

Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints

Volume One: Report

The Honourable S.H.S.
Hughes, Q.C.
Commissioner

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Commissioner

The Honourable Samuel H.S. Hughes, Q.C.

Commission Counsel

David C. Day, Q.C.

Clay M. Powell, Q.C.

Assistant Counsel

Sandra M. Burke

Executive Secretary

Herbert A. Vivian

Commission Investigators

Weldon H. Orser

G. Frederick Home

Secretaries

Virginia E. Connors
Patricia M. Devereaux
Margaret M. Linehan

Clerks

Bride Higgins
Colleen Power

Support Staff

Colleen Ryan
Joanne Truscott

**Canadian Corps of
Commissionaires**

William Follett
Boyd Taylor

TABLE OF CONTENTS

Introduction	v
Chapter I: Mount Cashel	
The Christian Brothers of Ireland	1
The Nelson Report	8
Mount Cashel and the State	23
The Centennial	27
Chapter II: The Guardians	
Social Services and Child Welfare	31
The Police	58
Education	63
Chapter III: De Profundis	
Brenda Lundrigan and Johnny Williams	77
The Earle Family	83
The Bradbury Report	85
Shane Michael Earle	96
Chesley Riche	98
At Harvey Road	100
At the "Janeway"	102
The Constabulary Investigation: December 1975	107
The Hillier Report: December 18, 1975	115
The Provincial and the Deputy	117
The Evidence of Pearl Bursey	119
The Evidence of Chief Justice Hickman	122
The Second Hillier Report: March 3, 1976	125
No Charges	129
The Confederation Building Meeting	130
Brother Nash Reports to the Provincial Superior	133

Disclosure Forestalled	136
Sergeant Pike and John Kelly at the Soper Inquiry	139
The Letter to Rome	149
The Mount Cashel File in Justice	151
The R.H. Kelly Case	156
The Burton Case	161
The Stead Crawford Letter	165
Chapter IV: Dies Irae	179
The Reappearance of Shane Earle	188
Reopening the Investigation	191
Problems of the Royal Commission	196
Nature of the Complaints	198
Testimony and Charges	201
Recording Mount Cashel Residents at December 1975	205
Chapter V: The Questions in Article I	
The Answers	207
A Way of Life	219
Chapter VI: Child Welfare	
Mandate and Method	223
Administration	235
Mount Pearl: A Decade of Foster Care	244
Child Welfare Profile No. 5: A Battered Child in Central Newfoundland	264
A Battered Child on Conception Bay	272
Cases of Sexual Abuse	286
Superintendent Kaiser's Position	310
Whitbourne 1984	312
Sampling Other Profiles	325

Chapter VII: Questions in Article II	365
Chapter VIII: Law Avoidance	
Due Process of Law	375
Avoidance in Practice	377
Avoidance in Principle	387
Police Response to Avoidance	391
The Police Response Panel	403
Consolidating the Response	407
Chapter IX: The Chance of Prevention	420
Prosecutorial Discretion	422
The Mount Cashel Investigation	431
Reasonable (and Probable) Grounds	434
The Director of Public Prosecutions	435
The Case for a Solicitor General	443
Chapter X: Recommendations to the Commission	
Participants and Others	446
The Panels	452
Chapter XI: Furthering the Administration of Justice	
The National Crisis	458
Training and the Public Service Commission	461
Complaints by the Public against the Police	462
Justice Delayed	465
Support for Victims and Witnesses of Crime	472
Publicity Under the Summary Proceedings Act, S.N. 1979, c.35	478
The Public Enquiries Act, R.S.N. 1970, c.314	482
The Compensation Issue	486

Chapter XII: Concluding Reflections	
The Incessant Glare	490
Acknowledgements	497
Consolidated Recommendations	504
Index	517

Introduction

I retired as a judge of the Supreme Court of Ontario according to the Constitution on the seventy-fifth anniversary of my birth, or October 24, 1988, and late in March 1989 I was approached indirectly and later directly by the Honourable Lynn Verge, Q.C, Minister of Justice and Attorney General of Newfoundland and Deputy Premier in the Government of Newfoundland and Labrador, to undertake the inquiry which is the subject of this report. The appointment of counsel and other matters were settled between us and David C. Day, Q.C. of the bar of Newfoundland and Clay M. Powell, Q.C. of the bar of Ontario decided upon. A minute of the Order in Council appointing these gentlemen and myself was dated on April 14, 1989. Thereafter our dealings were with the Deputy Minister of Justice, Ronald J. Richards, Q.C. and his officers as the minister became increasingly preoccupied with the general election campaign. Mr. Powell and I flew from Toronto on April 18 to confer with Mr. Day and with Herbert A. Vivian, Executive Secretary designate to the Royal Commission, a senior officer of the Department of Justice and former member of the Royal Canadian Mounted Police. The date for the first organization meeting of the commission was set for May 8, 1989. Mr. Powell and I returned to Toronto on April 20 at which time the government of the day was defeated at the polls.

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Criminal Justice and Complaints

naturally required time to consider to what extent it would adopt the terms of reference contained in the commission issued to me under the great seal of Newfoundland and dated March 31, 1989. In due course this was superseded by a new commission dated June 1, 1989 which is reproduced at the front of this report. While the earlier document is not reproduced it is desirable to point out the differences in emphasis and detail contained in its successor.

These documents are divided after preamble into articles I to IV in the case of the version of June 1 and articles I to III in the case of that of March 31, 1989. The opening recital in both are the same. To the second of June 1 has been added the second and third recitals now appearing, the fourth recital being identical with the first of March 31. The first words of article I "*to inquire into...*" are the same in both documents and paragraphs (c), (e) and (g) of the second are identical with paragraphs somewhat differently identified in the earlier version. Paragraph (a) discarded the words "*then prevailing*" which originally followed "*police policies*". Paragraph (b) is new while paragraph (d) has added the police report of December 18, 1975 to the former reference only to that dated March 3, 1976. In paragraph (f) of article I the reference to files has been changed to "*handled in the normal manner*" from "*registered in the Department in the normal manner*" and in paragraph (h) the words "*if so, the terms of such bargain*" have been substituted for "*in return for any reciprocating action*" with a notable improvement in style. In the March 31 version paragraph (j) reads as follows: "*whether the Director of Child Welfare was aware of the allegations investigated by the police in 1975, and if so, how he was made aware of these matters and what actions, if any, were taken.*" This was discarded for the existing paragraph

Introduction

(i) of article I of the current terms of reference. Article II is wholly new and greatly enlarges the original charge. Article II of the earlier version which required recommendations as to compensation which might be paid to the complainants was removed; article III is new and article IV of the present version is the same as article III of its predecessor.

For the rest nothing was changed except the final paragraph which at March 31 read "*AND FURTHER, \ve require you to report your findings with as little delay as possible*", on June 1 altered to read in the final version "*AND FURTHER, \ve require you to report your findings within ninety days of the commencement of Hearings*". In short order it became apparent that this change was unrealistic in view of the mass of evidence offered and uncovered and the provision was removed in its entirety by Order in Council 1166 of 1989, dated December 29, 1989.

Henceforth the commission's business with the Government was conducted with and through the Honourable Paul D. Dicks, Q.C., Minister of Justice and Attorney General in the Ministry headed by the Honourable Clyde Wells, Q.C., and his Deputy Minister Mr. James Thistle, Q.C.. The co-operation of government departments with its investigations in compliance with an Order in Council dated April 14, 1989 was abundantly forthcoming. A further Order in Council dated June 2, 1989 seconded Mr. Herbert Vivian to the position of Executive Secretary of the Royal Commission, provided it with a budget of \$500,000, and authorized the acquisition of premises without the need for public tender, and the hiring of staff with preference for secondment from the public service. It was now possible to advertise in the Newfoundland Gazette and the provincial press June 28, 1989 as the date of the first organization meeting of the

Criminal Justice and Complaints

commission, setting out the terms of reference and inviting those who wished to seek standing to appear at its public hearings and participate in its proceedings. The site of this meeting was the commodious premises of the Public Utilities Board on Torbay Road in St. John's especially designed for the conduct of hearings of the type contemplated and kindly provided until a time in September when that body's requirements became paramount; thereafter the commission moved to premises at Exon House, Strawberry Marsh Road, which it occupied until the conclusion of the public hearings on June 29, 1990.

The transactions of June 28 and of August 14 to which the excess of business on the former day compelled adjournment, need not be itemized. A list of those who were granted standing on these and subsequent occasions is set out at the conclusion of this introduction. Suffice it to say that both co-counsel projected the work of the commission in their opening statements and two preliminary rulings were made by me; one of them involving the rejection of an application for funding by the province of the legal expenses of one of the complainants who had resided in the Mount Cashel Orphanage in 1975, after hearing submissions on the subject from him and from counsel for the provincial government. The public hearings of the commission began at Exon House on September 11, 1989.

