforcer of laws and facilitator of harmony" (Brickey:1978:6). Problems in society were perceived as rooted in particular individuals or groups (Brickey and Cormack:1986). The major concern of functionalist criminology was the origin of crime and deviance. In keeping with the emphasis of professionalized justice, however, the individual was the locus of investigation rather than the relationship between the state and individuals or groups (Cain:1987). The functionalist approach fell from favor with some social theorists because it failed to explain the anti-Vietnam war protests, the use

of the War Measures act to attack separatism in Quebec and the increasing militancy of student and radical groups in the 60's and early 70's (Brickey and Cormack:1986). Obviously if a significant portion of the general population is considered criminal or deviant, the consensus on which functionalists base their argument becomes a fiction.

One outgrowth of the failure of functionalism was a more critical or radical approach to explaining crime. Marxist theory which looks at the broader structural features of society was resurrected (Taylor, et al.:1973) to examine not "crime per se, but... law (both criminal and civil) within the broader structure of the state in capitalist societies" (Brickey and Cormack:1986).

Broadly speaking, there are three positions in critical criminology about the way in which the state functions: Pluralist, Instrumentalist, and Structuralist. Each of these three general theories is grounded in a view of society which sees groups in conflict, vying for control.

Pluralists see the state working with a large amount of autonomy as a neutral force to arbitrate disputes among competing interest groups. Power is dispersed among the groups which come together for specific issues and shift alliances as issues change. No one group rules society or controls the state. For the pluralist, the conflict is not based on class or class interests but among the variety of groups seeking greater control. The state acts as a class-neutral arbitrator of the conflict, uses its coercive

apparatus by popular consent to balance the "unequal relations operating in the productive system and in the marketplace" (Ratner, McMullan & Burtch:1987:90). Pluralists argue that the autonomy of the state to direct its activities and mediate the struggle for power is reality rather than mere appearance. The pluralist position, however, converges with functional theory around the concept of a "common value system" as the basis of the state's power (Hall and Scranton:1981).

Instrumentalists posit a class based conflict with the power of the state controlled by a relatively homogeneous capitalist class. In this view, the state has no autonomy and functions as the instrument of ruling-class domination. Instrumentalists contend that the autonomy of the state is merely an appearance which masks control of the state by the dominant class (Quinney:1980). They argue "the class composition of personnel who hold key positions in the state" shows the direct relationship between class power and state power (Brickey and Cormack:1986:18). Moreover, they point to differences in the way the law is applied to white collar crime such as corporate tax fraud as opposed to the petty offenses of welfare cheaters, as a confirmation of the dominance of the ruling class (Snider:1980).

Structuralists contend that the state functions on behalf of capital but exercises a relative degree of autonomy that falls between the neutrality of the pluralists and the subservience of the instrumentalists. In this theory, the

state is the structure or arena for class conflict, with the power of the state being subject to pressures from above and below (Carnoy:1984) but working primarily to ensure that "the long term interests of capital are protected" (Brickey and Cormack:1986:19). In modern day capitalism, the State is also seen as having its own particular interest at stake. Offe (1984), for example, posits an Independent State, caught in a schizophrenic existence between its need to serve capital accumulation and the need to maintain legitimacy in order to stay in power. The theory of the relative autonomy of the state seeks to explain how the state functions on behalf of capital accumulation, on the one hand, while maintaining its legitimacy by representing class or group interests on the other. In order to carry out these two conflicting interests the state requires a degree of autonomy from "direct manipulation of the state's activities by the dominant class" (Brickey and Cormack:1986:19). But while serving the general interests of capital "the State bureaucracy must appear to be autonomous from the dominant class" (Carnoy:1984:254). This in turn creates a contradiction because it allows for the possibility of groups which coalesce around an issue to take control of the political apparatus and interfere with "the class reproductive functions of the capitalist state" (ibid.) This coalescence of groups with diverse interests can be seen in the pressure which compelled the province of Nova Scotia to establish the Royal Commission (See Chapter Four).

The theoretical debate among Pluralist, Instrumentalist and Structuralist factions grows from the attempt to understand how society affects law and how law affects society (Brickey and Cormack:1986). Chambliss argues that most lawmaking is simply "tinkering with existing law", and does not provide clear insights into the sociology of law. But he admits that there are critical events and cases which can help us to understand the relationship between law and society (1986:28). While royal commissions do not make laws, the deliberations they conduct and the recommendations they make can have an effect on the laws that are made and how they are implemented (Hastings and Saunders:1987). The Marshall Commission undeniably has been a significant event in the history of the criminal justice system in Nova Scotia. As such it provides an arena in which to view the conflict that exists within the criminal justice system itself, between the system and external groups vying for power and between the justice system and other facets of the state apparatus.

Those who work from a Marxist conflict perspective generally see the state as having "three cardinal functions; capital accumulation, legitimation, and coercion" (Ratner and McMullan:1987:xi). Accumulation means those functions of state activity which assist the process of capital accumulation. Legitimation "refers to those activities of the state that are designed to maintain and create conditions of social harmony" (Brickey and Cormack:1986:19). Coercion is

the direct or indirect exercise of official power to restore equilibrium in the face of a real or perceived threat to social order (Turk:1976).

While recognizing that capital accumulation, legitimation, and coercion are intertwined in reality, this study looks primarily at legitimation and coercion. This emphasis can be justified by the fact that the criminal justice system has only a minor role in capital accumulation. It creates little capital of its own and depends upon other branches of the state for its support (Taylor:1983). In trying to use the Royal Commission to defuse the crisis of confidence in the criminal justice system (see Chapter Four) the government of Nova Scotia was trying "to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society" (Schaar:1984: 108). Likewise, the desire of the Commission to make recommendations which would "increase the confidence of all Nova Scotians" in the criminal justice system (Hickman, May 13, 1987:3-4) is an example of the legitimation function of the state.

The attempt by the lawyers representing the Attorney General's office to stop the Commission from looking into the files of prominent politicians by seeking a court order to quash the subpoena, and the decision of the Commission to defer the issue of racism from the public hearings to an academic study can be seen as examples of coercion. These examples are indicative of the types of conflict that were

commonplace in the course of the Commission's short history. The accumulative function of the state was only raised in relation to the cost of the Royal Commission. During the dispute about payment of lawyers' fees, a $2.3-million dollar estimated price tag was used by government officials as a reason why the Commission should limit its inquiry to the issues contained in the mandate and not open a wide-ranging look into the present day conduct of the criminal justice system of the province (Cape Breton Post, May 28, 1987; see Chapter Five). Ironically, this argument was used by government officials to seek support from the general public which was largely responsible for the pressure which caused the government to convene the Commission in the first place. By raising question about the run away cost of conducting the Commission, the provincial government used capital accumulation as ideology to support and enhance its efforts to restore an aura of legitimacy.

In order to carry on with some hope of success in the struggle for power, groups in conflict develop political strategies to achieve their goals. In the absence of evidence to the contrary, we assume, for example, that the government of Nova Scotia had an objective in mind when it established the Commission and that the Commissioners had their own plan when they ignored the limitations of the mandate and broadened the Inquiry. Similarly, each of the groups and individuals who sought standing as parties to the

Commission's deliberations had specific goals which required the formulation of strategies.

The conflict which drove the government of Nova Scotia to establish the Marshall Commission was clearly not an economic issue and thus not distinguishable directly as part of a class struggle between Capital and Labor. Still, the charge that the province has a two tiered criminal justice system, one for the rich and politically connected, the other for the weak and disenfranchised (MacKay & Kimber:1989), does frame it as a class struggle. In this case, the lawyers, judges, high level bureaucrats and politicians could be seen as a dominant class in conflict with the poor, Native, Black, and less educated. The threat of defeat at the polls as a result of the revelations of the Commission adds a political context to the conflict (Kavanagh:1988). Simply stated, the government had to overcome the threat in order to ensure its political survival (ibid.). Manette's (1988) argument that Commission was chosen as a vehicle to repair an ideological disruption of the hegemonic order describes an ethnic or cultural conflict. Earlier (see Chapter Five) I disputed this concept by showing that the Commission was primarily a political tool chosen by the provincial government to defuse controversy. However it could also have the effect of restoring ideological hegemony even when this was not the main purpose of the government in setting up the Commission. These examples point out how confused the analysis of any event can become and how dangerous it is to rely upon a rigid

theory which does not take into account the fluid interactions of individuals, groups and structures of the state.

The quasi-judicial forum established by the Commission is an apt arena for viewing the conflict strategies of the various groups because it is designed around the adversarial system of presenting evidence and determining fact. The adversarial system implies a conflict between parties. While in the normal course of judicial conduct the judge is presumed to be a neutral mediator, the Commissioners, by rejecting the limitations imposed by the government's mandate, set themselves up as a group in conflict. While all of the strategies of the various groups in conflict can not be seen directly in the public hearings of the Commission, it provides enough scope to assess their intent. For example, lawyers who represented agencies of the federal government had an agreement with the Commission and Commission counsel not to allow questions about certain areas of the criminal justice system which were considered federal rather than provincial jurisdiction and therefore outside the power of the Commission.[1] The exact terms and conditions of this agreement were never made public but its existence was referred to on a number of occasions when the federal lawyers objected to questions about Marshall's treatment while in prison (see for example, testimony McConkey:May 30-31, 1988), and when the lawyer for John MacIntyre sought to have the

service record of Sgt. Wheaton produced to use in cross-examining him (see testimony Wheaton:January 25, 1988).

Who then, were the parties in conflict; what goals did they seek in the Commission hearings; what strategies did they employ to reach those goals; and, what do their actions tell us about the Canadian state?

We can divide the parties into three general groups: those representing various levels of the state; those representing the interests of private individuals; and those representing broader social groups or the general public interest. Although from time to time parties from one group aligned themselves with a different group over a specific issue, this division provides a convenient analytical device to view the conflict.

In the first group were the lawyers representing the Department of Attorney General, individual Attorneys General, lawyers for the federal Department of Justice, Solicitor General and the various agencies of Solicitor General such as the Parole Board, Correctional Services, and RCMP. The lawyers for this group described their role as keeping the Commission on track, making sure the Commission stays within its mandate, and protecting the interests of the departments and individuals they represented.[2] The strategy they employed consisted of traditional courtroom cross-examination, threats of law suits to forestall unwanted lines of inquiry and applications to the court in those instances when the Commissioners made an unfavorable ruling, e.g. the

application to the Supreme Court of Nova Scotia, Trial Division to stop the Commission from asking Cabinet Ministers about their secret conversations (see Chapter Five). Ratner, McMullan & Burtch argue that one reason why the state is able to achieve autonomy is that it "accumulates stores and distributes vast amounts of information relevant to the control of the conduct of its constituent population" (1987:100). The ability of agents of the criminal justice system to restrict access to information was an crucial factor in Marshall's arrest, conviction and imprisonment. The existence of statements favorable to the defense and the admission of Jimmy MacNeil that he was in the park with Roy Ebsary when the stabbing took place, are but two important items that were not shared with Marshall's attorneys by police or prosecutors (See Chapter Two). Later, Marshall's lawyer Steve Aronson was denied access to files in the Attorney General's office which he needed to prepare his defense during the 1982 reference hearing (See Chapter Three). During the Commission hearings, the autonomy of the members of this group, all of whom represented various government agencies or highly placed individuals, was evident in their ability to provide or withhold the information in their possession. The Commission had to use the threat of a law suit against the Attorney General to obtain the files of politicians Thornhill and MacLean (See Chapter Five). They also went to court in an unsuccessful attempt get the judges of the Nova Scotia Court of Appeals to testify before the

Commission (See Chapter Five). And they entered into negotiations with federal government representatives to obtain information about Marshall's time in prison and handling by Parole officials (see above).