This bald recital must not be allowed to conceal the amount of work undertaken under pressure to recruit staff and to prepare documents and witnesses for the smooth and continuous production of the work at those hearings. I have elsewhere acknowledged my debt to counsel and to the staff of the commission for their patience and devotion but I should say here that the task of breaking ground for an inquiry of

Introduction

this type is something which is difficult to describe without having had some share of the toil involved. I did not, but as a result of my experience with this and two previous Royal Commissions I have a healthy appreciation of the work that is necessary before the first witness is called. The production of evidence is the culmination of one task as much as the beginning of another; thereafter, the two are maintained concurrently, and in the case of this inquiry night was turned into day with some necessary pauses.

A word must be said about the record of these public hearings. A significant saving of cost to the public was achieved by the Executive Secretary securing an arrangement with Avalon Cablevision Limited to provide tapes recording the proceedings both audibly and visually without charge to the commission in exchange for the right to broadcast at pleasure. The practice of televising and transmitting a record of such proceedings has been gaining favour for some time and now is no longer viewed with unanimous disapproval. Nevertheless by dispensing with a written transcript of evidence prepared by shorthand reporters or other mechanical means it may be that the experience of this commission has been unique. Remarkable speed of retrieval of the evidence of witnesses has been secured through the use of video cassette recorders and computers, although a typewritten transcript is easier to use when scanning the evidence and selecting passages for reproduction. Eventually a selected passage has to be transcribed after computer-assisted searching of a tape reflected on the screen. On the other hand, should any misfortune overtake a commissioner in my situation, rendering him or her unable to complete the task, it is possible for another appointee not only to hear the evidence as given, but to see and observe the demeanour of the witnesses

Criminal Justice and Complaints

through this technological achievement. In any event I took copious notes throughout the 150 days on which evidence was given and submissions made, notes which I would only have taken at a trial where either an oral judgement or a charge to the jury was to be expected at the end of it. A combination of these and the audio-visual record made checking the accuracy of the former a matter of simplicity and dispatch.

Because of these arrangements for the provision of the record and its wide dissemination, contemporaneously by day with review by night, the public was surfeited with information and press, radio and television journalists were provided with accommodation in the commission's premises from which they could monitor the proceedings without attending the actual hearings. The incongruous result was that the capacious hearing-room was largely deserted except for counsel and participants engaged. In spite of the sometimes distressing nature of the evidence the public reaction remained calm and judicious throughout, the only possible exception, in the shape of a bombing threat early in the proceedings, having proved to be illusory.

In his report as commissioner of the *Commission of Inquiry Into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance*¹ the Honourable Charles L. Dubin, Chief Justice of Ontario begins his comment on "the process" as follows and I can do no better than quote it and adopt it.

Canadian Government Publishing Centre, Supply and Services
Canada, 1990.

Introduction

"The function of a commission of inquiry is not always understood. A commission of inquiry is not a trial. No one is charged with any criminal offence, nor is anyone being sued. There is, to use legal jargon, no *Us inter paries*. There is no dispute between parties as such, and no legal rights are determined. It is intended to be an independent, objective inquiry into the subject matters referred to it by the Order in Council pursuant to which it is established, with a view to ascertaining what has transpired, to identify the problem areas, to define the issues, and to seek a way of correcting the errors of the past so that they will not recur.

There are no set rules governing the conduct of a commission of inquiry, and the procedure to be followed is determined by the Commissioner."

It should be noted that throughout his report no attempt is made to refer to his commission of inquiry as a royal commission doubtless for the good and sufficient reason that it proceeded from an Order in Council exemplified by a minute of a meeting of the committee of the Privy Council approved by Her Excellency the Governor General and not as either a proclamation or commission issued in Her Majesty's name. It is only in the latter sense that a commission of inquiry can properly be called a royal commission as this one is, attested to by His Honour the Lieutenant Governor endorsed by the Minister of Justice and impressed with the great seal of Newfoundland. By this simple standard it becomes clear that the inquiry into the Donald Marshall Jr. prosecution established by the government of the province of Nova Scotia is not a royal commission even though the editors of that commission's report have apparently arrogated that title to its production. There are no doubt other examples, and some

Criminal Justice and Complaints

academic fun has been poked at the inconsistency of names for commissions of inquiry, some being named after their subject and others being named after the commissioner all at the whim of the press and the public. But on the propriety of the word "Royal" there can be no dispute.

The procedure adopted by me was not unusual and is, I believe, what is generally observed and applied in public inquiries of this type. Commission counsel prepare the evidence with the assistance of commission investigators; this includes interviewing all witnesses before they are called and acquainting them with the line of questioning which will be applied to them; commission counsel then call witnesses before the commissioner, the oath is administered and questions are put in reasonably close observance of the rules of court, although there is no strict exclusion of the use of the technique of cross examination by commission counsel at any time; finally any participant with standing either through counsel or in person is invited to put questions to the witness with commission counsel able in the end to put such as may clarify the additional evidence adduced. When all the commission's witnesses have been called and any which participants may wish to call, the time comes for argument by counsel and participants and for presentation of other forms of submission and the hearings conclude. This procedure, although closely analogous to what obtains in court, does not confine the commissioner to considering only the evidence that he has heard in public and I have been from time to time compelled to clarify some points in the oral evidence by making subsequent inquiries. Moreover, two witnesses were heard *in camera* as a result of a ruling made by me on

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Criminal Justice and Complaints

appeals and special prosecutions and in 1971 became Assistant Deputy Minister, Criminal Law. In 1976 he commenced private practice in Toronto, and was called to the bar of British Columbia in 1981, conducting several prosecutions for the Crown in that province. In 1986 he was counsel to the *Royal Commission on the Testing and Marketing of Liquor in Ontario* headed by Mr. Justice Osier, as he then was. For sixteen years past he has been coordinator of the National Criminal Law Programme for the Federation of Law Societies in Canada and has written a book, "Arrest and Bail". Queen's Counsel since 1974, Mr. Powell has been certified by the Law Society of Upper Canada as a specialist in the criminal law.

Miss Sandra M. Burke, an associate of Mr. Day in the practice of law in St. John's, a graduate of the Memorial University of Newfoundland in 1985 and Dalhousie Law School in 1988 and called to the bar of Newfoundland in 1989 gave valuable service to the commission as the work unfolded in the capacity of assistant counsel.

In the course of the organization meetings of June 28 and August 14, 1989 and of the two days following the opening of public hearings on September 11, 1989 standing as participants in the commission's proceedings was granted on the dates as indicated to the persons and agencies named, represented by counsel or representatives as noted:

28 June 1989	Government of Newfoundland and Labrador by George P. Horan
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Introduction

- 28 June 1989 The Congregation of The
Christian Brothers in Canada by M.
Francis O'Dea, Q.C.
- 28 June 1989 Shane Michael Earle by
John J. Harris
- 28 June 1989 Joseph Burke by
Marvin R.V. Storrow, Q.C.
- 28 June 1989 The Provincial Advisory
Council on the Status of
Women, Newfoundland and
Labrador by Ann Bel)
- 28 June 1989 Working Group on Child
Sexual Abuse, Community Services
Council by Darlene Scott
- 28 June 1989 Interagency Committee on
Violence Against Women by
Jennifer Mercer
- 28 June 1989 Roman Catholic Episcopal
Corporation of St. John's by
Thomas J. O'Reilly, Q.C.
- 28 June 1989 Douglas Kenny by
J. Derek Green, Q.C.
- 14 August 1989 Darren Connors by
John J. Harris
- 14 August 1989 John E. Mac Isaac by
John J. Harris

Criminal Justice and Complaints

14 August 1989	James F. Ghaney by John J. Harris
14 August 1989	Alvin Simms
14 August 1989	The Law Society of Newfoundland by Lois Hoegg
14 August 1989	Gerard Brinston
14 August 1989	Robert M. Connors by John J. Harris
14 August 1989	Gregory P. Connors by John J. Harris
14 August 1989	William R. Earle
14 August 1989	Gwen Mercer
13 September 1989	Edward French by Gerald F. O'Brien, Q.C.
13 September 1989	Kevin Short by Gerald F. O'Brien, Q.C.

On November 29, 1989 after initially being refused, Mr. James R. Chalker, Q.C. succeeded in obtaining standing for the Estate of Vincent P. McCarthy which he represented throughout the rest of the proceedings.

It will be appreciated that the time of writing a report of this nature may precede its publication by many weeks. The act of writing in itself is spread over a considerable period;

Introduction

for example I began writing in July 1990 and finished at the end of January 1991. By means of footnotes and some interpolations care has been taken to make the text as contemporary as possible; but such is the activity of public officials and legislatures that the occasional anachronism must inevitably be revealed. Apologies for this cannot always be explicit and must be taken for granted.

A more visible departure from normal format in this report is the idiosyncratic use of, or more correctly lack of use of capital letters referring to government departments and agencies and titles of various members of the public service whose activities have been recorded. The constant appearance of combinations of capital letters such as "Acting Assistant Deputy Minister of Justice and Attorney General" is apt to crowd a page with a result unpleasing to the eye. In order to offset this an experiment has been made in use of lower case letters where constant repetition cannot be avoided, but only after making a concession to that of capital letters at the beginning of a chapter or section of the text. How successful this may be remains to be seen; it is hoped that it will not irritate too many.

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Chapter I: Mount Cashel

The Christian Brothers of Ireland

Any attempt to produce an historical sketch of the activities of the lay order variously known for nearly two centuries as the Brothers of the Christian Schools of Ireland, the Irish Christian Brothers, the Christian Brothers of Ireland in Canada under which name it was incorporated by Act of Parliament in 1962 and now internationally as the Congregation of Christian Brothers, might be judged an impertinence on the part of the author of a report to the Lieutenant Governor in Council of Newfoundland, so widespread is its reputation across Canada and particularly in this province. And yet the pervasiveness of its influence on Roman Catholic education under a denominational system peculiar to the latter and the respect secured by its record of teaching Roman Catholic boys around the world and as pioneers of such teaching in Newfoundland are crucial to this inquiry and the discharge of its mandate.

As is well known the founder of the order, Edmund Rice, born in Co. Kilkenny in 1762 was a Waterford merchant who, moved by an early bereavement and compassion for the poor and uneducated boys of the town, embraced with his companions a religious life devoted to teaching them. With episcopal approval of the wearing of a quasi-clerical habit, the taking of vows of chastity, poverty and obedience and the assumption of sanctified names such as Ignatius by which Rice was known, the Christian Brothers, founded in 1802, had by 1820 established schools in Dublin and the southern and western parts of Ireland to such an extent that in that year

Chapter I

Pope Pius VII recognized the order as a Papal Institute under the direction as Superior General of its founder who retained that office until 1838. Care must be taken to distinguish the Christian Brothers of Ireland from the French order of Brothers of the Christian Schools founded by Saint Jean Baptiste de La Salle and constituted a Papal Institute by Pope Benedict XIII in 1742, the congregation being known familiarly in Canada where it currently operates as the De La Salle Christian Brothers, Edmund Rice was indebted to this order, not for his inspiration but for the temporary adoption of its rule in 1816, which aided his efforts to secure the brief of 1820 from Pius VII.

As is even better known the Benevolent Irish Society in St. John's, which had undertaken a largely non-denominational task of educating the impoverished youth of the colony since 1826, was faced for fifty years after with periodic administrative failures in the absence of any kind of public education, and particularly with the problem of underpaid and undereducated teachers. For a time some help was forthcoming from a Franciscan community in Ireland, but only for two years when its representatives withdrew discouraged. What the society wanted was the vigorous presence of the Irish Christian Brothers whose reputation as teachers was soundly established by mid-century, but successive applications through the Bishop of St. John's to the Superior General in Dublin were unsuccessful, because the growing responsibilities of the order in Ireland and England precluded a venture as distant and as speculative as was needed in Newfoundland. When at last in 1876 the Superior General saw his way, the gratitude and enthusiasm of the Catholic community of the colony and the disciplined teaching of the Christian Brothers had an immediate and beneficial

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Chapter I: Mount Cashel

The Christian Brothers of Ireland

Any attempt to produce an historical sketch of the activities of the lay order variously known for nearly two centuries as the Brothers of the Christian Schools of Ireland, the Irish Christian Brothers, the Christian Brothers of Ireland in Canada under which name it was incorporated by Act of Parliament in 1962 and now internationally as the Congregation of Christian Brothers, might be judged an impertinence on the part of the author of a report to the Lieutenant Governor in Council of Newfoundland, so widespread is its reputation across Canada and particularly in this province. And yet the pervasiveness of its influence on Roman Catholic education under a denominational system peculiar to the latter and the respect secured by its record of teaching Roman Catholic boys around the world and as pioneers of such teaching in Newfoundland are crucial to this inquiry and the discharge of its mandate.

As is well known the founder of the order, Edmund Rice, born in Co. Kilkenny in 1762 was a Waterford merchant who, moved by an early bereavement and compassion for the poor and uneducated boys of the town, embraced with his companions a religious life devoted to teaching them. With episcopal approval of the wearing of a quasi-clerical habit, the taking of vows of chastity, poverty and obedience and the assumption of sanctified names such as Ignatius by which Rice was known, the Christian Brothers, founded in 1802, had by 1820 established schools in Dublin and the southern and western parts of Ireland to such an extent that in that year

effect. It may well be that the success of the congregation in imposing a high standard upon Roman Catholic education there was responsible for the present system of public education, conducted as it is by a tripartite denominational condominium, aided by legislative sanction and governmental restraint.

The second witness to testify before the commission on the first day of its public hearings (September 11, 1989) was Brother Francis Gerard Hepditch the Provincial Superior -more familiarly the Provincial - ruling with the aid of his council and "consultors" over the affairs of the order in a province consisting of Canada and the West Indies. His evidence, and that provided in writing by a judicious sampling of the considerable literature on the subject compiled by commission counsel, illustrated its progress in its chosen work, exemplified by its motto "To Do and to Teach", culminating in its establishment in thirteen "provinces" and three "regions" around the world, and the creation of its only orphanage in the Canadian province within the ample confines of Archbishop Howley's family home on Torbay Road in St. John's, and since 1892 the site of devoted work on behalf of orphans and children of broken and impoverished homes until the present day. This property was called "Mount Cashel" after Cashel in Munster, high upon its famous Rock, where royal transactions both pagan and Christian took place in the Dark Ages. It became the site of an orphanage housed in buildings which transformed the cottage that the archbishop had bequeathed to the archdiocese into a substantial group, partially destroyed by fire in 1926. The loss was repaired by fresh construction, urgently undertaken since the housing of the boys was critical, and the enthusiasm of the community thoroughly aroused. The last improvement was a complete

Chapter I

renovation and some structural additions beginning in 1976.

The Congregation of Christian Brothers was first established in North America as a separate province in New York in 1916. By 1962 the Canadian activities of the order justified the establishment of a Canadian province and the Christian Brothers of Ireland in Canada were duly incorporated by Parliament (11 Elizabeth II c.22). The preamble of this private act sheds fresh light upon the nomenclature used in the order, saying "whereas the Brothers of the Christian Schools of Ireland, hereinafter called 'the Congregation' is a religious congregation in communion with the Roman Catholic Church...". In section 1 the petitioners are described as the Reverend William E. Drayton of the city of Montreal, the Reverend Joseph B. Darcy and the Reverend Gordon R. Bellows, the latter two being of the city of St. John's. Section 3 lists the objects of the newly established corporation:²

- "(a) to provide educational facilities;**
- (b) to establish and maintain orphanages;**
- (c) to establish, maintain and conduct novitiates to be used for educational, religious and residential purposes;**
- (d) to promote the religious life;**
- (e) to create, direct, organize and maintain, enlarge and operate or direct and administer teaching at other educational institutions such as colleges, schools and academies;**

Exhibit C-0136, pp.34 - 35.

Mount Cashel

- (f) **to administer in Canada the property, business and other temporal affairs of the corporation."**

The nature of the congregation presents some difficulty of classification in the catalogue of disciplined organizations of the Roman Catholic Church, since the Christian Brothers, admittedly not in orders, are described as "Reverend", but it is not necessary to exaggerate anomalies in view of what was deposed to by Brother John Patrick Keane in his examination for discovery in the case of the *Christian Brothers of Ireland in Canada and the Assessment Commissioner for the Counties of Wellington and Dnfferin el al* [1969] 2 O.R. 374, then secretary of the congregation in Canada who, when asked what was the position of the Christian Brothers in the Church, replied as follows:³

"They are not clerics. That is a mistake, I think it is the garb. This is a kind of a relic of past times. We are secular, we are just organized for this particular apostolate. We are not clerical, we have no function in the Church at all. We attend services but we do not attend as officers of the Church. We are just secular. Sometimes deference is paid to us because we might be better informed than other seculars, but this priority has no foundation in the Church."

By the time these words were uttered the Christian Brothers had long since established a dominant position in Roman Catholic education in Newfoundland and had fixed their Canadian provincialate in Ontario with headquarters at the former Beardmore property in Mono Mills. Canada was a

Chapter I

vice-province from 1963, becoming a province in 1966 as Canada and the West Indies. In this brief note it is not possible to embark upon a detailed account of the work of the congregation in Canada and particularly in latter days in British Columbia, but it may suffice to say that much of the expansion in the American and Canadian provinces proceeded from the firm base established in Newfoundland.