The second group consists of the lawyers for individuals such as Marshall, MacIntyre, Wheaton, the estate of D.C. MacNeil and Oscar Seale, the father of victim Sandy Seale. Their goals were circumscribed by the interest of their individual clients. Marshall's lawyer, Clayton Ruby expressed his purpose in the hearings in this way:

> "The character principally responsible for Donald Marshall's predicament is (Sydney Police Officer John) MacIntyre... And so my role, I think, principally from my client's point of view is to see that MacIntyre is questioned thoroughly and properly about what he did, and that it's brought out into the public."[3]

MacIntyre's lawyer, Ron Pugsley, had a conflicting goal:

> "To ensure, as far as he is concerned that all the favorable facts are brought out... that the Commission appreciate his point of view, and certainly, to diminish, within reason the effect of some of the extreme statements made by a lot of people towards John MacIntyre.[4]

The strategy of this group also reflected the quasi-legal forum of the Commission. It vigorously cross-examined

witnesses who made derogatory statements about a client and introduced evidence favorable to the reputation of the client. Ruby was accused of playing up more to the media than doing his homework to prepare for his examination of John MacIntyre (Kavanagh:1988b), but this action was consistent with the fact that this group had the least direct access to the government's storehouse of information and therefore less autonomy in planning its strategy.

Commission and Commission counsel, the Black United Front, Union of Nova Scotia Indians, and the media form a third group. The goal of the Commission was to develop meaningful recommendations based upon the present state of the administration of justice, and the goal of the Black United Front and Union of Nova Scotia Indians was to have the Commission include recommendations that would improve the treatment of minorities in the criminal justice system. The strategy of the Commission was to take control of the mandate and then conduct the hearings with relaxed rules of procedure which would permit wider latitude in the questioning process (See Chapter Five). The strategy of the Black United Front and the Union of Nova Scotia Indians was to push the limits of the questioning to include issues of racism and discrimination which were not directly related to Marshall (see Chapter Six). While the Commissioners and Commission counsel had a varying degrees of autonomy over the conduct of the Inquiry, the Black United Front and Union of Nova Scotia Indians lawyers were more likely to turn to the media to

raise issues or express concerns that were not permitted in the public hearings (See Chapter Six). Although the media was not an official party to the Inquiry, its members were present consistently and often in larger number than the lawyers for other parties. The goal and strategy of the media was aptly argued in an open letter to the Commissioners by journalist Parker Donham:

> "I wish your inquiry had examined the role of the press in the Marshall case... Lawyers scolded officials suspected of speaking to reporters about the case, betraying no understanding of the role such leaks played in keeping the case alive during the long period when the provincial government tried to slam the lid on the Marshall affair. The press is an important institution in a free society; one of its roles is to keep a watchful eye on government wrongdoing (Halifax Daily News, October 30, 1988).

The media however labours under the double burden of short deadlines and competition for readers and viewers. The spectacular or unusual is rushed to the eye and ear of the waiting public. The more mundane, but perhaps equally important item gets a thirty second clip of air time or lies buried in the back pages. While the Marshall Commission was holding its public hearings, however, the revelations

contained in the testimony became daily fare of media viewers and readers, not only in Nova Scotia, but across Canada. The media therefore was a party to the Commission in that it framed the issues for public consumption.

This list of parties, goals and strategies shows in the microcosm of the Royal Commission, the complex interactions of individuals and groups that exist in society generally. Neither the Marshall case, nor the Royal Commission, set up to investigate it were independent of the society and culture in which they operated. Trying to force the convoluted actions of the hundred of individuals who acted in this drama over the years to fit into a theory which views the development of society as rigid and inflexible is like trying to build a house of gelatin. As soon as you bring light to bear on any part of the construction, it begins to melt away. It is for this reason that the theory of the relative autonomy of the state (Ratner, McMullan & Burtch: 1987) provides an appealing paradigm in which to analyze the Royal Commission.

Ratner, McMullan & Burtch (1987) describe five levels of relative autonomy in the criminal justice sector. They use a set of five concentric circles to provide a graphic display. In the outermost and largest circle is the premise that the criminal justice sector has a general orientation to social order and capital. They argue that the source of the autonomy for the justice sector derives from three factors: technical capacities for mass surveillance; control over legitimate use

of violence; and its role as the "chief agent of the ideological hegemony of the legal form" (ibid.:106). The criminal justice sector uses these three factors to protect the vital interests of capital but at the same time poses a threat to capital if it withdraws its services. The reality of the threat can be seen in the Sydney police strikes of 1971 and 1984 and the Halifax police strike of 1981 (Gilson: 1987). While this general orientation was not explicit in the Royal Commission, the stated goal of the Commission -to provide recommendations for reform that would restore the confidence of Nova Scotians in the criminal justice system - implies an orientation toward the existing social order which is capitalism. On its face, this goal of the Commission refutes the pluralist contention of the justice system as an neutral arbitrator, independent of class or group interests. Moreover, the action of the Commission in seeking out and publicly examining the files of high level politicians is difficult to explain from an instrumentalist perspective which sees the legal apparatus as an instrument of ruling class domination. The actions of the Commission are, however, consistent with the view that agencies of the state exercise a degree of autonomy in their day to day operations and while maintaining a general orientation toward capital, they develop resources to enable them to act independently of the control of capital (ibid.:106)

The second level of the circle posits that the criminal justice sector has comparatively more autonomy than other

state agencies. This level of autonomy results from the fact that other state agencies rely upon the criminal justice sector to enforce their directives and fulfill their mandates. And, while the justice sector may investigate other state agencies, it is relatively immune from reciprocal investigation and criticism (ibid.:108). Examples of how the criminal justice sector exercises degrees of autonomy over other state agencies were frequent during the hearings of the Commission. The refusal of the Royal Commission to be limited by the terms of the mandate given to it by the provincial government and then compelling members of the provincial Cabinet to testify about secret discussions held within Cabinet are perhaps the most prominent examples. Conversely, the Commission was not able to force the justices of the Nova Scotia Court of Appeals to appear and testify. Another example can be seen from the fact that the Commission was able to expend almost $7-million,[5] more than five times the $1.3-million which the government originally budgeted for the Inquiry (Cape Breton Post, May 28, 1987). The Commission also exercised its influence over the Provincial Department of Health in that they ordered and received the medical records of John Pratico and Roy Ebsary which then became a part of the public record (Exhibits 44, 45, 47, & 49 introduced at public hearings). Medical records, and especially those concerning psychiatric care are considered highly confidential. In a court of law, the relationship between a doctor and patient is considered privileged to the

point that communications between doctor and patient are not allowed as evidence except with the consent of the patient. Even the person directly involved often has difficulty in gaining access to his or her own medical records. Yet the Royal Commission was able to subpoena the mental and physical health records of Ebsary and Pratico and discussed them openly in the course of the public hearings.

The relative autonomy of organizational components, relative autonomy of sub-components and relative autonomy of fractions within sub-components within the criminal justice system occupy the three inner rings of Ratner, McMullan and Burtch's (1987) concentric circle. The attribution of autonomy to the various organizational components of the system flows logically from the initial premise. The whole can not be more than the sum of its constituent parts. Nor could autonomy be exercised in the wider scope of the criminal justice sector unless it was supported by a degree of autonomy in the structure of the organizations which make up the system. Testimony at the public hearings of the Royal Commission also was liberally sprinkled with examples of the exercise of relative autonomy between and among the components of the criminal justice sector, between sub-components and between fractions within sub-components. RCMP Sergeant Wheaton urged his superiors and Crown Prosecutor Edwards to investigate the actions of MacIntyre and the Sydney police (testimony Wheaton:January 19, 1988; Edwards: May 19, 1988). When the order came down from the office of

the Attorney General to hold this investigation in abeyance, (See Chapter Four) Wheaton, in apparent violation of RCMP guidelines, leaked details of the investigation to journalist Michael Harris for his book on the Marshall case (1986) (testimony Harris:September 12, 1988). Edwards against the wishes of his superiors in the Department of Attorney General gave RCMP files to Marshall's lawyer Steve Aronson to help him prepare for the reference to the Nova Scotia Court of Appeals (testimony Aronson:March 14, 1988; Edwards:May 24, 1988). Gordon Gale, in charge of Criminal Prosecutions in the Attorney General's office directed Edwards and the RCMP to hold the investigation of MacIntyre and the Sydney police in abeyance (testimony Gale:June 7, 1988; Edwards:May 25, 1988). MacIntyre consistently opposed parole and temporary absence from prison for Marshall (testimony Lynk:January 14, 1988). Judges of the Nova Scotia Court of Appeals intervened to change the scope of Marshall's reference before that court (testimony Edwards:May 24, 1988, see also Harris:1986:359, and Donham:1989b:175). Crown Attorney Giovanetti petitioned the Chief Judge of the Nova Scotia Court of Appeals to remove Leonard Pace from the panel hearing the third appeal of Roy Ebsary because he felt that Pace's presence on the court had the appearance of bias (testimony Giovanetti:May 30, 1988). Edwards insisted that he, as Crown Attorney in Marshall's reference hearing, would side with the defense and urge the court to find Marshall not guilty, while senior lawyers in the Attorney General's office insisted that he should take no

position and let the court decide (testimony Edwards:May 24, 1988; Coles:June 20, 1988). These examples show police exercising discretion and autonomy in choosing what to investigate, prosecutors challenging judges and their superiors in the Attorney General's office, state bureaucrats directing the course of investigations, and police and prosecutors acting against the directives of superiors. In each case, the individuals involved exercised independence over their actions performed within the structural context of their role in the criminal justice system.

The role of the Crown Prosecutor in the criminal justice system was also considered at length by the Commission, in particular the questions of disclosure and laying of charges. Historically in Canadian criminal law, the role of the Crown Prosecutor was to collect and present all available evidence of an offense to the judge and jury for consideration (Gibson and Murphy:1984). The responsibility on the Crown to present all evidence has not changed even though it is now common for accused persons to have an attorney represent them in criminal trials. In practice this has meant that the Crown would disclose its evidence to the defense attorney who could then use it to prepare the case. In the Marshall case however, statements obtained by the Sydney police which tended to corroborate Marshall's story were not disclosed to his defense attorneys. Now were Marshall's attorneys appraised of the fact that Jimmy MacNeil had come forward and named Roy Ebsary as the assailant of Sandy Seale (See Chapter

Two). When the Commission asked why the disclosure had not taken place, they learned that opinion on whether disclosure must take place and if so what must be disclosed was varied and contradictory. Edwards stated that it was his policy to disclose everything to the defense (testimony:May 19, 1988). Crown Prosecutor MacNeil, on the other hand, did not disclose evidence favorable to Marshall (testimony Khattar:November 5, 1987). Legal Aid lawyer Mollon (testimony:November 17, 1987) Khattar (testimony:November 5, 1987) Aronson (testimony:March 14, 1988) and Cacchione (testimony:May 17, 1988) all contended that the amount and type of disclosure depended in large measure on the policy of the various prosecutor's offices and their relationship with particular defense attorneys. Assuming that police investigators provided all the information in their possession, it was then left to the discretion of the Crown Prosecutor to decide what information was provided to the defense and indeed whether or not to proceed to trial with the charges presented by the police. (See Volume 6 of the Commissioners' Report 1989).

How then can we explain these actions within the justice sector which seem to display discretion and autonomy?