Since it is not within the scope of this inquiry to examine in detail the history of the Christian Brothers of Ireland, it is necessary to say that very full evidence was presented by David C. Day, Q.C., commission co-counsel not only from Brother Hepditch, Provincial Superior, Brother Gabriel McHugh, Superior General of the Congregation world-wide, and Brother Gordon Bellows, Provincial Superior immediately succeeding Brother McHugh and now a member of its General Council stationed in Rome, all of whom testified as to the constitution and history of the order, but also from former Brother J.F Barron, Brother Louis Bucher and Brother Timothy Turner dealing with recent developments at Mount Cashel Orphanage, now described as Mount Cashel Boys' Home and Training School. As well he entered in evidence valuable documentary records including publications celebrating the fiftieth, seventy-fifth and one hundredth anniversaries of its work in Newfoundland. Of these publications the one written on the occasion of the centenary and entitled "*Journey Into A New Century*"⁴ is by far the most objective and least larded with superlatives.

In this compilation, distributed to coincide with the centennial celebrations in 1976, the North American foundations of the Christian Brothers are set out at length

Mount Cashel

and, although my primary concern is with Newfoundland, it may be instructive to record that in Nova Scotia an activity beginning in 1913 and ending in 1940 at St. Mary's College, Halifax is listed under "abandoned teaching missions" such as St. Pius X High School in Montreal active only between the years 1959 and 1971. These disappointments were more than offset by progress in Ontario where the St. Joseph's provincialate and the Christian Brothers College were established at Mono Mills in 1967 and 1968, and teaching responsibilities undertaken in Toronto. In British Columbia, after a period of just over fifty years, the Christian Brothers had been compelled by financial stringency to abandon St. Louis College in Victoria, but Vancouver College and St. Thomas More High School in Burnaby were in a flourishing state. An international dimension was given to the Canadian province by establishments in Dominica and Antigua from which expansion in the West Indies was contemplated. The eastern American province was rich in communities of the order and included three in Peru; the western American province comprised those in the states of Washington, Montana, Illinois, California, Michigan and Hawaii. In Newfoundland, where the deepest roots were struck, the Brothers were teaching in St. John's at St. Patrick's High School, St. Bonaventure's College, Holy Cross School, Brother Rice High School and St. Pius X Boy's School; in Corner Brook at Regina Regional High School; in Grand Falls at St. Michael's Regional High School; in Harbour Grace at St. Francis Regional High School; in Avondale at Roncalli Regional High School and in Placentia, the latest commitment, at Laval Regional High School since 1968.

By this time Mount Cashel orphanage had ceased to qualify as such with the decline in the large number of orphans

Chapter I

created by losses at sea and tuberculosis in earlier years, and had become a residence for children of separated parents or abandoned mothers whose large families and limited means compelled them to entrust their boys to the Director of Child Welfare, either as wards of the state under the *Child Welfare Act, 1972* or by what was known as "non-ward" agreement with the director where the boys were neither wards by apprehension or delinquency. Mount Cashel when an orphanage had, as the commission was advised, supported a pupil population of two hundred, taught within its confines by the Christian Brothers at all levels, but with the merciful decline in the number of orphans and abandoned children as the twentieth century proceeded, had lost over half its maximum population. The Brothers who resided there taught in city schools by day, returning to Mount Cashel at night, and to occupation with the boys who themselves had been taught by day in the city schools and had returned in the evening to their dormitories and their dining room. A closer look must be taken at this unique institution, begun as an orphanage in the early days of the work in Newfoundland and becoming by operation of social forces a group foster home of impressive proportions and unusual facilities.

The Nelson Report

Of the thousands of government files examined by the commission's investigators and counsel, the Mount Cashel file kept at the headquarters of the Department of Social Services in the Confederation Building in St. John's was of paramount concern. Here, beginning in 1952 with correspondence between the minister of Public Welfare, the Honourable H.L. Pottle, and Archbishop Skinner, Roman Catholic Archbishop

Mount Cashel

of St. John's, may be traced the first tentative efforts to bring a proud and private religious institution to some measure of control by a government department under recent and revolutionary legislation.

The Welfare of Children Act, almost entirely to be replaced by the *Child Welfare Act, 1972*, S.N. 1972, No. 37 gave the province the power and prescribed the duty to interfere on public grounds, although the documents indicate that the first occurrence of a ward of the province being admitted into care at Mount Cashel was on April 1, 1966, attested to by an application to share costs under the Canada Assistance Plan dated September 25, 1968.⁵ Reasons for funding Mount Cashel were stated by the applicant province as the superiority of institutional care over that of foster homes, and the general shortage of the latter. In any event, the impact of this policy led to a request by the Christian Brothers to the deputy minister of the department - now Social Services and Rehabilitation - for "an analysis...of the administration and management of Mount Cashel orphanage in the light of current child care principles and philosophies". This was undertaken in the summer of 1971 by Ramona Nelson, a consultant in the federal department of Health and Welfare, from whose report this quotation is taken.⁶ The author had interviews with the deputy minister, Mr. R.L. Andrews, with Mr. M. Vincent, director of child welfare, Brother J.F. Barren, superintendent of the orphanage, Brother Douglas Kenny who evidently succeeded him as superintendent during the course of the study, and with Brother Darcy representing the secretariat of the order. On a lower level she discussed

• Exhibit C-0055, p.67.

⁶ Exhibit C-0055A.

Chapter I

the affairs of the orphanage with Brothers Thorne and French and "several of the boys in residence". She was furnished with files referring to the boys in Mount Cashel compiled by its staff and that of the department and further examined the report of the "Fire Marshal"⁷, which had suggested remodelling the building, and financial statements of Mount Cashel for the previous two years. She was provided with a tour of the institution and its existing summer camp, and in this season of openness in the attitude of the Christian Brothers, soon to cloud over under the rule of the new superintendent, her report provides a valuable assessment of the situation at the orphanage in the period immediately preceding the one material to examination by this commission. Miss Nelson must be allowed to speak for herself and at length.⁸

"Mount Cashel is historically an orphanage traditionally dedicated to the care of "homeless" boys. The Christian Brothers have for many years responded to the need for care, shelter and education of these boys. As I understand the situation, the "orphanage" was, until recently, somewhat isolated and self contained with schooling, recreation, as well as daily care all being centred at Mount Cashel. This has changed to a point where all boys over Grade III attend the regular community schools, and where all boys are encouraged to involve themselves in recreational and social facilities of the community. This integration programme greatly changed The nature of the institution. The Brothers too, moved out into

No such office in St. John's. Inspections were completed by the St. John's Fire Inspector.

Exhibit C-0055A.

Mount Cashel

the community and began teaching in the local schools. The educational aspect of the institution which had been its focal point thus changed completely. The Christian Brothers who are, by and large, a teaching order, found their role had changed to a much greater social and parental emphasis. While this move into the community was progressive, and very much in the best interests of child welfare, there is no doubt that it has created many difficulties and adjustments for the Order.

Intake policies have changed a great deal in the past few years. In the past year, Mount Cashel has only accepted children referred by the Department of Social Services. Up until that time many of the boys were admitted privately on the direct response of a parent. This in effect means that it is the Department who requests admission for children who are deemed to be in need of protection. While this again is a most progressive step in that only children who must be separated from their parents are placed in the institution, it changed the role of the Brothers in relation to the community and the parents of the children. They are not in reality responsible to the parents of the boys but to the Department for the quality of care etc. that the boys are receiving.

Mount Cashel is a large 3 storey stucco building whose construction began in 1898. The main floor consists of the Director's office and adjoining office for secretary, a kitchen, dining hall, gymnasium, indoor swimming pool, outdoor handball and tennis courts, classrooms, and a t.v. room constructed like a little theatre, a well appointed study room built on the lines of an oversized den for the older boys as well as some rooms for the use of the Brothers. The second and third floor consist of 5 large dormitories, each with a capacity of 40 beds, washrooms etc. One end of the

Chapter I

building with a separate entrance and giving the appearance of a separate house, has 8 or 9 rooms and is used for older boys. Grade 10+. There are two boys in each room.

Parts of the building are in need of redecorating and repair, e.g. stairs to the third floor. The dormitories appeared barren and depersonalized with bunk-beds all along the walls and lockers in the centre aisle. The rooms downstairs that have been re-decorated, (the older boy's study and the t.v. room) have been done imaginatively and tastefully, with the needs of the boys very much in mind.

Brother Kenny - Superintendent; nine Brothers - seven of whom teach full time in Primary and Secondary schools in St. John's, one who assists in the office administration and one who is responsible for maintenance. One lay teacher (female); qualified kindergarten teacher who teaches Grade 1, 2 and 3 at Mount Cashel; Secretary - full time - female; and, 3 cooks - full time - live in female. Total 16. Ratio of staff to residents 1-6.4.

The Superintendent appears to be very much the "manager" of the institution, is directly responsible for all the administrative work and planning. He is also the "disciplinarian and the confidante" of the boys - the "Headmaster", Both of the Superintendents with whom I had contact were committed and dedicated young men keenly concerned about the boys and about the best ways of meeting their needs. It seems probable that the Superintendent's duties are so great that he is considerably overworked. During my visits they were involved in such things as direct purchasing of food and clothing, minor as well as major administrative and programming problems.