The Instrumentalist position asserts that these indications of autonomy in the criminal justice sector are simply an appearance which masks the class bias of the state. (Quinney:1980). Achieving the appearance of independence is not in itself enough to guarantee that the Commission is not just another example of criminal justice reform, which

McMahon and Ericson aptly show, can be simply an instrument that conceals the true intent of the state to retain and solidify social control (1987:38). Indeed, Mandel argues that the absence of clear lines of authority between capital, the state and its agencies should not be interpreted as autonomy, relative or otherwise. Rather, he asserts that, once "we recognize a general orientation of the criminal justice sector... to the interests of capital", then we must recognize that "such mechanisms as discretion... actually enhance the power of this sector to practise this orientation" (1987:154-155). This line of argument is reflected in Havemann's analysis of the Young Offenders Act (YOA) where he shows that the "principle of least restrictive alternative" has actually resulted in more and greater restrictions (1986:239). The YOA was drafted after many years of study as a response to the excesses of the Juvenile Delinquents Act of 1908 which saw young people institutionalized for such non-crimes as truancy, running away from home and promiscuity. The preamble of the YOA cites as a principle that the "rights and freedoms of young people include a right to the least possible interference with freedom that is consistent with the protection of society (YOA Section 3.(1)(f). Yet, the implementation of the YOA has resulted in a three fold increase in custodial sentences for young people in 1988 compared with the number in custody in the year before the act was proclaimed (Statistics Canada Service Bulletin Volume 10, #1, January 1990). Mandel is

also disturbed by the lack of a precise definition for relative autonomy but concedes that it can help us understand what "makes the system tick in the lopsided way it does" (1987:162). Following this line of reasoning, however, leads us, as Brickey and Cormack explain, into "a kind of conspiracy theory which is devoid of any systematic analysis of how the strategies and actions of various ruling class groups are limited" (1986:18). Indeed, if we accept that the state is simply the instrument of capital and the actions of the Commission in seeking reform are a clever disguise for their real intent, then the Commissioners were either skilled actors in an elaborate charade or they were witless tools of the interests of capital. Neither conforms with the objective evidence of the way in which the Commission functioned. Anyone who watched the reactions of Justices Hickman, Poitras and Evans, as I did on a daily basis, when they listened to the testimony of the various police and government agents, would be loathe to suggest that they were part of any conspiracy to whitewash the system or suggest meaningless changes which would only reestablish the dominance of the present political system in another form. On the contrary, the Commissioners were able to exercise control over their own affairs. The Commission went beyond its mandate to attack the privileged position and treatment of politicians by the criminal justice system of the province. They went further and challenged the grizzled doctrine of absolute judicial immunity (albeit unsuccessfully). And autonomy on the part of

the Commission would only be possible if the state itself had some autonomy in the exercise of its affairs. It would only be possible if the structural embodiment of the state apparatus included the ability to function with autonomy in order to protect the general interest of capital by legitimating the actions of the state.

The pluralist position also fails to provide an explanation for the intricacies and complexities of the operations of the Royal Commission. In this perspective, the criminal justice system is seen as separate and distinct from politics, culture and the economy. The police protect the good from the bad, maintain law and order, fight crime, and when possible apprehend those who break the law. A complex array of practices and procedures are said to protect the accused as lawyers process the case through the courts to reach an adjudication of guilt or innocence. Judges apply sanctions designed to deter, punish, rehabilitate and/or protect society. The correctional system in its various forms, from probation to incarceration to after-care, works to change behavior and return the criminal to a productive life in society. The justice bureaucracy administers, but does not intrude upon the mechanism that decides the fate of the accused. The assumption is that society is uniform and unchanging rather than being characterized by diversity, coercion and change (Quinney:1978). Justice is depicted as impartial to race, religion, class, gender, economic status and political affiliation. "The figure of Justice usually

appears as a blindfolded woman with a scale in one hand and a sword in the other" (Hirsch, Kett & Trefil:1988:171). This popular image of blind justice and equality before the law persists despite ample evidence to the contrary. The case of Donald Marshall, Jr. shows the transparency of the blindfold worn by "Justice" and exposes "feet of clay" beneath her long robe (ibid.:61) .

The Marshall case challenged the liberal image and showed it to be a myth. Despite the alleged safeguards of the system, an innocent man was arrested, tried, convicted, and sentenced to life in prison for a crime he did not commit. When Marshall was freed after eleven years, people wanted to know what had gone wrong with the justice system. The explanation of the Nova Scotia Court of Appeals that the miscarriage was more apparent than real and that Marshall was in large measure responsible for his own predicament did little to restore confidence in the system. The niggardly compensation settlement from which Marshall was required to pay the legal costs of proving his own innocence raised questions about the neutrality of the provincial government in dealing with Marshall. The minimal sentence of one year for manslaughter given to Roy Newman Ebsary, the killer of Sandy Seale, suggested that a different system of justice prevailed when the accused was a white man rather than an Indian, a black or a member of some other minority group. Preferential treatment of prominent politicians by the justice system of Nova Scotia hinted at a two tiered system

of justice. Fifteen years after Donald Marshall, Jr was wrongly convicted of killing Sandy Seale, and four and a half years after the mistake was discovered, the government of Nova Scotia finally announced the appointment of a Royal Commission to look into the circumstances of the 1971 stabbing. Three and a half more years passed before the report of the Commission was completed and released. The Attorney General of Nova Scotia has now said that all 82 recommendations of the Royal Commission's report could be adopted or endorsed by the provincial government (Halifax Daily News February 8, 1990). Six days earlier, Premier John Buchanan said that there was no need to set up the special sub-committee of his Cabinet to deal with race relations (Halifax Daily News February 2, 1990), as recommended by the Commission (Recommendation #9 Commissioners' Report:1989:153). On the other hand, the government did "recanvass the adequacy of the compensation paid to Marshall in light of what we have found to be factors contributing to his wrongful conviction and continued incarceration" (Recommendation #8 ibid.:148).[6] Clearly, there will be continuing conflict over when, how and if the recommendations of the Commission will be implemented.

Looking over the history of the Marshall case, we can understand Galsworthy's[7] wry comment that "Justice is a machine that when someone has once given it a starting push, rolls on of itself". In the nineteen years since Sandy Seale was stabbed and died, the incident has been the cause of four

full blown trials, three appeals, a special reference to the Court of Appeals, and the four and a half year long Royal Commission on the Donald Marshall, Jr., Prosecution, which produced three more appeals, two of which went all the way to the Supreme Court of Canada. And it is continues to roll.[8] In a bizarre turn of events, Ian MacKeigan, who was Chief Justice of the Nova Scotia Court of Appeals when it heard the reference concerning Marshall in 1982-3, denied that the court blamed Marshall. "We didn't say that", he asserted (Daily News, January 11, 1990. He made this contention despite the fact that the words "any miscarriage of justice is, however, more apparent than real" and "there can be no doubt that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction" remain a part of the decision of the court (Decision May 10, 1983). Less bizarre but no less unusual, the Judicial Council of Canada agreed to hold unprecedented public hearings about the actions of the five judges of the Court of Appeals who heard Marshall's reference (Daily News, March 1, 1990).

The strength and pervasiveness of the myth of blind justice and equality before the law (Cain:1988), however, make it difficult to see the extent of state control in the day to day operations of the criminal justice system. When non-members of the system set out to look into its workings, they often end up being co-opted (McMahon & Ericson:1987). Where official mechanisms are set up to investigate the system, the end product is usually a series of

recommendations for change that can be left to gather dust on the shelves (Salter:1988). Sometimes commissions, with the passage of time, change and adapt to new conditions as Hastings and Saunders point out in their discussion of the Law Reform Commission of Canada:

> "It has almost completely abandoned the potential, explicit in its original mandate, for rethinking the law in order to develop new legal approaches more in keeping with the changing need of contemporary Canadian society... [it is] now in a fundamentally different relationship to wider social events" (1987:129).

When change does occur, "it is a slow gradual process, the results of which may take years and years to appear" (Fattah:1987:80). Given that meaningful change or reform takes time, it is important to look at how the Royal Commission on the Donald Marshall, Jr., Prosecution has already affected the criminal justice system and the groundwork it has laid for the future.

First of all, in order to function effectively, the judges chosen for the Commission needed to legitimate their role. They knew that Commissioners in other prominent inquiries received a lot of media attention and they did not want to appear to be covering up for the province when they did their investigation. Justice Grange alluded to the fame that follows a judge who heads a prominent inquiry:

> "I have been in and about the law for over 40 years... But I know perfectly well that when the time comes to take my departure, if I am mentioned at all in the obituary columns it will be only for the period spent investigating some over-dosages of digoxin at the Hospital for Sick Children in Toronto with perhaps a line about playing with derailed trains in Mississauga" (1988:1).

The justices could have aligned with and sought guidance for their job from officials in the Attorney General's office. As Grenville points out, the government that sets up a royal commission is in the best position to offer advice and practical assistance, but that for the most part such assistance and advice is minimal "due to a proper concern that the traditional independence of a Royal Commission be safeguarded" (1988:1). Instead the Commission exercised autonomy and broadened the mandate, thereby placing itself in conflict with the government that set it up. The first effect of the Royal Commission, then, was to show the government that their long standing practice of using royal commissions (Kavanagh: 1988) to obfuscate and delay (Salter:1988) was now a more problematic course of action.

While the Commissioners were able to exercise autonomy it was not absolute. It was relative. It was constrained by, among other things, the Public Inquiries Act (R.S.N.S. 1967,c.250) which contained their legal authority. The could

not order, for example, the province to pay for legal counsel for parties with standing before the commission because the act does not give them that power (Decision on the matter of applications for the provision of funding for legal counsel, May 14, 1987). They also could not subpoena a witness from outside the province because their authority to act came from a provincial statute. So they could not compel Donna Ebsary to give testimony because she had moved to the United States and did not wish to return. Their autonomy was relative also because their appointment was at the pleasure of the Lieutenant Governor (Order in Council, October 28, 1986). It could have been revoked at any time. Indeed, that option was considered by officials of the government even before the public hearings began. The idea was rejected because of fears that the government would not then be able to find others to take the job.[9] The Commissioners were also restrained to a degree by the same ethnocentric bias that I described in Chapter Three. From the outset they seemed unable to conceive that the system in which they had spent their working lives could have failed so completely. Daily they heard of failure heaped upon failure until they were forced by the weight of testimony to admit "that the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to - and even beyond - his eventual acquittal by the Supreme Court of Nova Scotia (Commissioners' Report:1989:15).

Still, the independence of spirit on the part of the Commission exemplifies Fattah's (1987) argument that attempts to intervene or bring about change may have unanticipated results. The provincial government appointed the commission to defuse a growing crisis over the state of the criminal justice system and ended up with a political time bomb that threatened to blow them out of office (Kavanagh:1988:153).

When the government lost the first two battles with the Commission (funding and political files, see Chapter Five), the government was forced to resort to damage control. As Kavanagh puts it, "the government was committed. It had called the inquiry. If they tried to interfere it was quite possible that the justices would resign and the government's critics would surely cite this as evidence of what they had been saying all along." (1988:153) So, whenever a problem was exposed at the hearings, the provincial government announced some action to show that it was working to solve that problem. When the hearings revealed a woeful lack of training for police, a committee to study the issue was established. When complaints about the selective disclosure of information to defense lawyers by crown prosecutors were aired, a directive was issued requiring full disclosure. In anticipation of recommendations that the Attorney General's dual function of chief law officer and chief law enforcement officer be split, a new department of Solicitor General was created by the province. When interference in sensitive criminal cases involving politicians was disclosed, a special

provincial prosecutor for such cases was promised and later appointed. Periodically during the course of the hearings, the Attorney General sought to win public support for his efforts to clamp down on the Commission by announcing how much it was costing the taxpayers of the province. When all else failed, the province took the commission to court to limit the Inquiry.

Is the change meaningful? Does it signal reform? Or is it simply window dressing?

Snider argues that criminologists have over-simplified the relationship between criminal law and state structure because they "assume a necessary relationship between relative autonomy and the liberalization of criminal justice systems" (1989:27). She proposes a need to look more closely to see "which types of reform threaten dominant classes and which are irrelevant to them" (ibid.). She contends that changes sought by criminal justice personnel do not always favor the interests of capital as the instrumentalists would suggest. After studying the Royal Commission, however, it is difficult to see how its recommendations could be construed as favoring the interests of Capital. And while judges, lawyers, high level bureaucrats, politicians, RCMP and local police were publicly chastised for their failures in the Marshall case (Commissioners' Report:1989:15-141), no one would assert that this indictment of the criminal justice system signals the imminent demise of the system as it now functions. Nor does it mean that all 82 recommendations of

the Commissioners will be enacted. Rather, what the Commission has provided is an authoritative yardstick with which to judge what is done.