Mount Cashel

The routines, schedules etc. are well planned and efficiently organized but tend, as do most institutions of this size, to rigidity. The boys fit into the schedule of the institution and there is little room for individual programme planning on the basis of the boy's (*sic*) needs. While real attempts have been made to cut down on regimentation, and while every effort is made to treat the boys as individuals, the very nature and size of the institution is against this. A programme in which the individual and the group needs could be met compatibly, would be very difficult if not impossible, to work out with the present number of children and staff and the present type of programming.

The goals and aims of the programmes appeared to me to be closer to those of a private school than a home. This is, of course, understandable in view of Mount Cashel's history as a school, and in relation to the Brothers all being teachers and having their expertise in this area.

A great deal of faith is placed in the process of directing the boy's (*sic*) energies into work and sports and thus directing them away from or leaving little time or energy for unacceptable activities.

Work activities appear well organized, duties such as cleaning, dishwashing, serving of meals, etc. are shared equitably. I could not estimate how onerous these were but I did not receive the impression that this was a problem."

The author then comments favourably upon the warmth and spontaneity of the management of the institution, particularly in connection with the activities of the summer camp, which she summarizes with the words, "the

Chapter I

commitment of the Brothers and of all staff to the boys is very great". She proceeds:

"Mount Cashel has been maintained by:

1. Private monies secured from an annual Christmas raffle and from the Order through private donations etc.
2. Payments from parents
3. Payments from the provincial government for children in their care (see annual financial report)

The building itself is owned by the Diocese but the complete maintenance, repairs, etc. are the responsibility of the Order. The heating and electricity for the building are major financial considerations due to the size of the building, and the running costs are greatly accelerated by these two factors.

At this stage, with almost all the children being under the care of the provincial government, the government is the major funding body. The rates paid by the provincial government were the same (minus the family allowance) as rates paid to foster parents and based on the same age criteria. While this appeared to be sufficient to cover the daily costs of food, clothing and personal needs of the boys, the overhead costs were not being met and thus a substantial deficit was accrued in the fiscal year 1970-71. While the population remained high (160-200), there were sufficient funds to function. As the population began to decrease to its present population of 103, the overhead of course remained constant and the deficit began to accrue.

The decision made in July 1971 by the provincial government to increase the rate by approximately 1/3 in each age group and to make a grant sufficient to cover a large portion of the deficit will remedy the situation temporarily."

The report continues with recommendations which are prescient and prophetic.

¹¹1) Building

If the building is to be retained for the purpose of a children's institution it would seem important to make the following renovations:

- a) partitioning the second floor dormitories in such a way that individual rooms and rooms for 2 and 4 boys could be provided. The window positioning in the second floor would seem to make this feasible. This would give the boys a place of their own and would enable them to have some privacy. (It would also create additional problems in staffing which will be outlined in recommendation 3). It would seem to me a very important step in individualizing the institution and thus more adequately meeting the boy's (*sic*) personal needs;
- b) ensuring that the building meets all the requirements of the Fire Department Marshal's office;
- c) possibly sealing off the third floor. (If on the advice of competent authorities it were determined that heating costs could thus be substantially reduced). (This would also save the

Chapter I

cost of repairs to the staircases and the on-going maintenance work).

2) Intake

It has already been agreed that intake be confined to children under the care of the Director of Child Welfare.

We would recommend that

- (i) intake be restricted to boys eleven years of age and over
- (ii) that intake be restricted if possible to boys who are in contact with their families.

These recommendations are put forth for the following reasons:

- (a) The emotional and affectional needs of young children cannot in my opinion be fully met in a large institutional environment. In the formative years, and particularly the pre school years, individual attention, a position in a family and a sense of family is of great importance for present and future development.

While the institution has a very definite position in the range of placement services for children, it cannot adequately replace the familial needs of most children. It can though, provide specialized care and treatment for children who cannot be treated in individual homes. It can also provide a good living experience for children who cannot live in their own homes, but whose relationship with their own family is such that they cannot adjust to a "new family"

Mount Cashel

concept or the closeness of a foster home. This more commonly occurs with older children.

- (b) If it is agreed that a large institution cannot adequately give a feeling of family, it is important, in my opinion, to attempt to only place in this type of institution children who are having some of their "family" needs met outside. It is true that there are a good number of older children who cannot for a variety of reasons live in their own home but who have a relationship good or bad with their parents and cannot really accept the close family life of a foster home. For these children an institution such as Mount Cashel can provide a good living experience. This recommendation however should be considered as general intake policy, not as a rigid, exclusion (*sic*) one. There could be situations in which, for example, "family" could be strengthened and maintained by admitting a younger child with his older brothers to Mount Cashel. In all probability situations will arise where for other social and practical reasons an older boy might be considered for admission who had no contact with his family. In this type of situation it would then be important to find relatives or even a volunteer family to whom he could relate outside the institution.

3) Child Population

Confining the number of residents in Mount Cashel to a maximum of between 50 and 60 boys over 11 years of age would in all probability greatly strengthen the quality of life. A more home-like atmosphere could be created; much of the "regimentation" could be eliminated and the Brothers

Chapter I

and lay staff would then have more opportunity to work closely with the boys.

4) Staffing

The Brothers provide stability and structure to the institution that is highly desirable. Their commitment to the boys is one of the most positive features of Mount Cashel. However, as their main area of expertise is in the teaching field it would seem desirable to strengthen and augment their services in the following way:

- (1) adding to the staff a qualified experienced social worker on a full time basis. This person's duties would include the following:
 - (a) working with the families of the children in care as well as the boys themselves in order to
 - (i) effect rehabilitation with own families when possible and desirable;
 - (ii) respond more appropriately to the boys concerns and needs and feelings with regard to their own families by being in a position to know both the boy and the family.
 - (b) working co-operatively with the Brothers through a programme of exchanging and meshing the knowledge of the teaching and social work disciplines in order to effect in Mount Cashel an environmental situation conducive to optimum living conditions for the boys. This programme would involve

Mount Cashel

staff meetings and training sessions, as well as a direct working relationship with the superintendent;

- (II) adding to the staff, preferably by relieving one of the Brothers from some of his duties, an assistant to the superintendent who would be responsible for day by day administration functions, such as ordering and planning food requirements, clothing, transportation, and other administrative duties;**

- (III) considering at a later stage, the addition of a house mother/s to provide more female identification."**

I have omitted two substantial footnotes, the first of which deals with the proposed social worker, wherein the author says "the problem of deciding whether the social worker should be employed directly by Mount Cashel, or by the Provincial Government would be a matter for serious consideration". She recommends the latter as employer, but warns that the lines of accountability must be clearly developed to avoid conflicts. While admitting that she is not sufficiently knowledgeable to make a recommendation, she expresses the view that the social worker should be "an integral part of the Mount Cashel organization". In the second footnote which refers to the provision of "more female identification" as recommended above, she qualifies her view to the extent of doubting whether "this is really desirable" if her recommendations as to intake were accepted and the number of children reduced, in which case the existing female staff might suffice. The footnote concludes:

Chapter I

"An arrangement should be made though for house mothers or some of the Brothers to have their sleeping quarters in close proximity to the boys."

After suggesting that the funding of Mount Cashel should be a *per diem* rate cost structure based on "cost experience of each preceding year", Miss Nelson summarizes her conclusions in the following terms.

"Mount Cashel appears to be performing a very useful community function. In studying this institution several alternate plans for its future use were considered and the recommendations outlined above should not be considered as the "only way" for Mount Cashel to continue. For example, the feasibility of using Mount Cashel for family groups on a short term placement basis where the prognosis for reconciliation with own families was good, was investigated. As this would involve placement of girls as well as boys if the family concept was to be maintained the plan was not considered possible or realistic at this time. "Hostel" type care for older boys or young adults plans for after care for graduates etc. were all considered. The need to provide counselling services as well as emergency shelter for former residents who regard Mount Cashel as their "home base" was discussed in some detail and the possibility of private funds being allocated to this purpose should continue to be investigated. This type of service could quite feasibly be added to the regular programme.

It would seem inadvisable to consider immediate implementation of above recommendations re residence requirements. A phasing out process would seem more desirable. To many of the boys Mount Cashel is their home and it would seem unwise to uproot them in order to conform to a new policy. If the recommendations re

Mount Cashel

the appointment of a social worker were acted upon, a thorough and complete plan for each boy for whom Mount Cashel was not considered an appropriate placement under the new policy could be worked out. It seems probable that with concentrated and extensive work, a significant group of boys might be re-united with their own families. For another group, and particularly the very young group good foster and/or adoptive placements could be worked out. If intake were confined to boys eleven and over as a first step and if it were accompanied by the above "placement" process a natural reduction and change in age groupings would in all probability be achieved over a six month period. This would allow time for a satisfactory financial formula to be worked out, and for all the financial considerations with regard to the building itself to be fully considered.