Bruce MacIntosh, head of the Nova Scotia Barrister's Society believes that the Marshall Commission has prodded Nova Scotia's lawyers to be more vocal on issues affecting the justice system. He claims that "there's an openness and a willingness to accept reform that perhaps only comes around in a generation" (Chronicle Herald, January 2, 1990).

RCMP Inspector J. Peter Curley, recently appointed Officer in Charge of the aboriginal-visible minority policing program for all of Nova Scotia said his position is a direct result of observations about the RCMP by the Marshall Inquiry report. (Chronicle Herald, August 16, 1990)

Nova Scotia Attorney General Tom McInnis has promised six month updates for the media on the progress of implementing the Commission's recommendations. He made his first report on August 16, 1990 and claimed action on all 39 recommendations within his jurisdiction and 17 which have been addressed completely. (ibid.) Naturally, this type of glowing report provides incentive for journalists to compare the claimed progress with the reality.

Daily News columnist Harry Flemming earlier compared the government's announcement of an independent prosecutor for politically sensitive cases with the action taken to fill the position. He pointed out that the prosecutor will not really be independent because his appointment is by Order in Council

rather than legislation and that he can be overruled by the written order of the Attorney General. "What's shaping up is little or no real change in the administration of criminal justice, the system which has brought Nova Scotia into such disrepute throughout this decade" (September 20, 1989). Flemming has seen enough of Nova Scotia politics to be entitled to his pessimism, but ongoing comment like this can only serve to keep the spotlight on government as it attempts to deal with the recommendations of the Marshall Commission. Each of these announcements, actions and reactions show that the Royal Commission is having an effect on the criminal justice system of the province. They also provide additional information with which the media, opposition politicians and the general public can measure the performance of the government.

An example of the effect that the Commission has already had can be seen in a comparison of two similar cases involving ministers of the provincial government. In 1987, a mother on welfare, who was taking classes at Dalhousie University in Halifax, wrote an angry letter in the student newspaper complaining that the provincial Department of Social Services was withholding benefits due to her and thereby frustrating her attempt to get an education and get off welfare. Then Minister of Social Services, Edumund Morris, equally angry, tried to justify the actions of his Department by providing the media with details of the mother's personal file in the Department. The woman and a

local welfare rights organization screamed foul and demanded the resignation of Morris for his breach of privacy. They also demanded that Morris be charged for his actions. The Attorney General refused to lay a charge against Morris and would not order an investigation of the incident, saying, in effect, that Morris was justified because he was only responding in kind to an attack upon him by the mother. When continued outcry failed to move the government to take action, the woman swore out a private complaint with the RCMP, retained the services of a pro bono lawyer and took Morris to court. There he was eventually found guilty of the violation but granted a conditional discharge.

In contrast, recently a former deputy minister of government services appeared before a legislative committee of the provincial legislature and made sweeping allegations of corruption and kick backs extending all the way to the office of the Premier (now Senator) John Buchanan. Health Minister David Nantes, a member of the committee, in an apparent attempt to discredit the witnesses, mentioned that according to reports that he had received, the witness had been in mental institution in Ontario in the period shortly before he came to testify, and that he had left against the advice of doctors. Nantes repeated the substance of his comments to the media gathered at the door of the chamber after the hearing. Again the outcry for resignation and charges. But this time, instead of stonewalling, the Attorney General ordered the Halifax city police to investigate the

allegation that Nantes had violated the privacy of the witness under the Freedom of Information Act and under the Provincial Health Services Act. After one false start, the investigation led to two charges against Nantes and caused his resignation as Minister of Health. Moreover, the premier, who has long been known as Teflon John for his ability to remain free of the scandals which has touched so many of his Ministers, is now under investigation by the RCMP as a result of the allegations of the same witness.

These examples show clearly that conditions within the criminal justice system of the province have changed. The two tiered system of justice, one for the politicians and their friends and the other for the ordinary citizen has been dealt a severe blow. Like the Marshall case which has had a snowball effect as it rolled along through the public hearings of the Royal Commission, these changes signalled by the Nantes case will also grow in size and strength. And these changes have been fostered directly by the exercise of relative autonomy by the Royal Commission on the Donald Marshall, Jr., Prosecution.

Chapter Seven Notes:

1. The evident reluctance of the federal government to allow the Commission to delve too deeply into things such as the decision making process for parole as it affected Marshall casts some doubt on the sincerity of the federal government when it threatened to inquire into the Marshall case if the province failed to do so. In an inquiry established under federal jurisdiction, it would have been more difficult to deny an exploration of the parole system and conditions within federal penal institutions. At the same time, the Commissioners did not express any great displeasure at being denied these areas to explore, pèrhaps because they were more interested in the criminal justice politics in Nova Scotia than in exploring all the possible ramifications of Marshall's situation.

2. Informal conversations with Darrell Pink, representing the Nova Scotia Department of Attorney General and James Bissell and Al Pringle, representing federal agencies (see Note #5, Chapter Five) during an early sitting of the Commission.

3. Interview Clayton Ruby, November 16th, 1987.

4. Interview Ron Pugsley, January 14, 1988.

5. Final figures will not be available until the Public Accounts Committee of the Legislature tables its report in April of 1991, however, the figure $7-million has been widely reported and that was before the compensation package of almost a million dollars for Marshall.

6. See Chapter Four Note #1 regarding Marshall's new compensation package.

7. Galsworthy, John (1867-1933), from Act II of his play <u>Justice</u> (1910), in Bartlett, John, <u>Familiar Quotations</u> Little, Brown and Company, Boston, Toronto, London, Fifteenth edition, 1980.

8. Marshall was tried once before judge and jury and his appeal of the conviction was dismissed. In 1983 he was freed in a special reference to the Nova Scotia Court of Appeals. Ebsary's first trial ended on September 13, 1983 with a hung jury. The second trial resulted in a manslaughter conviction and Ebsary was sentenced on November 24, 1983 to five years in prison. Ten months later the conviction was overturned on Appeal and a new trial ordered. The third trial also ended in a conviction on January 17, 1985 and Ebsary was given a sentence of three years. This conviction was upheld on appeal but the sentence was reduced to one year. A final appeal to the

Supreme Court of Canada was denied in September 1986, one month before the announcement of the Royal Commission. The province carried one appeal against the commission to the Nova Scotia Court of Appeals on the issue of cabinet confidentiality. The commission appealed unsuccessfully to the Supreme Court of Canada on the issue of judicial immunity. And Marshall's lawyers appealed to that court, also unsuccessfully, trying to overturn a ruling of the commission that cabinet ministers did not have to reveal specifics of conversations about Marshall which took place in Cabinet. Still to be decided are Justice MacKeigan's complaint to the Nova Scotia bar against lawyers MacDonald and Spicer over their statements in final summation to the Royal Commission. Also on going at this time (July, 1990) is the investigation by the Judicial Council of Canada about the performance of the five members of the Nova Scotia Court of Appeals who ruled that there was no miscarriage of justice in the Marshall case.

9. Interview lawyer #11, July 7, 1989.

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Appendix A

Research Methods

The research which led to this thesis consists of five components: 1. personal involvement in the criminal justice system of the Atlantic Region with special emphasis on Nova Scotia since 1976; 2. employment with the Royal Commission throughout the public hearings; 3. an extensive survey of regional and national media reports on the Commission; 4. formal and informal interviews with participants in the Royal Commission hearing process; 5. academic research.

Justice System Involvement

Between 1976 and 1984 I was employed as Co-Director of Criminal Justice Projects at the University College of Cape Breton. The primary goal of these projects was to bridge the gap between corrections and the community. One aspect of the work was the development of an in-service training component

for police and other criminal justice personnel. Another was research about the constituent population of the correctional center. In the later it was determined among other things that Natives were disproportionately represented in the correctional facility. In the former, I came into close contact with most of the serving officers of the Sydney Police Department including Chief John MacIntyre and Detective William Urquhart who played a prominent role in the Marshall investigations. In 1983, shortly after the Nova Scotia Court of Appeals rendered its decision that Marshall was not guilty, I had occasion to interview both MacIntyre and Urquhart at length about their view of the case and their work on it.

In addition, I spoke at length with Constable Leo Mroz who was the first officer at the scene of the stabbing of Sandy Seale during the course of a program offered at the College titled Report Writing for Effective Policing. Mroz later became a primary source for Harris' (1986) book Justice Denied. Between 1984 and 1987 as a freelance writer and criminal justice consultant I continued to gather information and follow developments of the Marshall case, in person and in the print media. At the same time I worked on a contract basis for CBC Radio in Sydney where I was assistant producer for the Information Morning Radio Program. In this capacity, upon the announcement of the Commission, I interviewed Justice Hickman and Chief Commission counsel David Orsborn on a number of occasions prior to the start of the Hearings.

Commission Employment

The interviews with Hickman and Orsborn led to being hired on contract by the Commission as a writer/media relations coordinator. The later designation was, however, dropped shortly before the hearing began. My duty as writer was to attend the hearings of the Commission, take careful note of the testimony, and present the Commissioners and Commission counsel with a concise summary of the previous days testimony each morning for review. Since I could not wait for the official transcript I was required to take very careful notes, occasionally clarify a point with a witness after he or she left the stand and then check back during the following day to be certain that my summary and the official transcript were in conformity. In addition I had access to all of the exhibits and documents used by the Commission. The notes taken during the course of the hearings along with copies of the summaries are the primary of citations with in the body of this work where testimony of a witness is shown as the source. As well, because of my position with the Commission, I was allowed to interact with Commission and Commission counsel after hours during the Sydney phase of the hearings when they stayed at the local Holiday Inn. These occasions provided an opportunity to take part in informal, off the record discussions on the progress of the hearings.

Media Survey

The third phase of my research consists of a clipping file of written media reports, tapes of radio discussions of the case and video-tapes of documentary television programs concerning the Marshall case and the Royal Commission. Although far from scientific, the files, which I began in 1984 at the time when the provincial government was negotiating compensation with Marshall, consist of newspaper and magazine clippings from regional papers, primarily the Cape Breton Post, Halifax Chronicle Herald/Mail Star, and Halifax Daily News. During the course of the hearings I supplemented these sources with clippings from the Toronto Globe and Mail, Micmac News, and Toronto Star. In addition I collected articles which appeared in Regional and National periodicals including Atlantic Insight, MacLean's, Content, and Saturday Night and Canadian Lawyer. I also received through friends, articles which appeared in the New York Times, Los Angeles Times and Washington Post. These latter did not add any significant information but merely showed the extent of media coverage of the Marshall Commission. Since the Commission completed its public hearings I have maintained these files primarily from the Halifax Chronicle Herald, Halifax Daily News and Toronto Globe and Mail.

Interviews

The fourth stage of the research was formal and informal interviews with participants in the Royal Commission hearings. The formal interviews were conducted with counsel for parties with standing and others who while not representing parties were in a position to be knowledgeable of and involved in the operation and establishment of the Royal Commission. The purpose of these interviews was to obtain information to aid in the analysis of the way the Commission functioned. In particular I was interested in the Commission's treatment of the issue of Racism from the point of view of people with legal training. The interviews consisted of open ended questions which allowed the respondents to speculate about the effectiveness of trying to elicit testimony about racism in the context of a quasi-legal forum and suggest alternative methods.

Unstructured interviews were used to supplement the formal interviews. In some cases, as when the participant would not agree to a formal interview, these ranged from chats in the hall outside the hearing room to lengthy discussions over lunch or coffee. In addition to the Commissioners and Commission counsel, this group also included federal and provincial officials, media representatives and witnesses at the hearings. Again, these interviews can not be described as scientific, however, they did add significantly to my understanding of the way in which

the Commission functioned and the personal reactions of many of the participants.

Academic Research

The final phase of my research consisted of a directed reading program in Critical Criminology completed as a part of my course work at St. Mary's University and participation in conferences and workshops concerning the role of commissions of inquiry and in particular the peer review sessions of the academic studies on Black and Natives and the justice system.