If after careful analysis and consideration the costing considerations proved to be insurmountable to a point where it were deemed inadvisable to continue to function the population would then be reduced to a point where the closing of Mount Cashel would not create as great a problem as it would now. If the costing factors could be worked out the institution would be at a stage where programmes and functions could be initiated, compatible with a group of 50-60 older boys. From the information gathered from the Department, and from my observations of Mount Cashel, it would seem apparent that

- 1) there is and will be, a continued need for residential care of older boys that cannot be adequate or appropriately met through a foster home programme;
- 2) that Mount Cashel has provided and can continue to provide a service that would meet this need.

Chapter I

For these reasons, it is hoped that the financial problems can be worked out to the mutual satisfaction of the Department and Mount Cashel."

The following figures are appended to this report and illustrate the age groups and length of time in residence in total terms and as divided on a basis of status.⁹

MOUNT CASHEL

<u>Age Groups</u>	<u>Total Population</u>
Under 6	3
6 - 8	7
8 - 10	14
10-12	14
12- 16	46
over 16	17
Total	101

Length of time in residence

1 year or less	17
1 - 2 yrs	16
2 - 4 yrs	24
4 - 6 yrs	42
6 yrs +	2
Total	101

Exhibit C-0055A.

Mount Cashel

Status

<u>Non-ward</u>	<u>Wardship Pending</u>	<u>Temporary Wards</u>	<u>Permanent Wards</u>	<u>Permanent Delinquent</u>
51	2	5	25	3

over 16 status unknown

15

Contact with a parent in past 6 months 71

No contact with 30

Mount Cashel and the State

There is no doubt that the author of this report relied for much of its content not only on what she observed but what was told her by Brother John Francis Barren who was the superintendent of the orphanage from 1968 to 1971, having first taught there in 1963. After leaving he tried for a time to teach at the order's academy in Antigua but in 1972 resigned from it and became a lay teacher in Newfoundland, as he is to this day. When he testified before the commission in April 1990 he described a period when very little contact existed between Mount Cashel and the department of social services, even though the placement of children taken into care by the director of child welfare was well under way. He represented the more outgoing opinion in the congregation and did his best to foster good relations with the department, mindful as he was bound to be of the increasing cost of taking care of these Catholic boys and of the importance of making plain to it the difficulties of the orphanage. Some of the work in this respect done by Brother Barron bore fruit in the superintendency of Brother Douglas

Chapter I

Kenny who succeeded him as superintendent, the establishment for instance of a liaison committee composed of three of the senior brothers at Mount Cashel and of George Pope, Assistant Deputy Minister of Social Services, F.J. Simms, Director of Child Welfare and Catherine Cahill, district supervisor, Child Welfare Division, St. John's district office. This was in 1973, but already signs of a cooler climate were beginning to accumulate, particularly in the attention given to the status and functions of a social worker, the need for whom had been much emphasised by Brother Barron but whose activity was successfully curtailed by Brother Kenny and confined to minor administrative duties with limited access to the orphanage and its charges. Whereas Barron had done his best to encourage a closer relationship with the department and urged on all concerned the need for help in areas such as social welfare and health, Kenny seemed determined to keep it at arms length in accordance with an earlier tradition and to make sure that the intrusion of a departmental officer into the affairs of Mount Cashel would be strictly controlled in terms of his duties and responsibilities. In a letter of April 17, 1972 addressed to George Pope, then Director of Field Services in the Department of Social Services and Rehabilitation, F.A. Davis, regional administrator for St. John's observed:¹⁰

"Enclosed is a memorandum which was compiled by Welfare Officer Laurie and presented to the undersigned by Mr. Michael Tlobbs, District Supervisor, St. John's District Office. From what the Welfare Officer has said, it would appear that there has been a complete change in the outlook of the present Administrator of Mount Cashel as compared to his predecessor in that the

Exhibit C-0055, p. 126.

Mount Cashel

Welfare Officer's role now is to provide comprehensive social histories, attend to monetary issues, and arrange transportation home on behalf of the boys at certain periods of the year."

Mr. Davis's reaction to this was contained in a concluding paragraph in which he said that it had occurred to him, "on a number of occasions that Mount Cashel should have a competent person on their staff to deal with any problems that may arise with the boys, and that this Department should not become deeply involved or to the extent of our involvement within the past three or four years." He referred to "a different philosophy" although he could not say "what has happened since the administration changed hands". Similar concern, but reflecting more positive views, was expressed by probation officer Brendan Devine, in a letter to Simms, writing from the St. John's district office on July 11, 1972, and discussing the duties of a welfare officer, shortly to be known as a social worker, saying,¹¹

"My primary concern involves the lack of communication, the almost complete absence of a working relationship, that presently exists between Mount Cashel and this Department. So very little of what is actually taking place within the institution is shared with us that I have practically no idea of programs other than educational and recreational. Mount Cashel is staffed primarily by Christian Brothers who hold other positions ie. teacher etc. They perform the role of supervisors of the boys in addition to their regular working activities.,. There are, at this moment, 79 boys at Mount Cashel yet I am not aware of any one on the staff with social work training. We have on a

Ibid, pp.127 - 128.

Chapter I

number of occasions offered the services of one of our Welfare Officers, however, during the past two years I have been most unhappy with the relationship between our worker and the Superintendent. I gather from the welfare officer that his reception at the institution is somewhat cool and he is given very little opportunity to become involved with the boys."

The result was a meeting in the office of the new minister, the Honourable A.J. Murphy, a letter from him to Brother Kenny in which the liaison committee was approved and the arrangement of the first meeting. It is of interest to note that the minister's initiative was greeted by the superintendent with warmth in a letter commencing "Dear Ank". The minister did not weary of well-doing and took pleasure from his success in persuading the government to guarantee a loan of \$450,000 in response to a need expressed in a letter to him from the provincial superior of November 20, 1974 one paragraph of which may be quoted:¹²

"Since we have established the viability and, as far as one can predict, the durability of Mount Cashel, the Christian Brothers, now, deem it necessary to reconstruct the existing buildings of Mount Cashel. Structural engineers and architects have been consulted. All have agreed that the present structure is strong. Rather than construct then, we shall endeavour to reconstruct and renovate, bearing in mind current needs and approaches to Child Care."

This transaction was effected by order in council providing the orphanage with the option of either receiving a grant of that

Exhibit C-0055. pp.154 - 155.

Mount Cashel

sum to be advanced over a period of "ten to fifteen years" or, as an alternative, a provision that the department of social services would repay over such period the amount of \$450,000 as required by a lending bank. Thus there began a programme of renovation and reconstruction which was to continue at least until 1980 and realize one of the principal recommendations of Ramona Nelson's report. It was otherwise with her recommendations dealing with the social worker at the orphanage, and in this respect. Mr. Simms had to acknowledge defeat. He informed Catherine Cahill, district supervisor at Harvey Road, that "a meeting has been held with Brother Kenny, Superintendent at Mount Cashel, and Brother Nash, and it has been agreed that more organized procedures must be followed in order to improve the existing situation. It has therefore been decided to involve the Field Staff of our St. John's District Office but *for administrative purposes only.*" The social worker - to be, in the event, Mr. Robert Bradbury, many times a witness before the commission - was therefore to be restricted to making regular visits to the orphanage for provision of clothing, school books, and health services cards, completion of placement reports, and making recommendations for extended care. Since Bradbury had a complete caseload in the field of corrections it was as well for him that his duties were confined to matters of paper-shuffling routine.

The Centennial

In 1926 the Christian Brothers of Ireland celebrated the fiftieth year of laborious service to Roman Catholic education in Newfoundland. This jubilee celebration, by virtue of a

Chapter I

pilgrimage back to Newfoundland, was a great success, and the seventy-fifth anniversary in 1951 was celebrated with even greater *eclat*, church and state joining together in the persons of the Archbishop of St. John's and attending clergy and the Lieutenant Governor of the province to commemorate the auspicious occasion. By 1975 the time had come to celebrate the hundredth anniversary in the following year, and a distinguished member of the order, Brother Dermot F. Nash (properly Dermot Pearse) and of its provincial council was appointed to organize the celebration. Brother Nash had some five years earlier been chairman of a conference committee which, in its report to the council indicated the existence of grave misgivings as to the effectiveness of the teaching services of the order in Newfoundland. In his executive committee report for the Christian Brothers Education Council of Newfoundland he used the following language:¹³

"There never was, nor is there now, any doubt as to the fine spirit among our Brothers in Newfoundland, nor the slightest misgiving as to the devoted attention given students in our schools. The Brothers are convinced that they can and will achieve their role in education in Newfoundland because of their training, dedication, and availability. There has existed for some time, however, real concern that our ability to perform "effectively" has been greatly impaired, in terms of manpower shortage as also a radically changing school situation in Newfoundland. Disproportionately small numbers of Religious Staff Members in our Schools have, in the opinion of many Brothers, created a loss of real contact as "Religious" and even as "Educators" where we become pivotal dispensers of discipline. Meaningful

Exhibit C-0260, pp.41 - 42.

Mount Cashel

contact with parents, ex-pupils, and the business world has been greatly diminished and impaired. Fledging School Boards are exercising increased administrative control, while at the same time such Boards have not as yet realized their own aims and objectives in the field of education. In ever-increasing numbers lay teachers are becoming fully qualified and are seeking administrative positions. The whole spirit of the "times" indicates a certain cynicism toward religion and a reluctance toward control. Certain inadequacies on Governmental and Departmental levels in terms of curriculum make proper school administration difficult indeed. Constant and sound communication is obviously needed between School Boards, Government Educational Committees, and the Clergy. Viable participation in N.T.A.¹⁴ should be a must, for it is here that ample opportunity for energetic persuasion is available through Liaison Committee work, which profoundly influences policy of Government, the University and even School Boards. Finally, there is an urgent need for a fully authorized Brother who can and will speak for the Brothers in Newfoundland, as also a Director of Education for our Schools so that positive and informed action may result.

Thus our determined efforts throughout the year to turn our "sights" inward, in the hope that such efforts would bring fruitful and effective results. A thorough examination of our problems was proposed to prevent our drifting aimlessly into situations we did not particularly desire, or into situations which, because of our "scattered" and hardly representative thinking, could be taken as OUR ATTITUDE."

At the conference a resolution proposing that the congregation retain Mount Cashel, even if it involved funding

¹⁴ Newfoundland Teachers' Association.

Chapter I

from its own resources, was tabled, but the following was carried:¹⁵

"That the Congregation establish a fixed policy for Mount Cashel to ensure its efficient administration. Such policy should ensure the exclusion of the possibility of Government control."

Thus there was implicit recognition of the drawing together of the Mount Cashel community providing foster-care for the wards of the state, a department of government providing the much-needed funds, and the foreshadowing of a situation which must inevitably develop from him. who pays the piper calling the tune. In the proceedings of the conference it was even conceded that Mount Cashel would accept some boys from Pleasantville, or in other words juvenile delinquents committed to the Boys' School operating in that quarter of the city of St. John's, providing that they might be dismissed at the will of the superintendent of the orphanage.

The centennial celebrations took place early in 1976 and, naturally enough, were of even more consequence than those which had preceded them in the fiftieth and seventy-fifth year. Again the principal functionaries of church and state united to extol the virtues of the Christian Brothers, particularly as displayed in the teaching and nurture of boys in their far-flung schools and at Mount Cashel. But by this time in the orphanage the seeds of tragedy had been sown.

Exhibit C-0260, p.44.

Chapter II: The Guardians

Social Services and Child Welfare

Before dealing with evidence upon the credibility of which I have to rule and make findings of fact within the provisions of article I of the terms of reference of the commission, it is necessary to refer as briefly as possible to that which counsel produced in profusion as to the legislative and administrative apparatus in place for responding and dealing with complaints. This I trust is permissible because of the lapse of fifteen years between the time when these events occurred and the present day, during which the apparatus has become more sophisticated and the public more aware. I shall first address the situation of the Department of Social Services in 1975 and not pause to consider whether it was otherwise known as the department of Social Services and Rehabilitation or by any other variation of title which may serve to obscure the essential structure. An abundance of evidence was led, beginning with that of Mrs. Elizabeth Crawford who entered the public service in 1969 as a welfare officer and at the time she testified on the first day of the commission's public hearings was Assistant Director of Child Welfare; it continued to accumulate as various officials of the department were called and documents filed.

The early history of social policy in Newfoundland has been the subject of compendious treatment by Mr. Stuart R. Godfrey, a former assistant deputy minister of Public Welfare, in his book *"Human Rights and Social Policy in*

Chapter II

*Newfoundland: 1832 - 1982*⁶ an invaluable treatise about which it can only be said by way of adverse comment that the Canada Council and Memorial University should have extended their grants in aid to include an index. The post-confederation agency which opened a new and vital chapter in the quality of life in the province was established by the *Department of Public Welfare Act* R.S.N. 1952 c.18 which appears again in amended form as chapter 92 of the last revision of the statutes of Newfoundland in 1970 as the *Department of Social Services and Rehabilitation Act*. In 1973 this act was repealed and replaced by the *Department of Social Services Act, 1973*, S.N. 1973 No. 31 a statute which up until December 1975 had only been once amended in order to change the name "welfare officer" to "social worker" on December 20, 1974. The powers, functions and duties of the minister as section 7 of the act provides are set out in subsection (a) and include:

"the supervision, control and direction of all matters relating to social services and social assistance which are within the legislative authority of the province, including, without limitation of the generality of the foregoing, all matters relating to

(i) the welfare of children, (ii)

the adoption of children,

(iii) the administration of all matters arising out of the laws relating to deserted or neglected spouses or children and to illegitimacy,

⁶ Exhibit C-0290. Harry Cuff Publications Limited, St. John's, Newfoundland, 1985.

The Guardians

- (iv) the administration of all laws relating to juvenile delinquency within the jurisdiction of the province,
- (v) the care and guidance, other than institutional, of physically and socially handicapped citizens of the province of all ages,
- (vi) the identification of cases of economic hardship or deprivation and the prompt alleviation thereof by the provision of appropriate, publicly financed, material assistance including without limitation of the generality of the foregoing, such identification and alleviation as respects aged, blind and disabled persons,
- (vii) the furnishing, in cooperation with the Department of Manpower and Industrial Relations, the Department of Rehabilitation and Recreation, the Department of Rural Development and other departments of the Government of the province, of guidance to all recipients of the assistance referred to in subparagraph (vi) in their quest for opportunities of gainful employment and rehabilitation, and
- (viii) the effective prevention of abuses concerning matters referred to in subparagraphs (vi) and (vii)

which are not, or in so far as they are not, by law or by order of the Lieutenant-Governor in Council, assigned to any other minister or department of Government."

Useful detail is given in the annual report of the

Chapter II

department of social services for the year ended March 31, 1975 submitted by the minister to the Honourable Gordon A. Winter, Lieutenant Governor of Newfoundland in an undated letter of transmittal, and incidentally the last departmental report published to date for public consumption. Under the heading "scope and responsibility" on page one of this report the following appears:

17

"The Department of Social Services is a province wide organization with Regional and District offices in 45 communities throughout the Province. The Department is involved in providing financial assistance, material aid and a broad spectrum of Social Services to people in their own homes. The Department has a total staff of 427, of whom 337 are attached to Regional and District offices throughout the Province.

The mission of the Department is to prevent neglect and dependency from occurring and to alleviate want and distress. Services and financial assistance are provided directly to families and individuals in their own homes.

Vital supplementary and related services are provided co-operatively by:

- 1. Foster Parents.**
- 2. Mount Cashel Orphanage.**
- 3. The Department of Rehabilitation and Recreation.**
- 4. Other Departments of Government and private agencies throughout the Province."**

Exhibit C-0025.

The Guardians

After enumerating the statutes and regulations that the department was responsible for administering the report sets out its organizational structure briefly as follows:

18

"Field Services is responsible for delivering the programs of the Department to people in their own communities. This is done through a network of five Regional and 45 District Offices, staffed by trained Welfare Officers, Supervisors, and Regional Administrators.

Social Assistance is the Provincial Government's program within the framework of the Canada Assistance Plan to provide support and supplementation for needy persons to help them maintain a reasonable standard of living and to become partially or wholly self-supporting wherever possible.

Child Welfare Services are primarily concerned with prevention of neglect and abuse of children by protecting them in their own homes through family counselling; and providing suitable care through foster homes or adoption when separation of children and parents is considered necessary. They also work towards reuniting children and parents wherever possible.

Correctional Services for children are aimed at rehabilitating them in their own homes through individual and family counselling, and providing suitable substitute care through foster homes or institutions (administered by the Department of Rehabilitation and Recreation) where removal of

Ibid. p.3.

Chapter II

children from their own homes is considered necessary. They also provide follow-up care when children are returned to their own homes.

Employment Opportunities is a program to enable recipients of Social Assistance to change their circumstances for the better. It proposes to do this by creating and improving opportunities for recipients of Social Assistance to enter employment either directly through job placement or indirectly through retraining. The program is concerned particularly with those Social Assistance recipients who have particular and continuing difficulty in finding and keeping employment.

Staff Development. The Division of Staff Development is responsible for the planning, organization, coordination and evaluation of an on-going training program emphasizing the selection, orientation and professional development of the staff of the Department of Social Services as a whole; and for evolving systems to encourage the personal development of staff members in the areas of evaluation, recognition of excellence and effort, encouragement of innovation and the processing of grievance.

Planning and Research is the Division responsible for the development and direction of departmental research and planning related to the growth and development of the Department."

This preliminary treatment ends with a statement of the position of the provincial department in formulating a review of the social security system with other provincial ministers and the federal minister of health and welfare as a result of

The Guardians

which much progress and improvement has been made in subsequent years.

The programmes of the department summarized above were deployed over the province in five regions: Eastern at Harbour Grace, Central at Grand Falls, Western at Corner Brook, Labrador at Happy Valley and St. John's, each headed by an administrator or regional manager as the incumbent was subsequently called. These regions were subdivided into districts in turn presided over by district supervisors or district managers; the focus of the inquiry must be reduced to considering only the St. John's region at this stage of the report. Within that region were five districts: Bell Island, Long Pond, Bay Bulls, Fermeuse and St. John's. Headquarters for both the St. John's regional office and the St. John's district office were at Harvey Road, long known locally as "City Welfare" and in 1975 this district office served the whole city including Mount Pearl, where three offices perform its functions at the present day. This report will be mainly concerned with the Division of Child Welfare which at the material time was known as the Division of Child Welfare and Corrections, later to lose the responsibility for corrections programmes. It should be borne in mind that in relation to all programmes of the various divisions Field Services was responsible for providing personnel for their development. In remote parts of the province a single official might be found administering all the programmes of the department, whereas in St. John's and Corner Brook specialization prevailed and within the confines of a district office, particularly in the St. John's district, individual supervisors presided over each. Thus, as we shall see, child welfare had a district supervisor in the St. John's district office as did corrections, among others, to administer the

Chapter II

divisional programme. In the case of child welfare the administrative chain of command led from the social workers in the front line with their caseloads back to the district supervisor, then to regional headquarters and finally to the headquarters of the director at the Confederation Building, responsible to the minister for child welfare programmes across the province.

Looking at the departmental structure from the standpoint of the St. John's district office reference should be made to chart I¹⁹, appendix A,²⁰. Presiding over all was the minister to whom the deputy minister was responsible; he was reported to directly by an assistant deputy minister and a director of administration. The assistant deputy minister was apparently responsible for the transactions of the director of child welfare (and corrections); the director of social assistance, whose programmes involved the payment of long term and short term income subsidies or, in the plain words of the past, welfare payments; and the directors of employment opportunity, field services, and staff development. As we have seen the St. John's regional office reported to the director of field services and was in turn reported to by the St. John's district office which housed supervisors for the programmes of child welfare and corrections, social assistance and employment opportunity with attendant social workers, of which there were eight in the child welfare office and three in the corrections office. In the latter was Robert Bradbury, with, as observed above, a full caseload and the Mount Cashel liaison responsibility. As the chart will show there was a significant distinction apparently enjoyed by the director

^{ig} Exhibit O0024D.

^{?"} All appendices are found in Volume II.

The Guardians

of child welfare in that his supervisor at the district office could and did habitually report to him direct, and that he, like the members of the Child Welfare Board, a purely advisory body which with him, and through him, had direct access to the minister. The explanation of this apparent anomaly can be found in the provisions of the *Child Welfare Act, 1972*.

This statute cited as S.N. 1972, No. 37 repealed all previous enactments which began with the *Welfare of Children Act, R.S.N. 1952, c.60* and continued with the *Child Welfare Act, S.N. 1964, No. 45*, leaving, be it said, a truncated *Welfare of Children Act*, the surviving provisions of which applied to juvenile offenders until 1984 when the *Young Offenders Act (Canada)* superseded them. Since the *Child Welfare Act, 1972* was in force and reasonably contemporary with the period 1974 - 1976 with which this report will shortly deal, it would be pedantic to embark on a legislative history preceding its enactment. None the less one feature of the act is not new, having appeared in S.N. 1964, No.45 and subsequently in R.S.N. 1970, c.37 in similar if not identical language. Part I of the act of 1972 dealing with the director and child welfare board provides as follows:

"3. The Lieutenant-Governor in Council may appoint a Director of Child Welfare who shall administer and enforce this Act, under the control and direction of the Minister."

A legal opinion as to the effect of this provision might well conclude that the director of child welfare not only had access to the minister, but such access was independent of the deputy minister or any assistant deputy minister. But Mr. FJ. Simms who was director from October 1, 1971 to March 31, 1989, and who appeared before the commission on four

Chapter II

occasions as a witness beginning on October 11, 1989 testified as follows on that day, Mr. Day, putting the questions:

"Q. Now then, you say that as the Director of Child Welfare you reported to the Assistant Deputy Minister. Did you have any reporting responsibilities to anybody else other than the Assistant Deputy Minister as the Director of Child Welfare?

A. No, I was responsible to the Assistant Deputy Minister. I would only report to someone else if the Assistant Deputy Minister was not available. Like I would go to the Deputy Minister if the Assistant Deputy Minister wasn't available, or I would go to the Minister if both of these gentlemen were not available.

Q. And I take it that were the Deputy Minister or the Minister for some reason or other to request you to do a particular assignment, then presumably you would report back to that senior government person who had made the request?

A. No, sir. I would normally direct any responses to a request through my immediate supervisor, and that would be the Assistant Deputy Minister.

Q. So that if, for example, the Deputy Minister made a request to you, you would report in making your response through your Assistant Deputy Minister?

The Guardians

A. That is right. Unless some—there was some specific request -- some directive given for me to go directly to the Deputy Minister.

Q. Yes, well this is what I was getting at—that if you were specifically told by the Deputy Minister to report to him, you would if he specifically directed it?

A. Yes, I would then.

Q. But in the ordinary course of events the person or the position to which you reported was that of the Assistant Deputy Minister?

A. Yes. that is correct."

It will be seen later that this rooted belief in the propriety of proceeding through "channels" produced in some important particulars the delaying and sometimes withholding of information from the minister responsible to the House of Assembly for the conduct of his department. Another element in the establishment of the department was the child welfare board, of origin coeval with the director, and continued by section 7 of the act which reads as follows:

"(1) The Lieutenant-Governor in Council may appoint a board which shall be known as the Child Welfare Board and which shall consist of not less than five and not more than nine members,

(2) Members of the Board

(a) shall hold office during pleasure for three years from the first day of January

Chapter II

following their appointment, and until their successors are appointed;

- (b) are eligible for reappointment; and
 - (c) shall serve without remuneration, but may be paid their actual travelling expenses, if any, incurred while attending meetings of the Board.
- (3) When a vacancy occurs amongst the members of the Board because of death, resignation or illness or if, for any other reason in the opinion of the Minister, a member should be replaced, the Lieutenant-Governor in Council may appoint a successor to that member and the successor shall hold office for the remainder of the unexpired term of the member whom he replaces and the successor is eligible for re-appointment.
- (4) The Lieutenant-Governor in Council may designate one of the members of the Board to be its chairman, and the Board shall meet at his call or that of the Director.
- (5) The Board shall
- (a) meet as often as may be necessary for the consideration of questions pertaining to the welfare of the children of Newfoundland;
 - (b) assist and advise the Director in the administration of this Act;
 - (c) promote the proper treatment of children to whom this Act applies;

The Guardians

- (d) encourage, through study and discussion, the development and maintenance of sound standards of child protection in Newfoundland; and**
- (e) perform such other duties consistent with this Act as may from time to time be prescribed by the Lieutenant-Governor in Council or the Minister."**

There is nothing in the evidence which suggests that this body played any important or effective part in the area of child welfare, and when Elizabeth Crawford testified in September 1989 she said that it had not met since 1987.

The heart of the statute includes the definition of a neglected child (now known as "a child in need of protection") and is found in section 2 subsection (p) as follows:

"neglected child means a child

- (i) who is abandoned or deserted by both parents, or if one is dead, by the survivor or the guardian,**
- (ii) whose parents, or parent if only one be living, have or has allowed him to be brought up by another person at that person's expense under unsatisfactory conditions,**
- (iii) whose parents, or surviving parent if only one, are or is undergoing imprisonment, and there is no other person legally liable to maintain the child.**

Chapter II

- (iv) whose parents, or surviving parent, or guardian or other person in whose charge he may be, cannot by reason of misfortune, disease or infirmity properly care for him, or are unfit to have charge of him, or refuse to maintain him,
- (v) who is found wandering about without a proper or settled place of abode, or is found sleeping at night in barns, outhouses or in the open air, or any other undesirable place,
- (vi) who is found living with vicious or disreputable persons,
- (vii) who, by reason of neglect, intemperance or vice of his parents or guardians, is suffered to grow up without proper education and control, or in circumstances conducive to an idle and dissolute life,
- (viii) whose parent or guardian is able to provide proper medical, surgical or other remedial care for the child, but neglects to provide such care or, whether financially competent or not, refuses permission for such care or any remedial measure when recommended by competent medical authority,
- (ix) who is found begging in any place of public resort,
- (x) who habitually frequents any tavern, pool-hall or gambling room,
- (xi) who, being under the age of fourteen years, habitually sells anything in the streets or public places after nine o'clock at night,

The Guardians

- (xii) who habitually absents himself from his home or school,
- (xiii) who habitually uses obscene, profane or immoral language or is guilty of any indecent conduct in any public place,
- (xiv) who is unlawfully assaulted, ill-used or treated with cruelty or neglect by his parents or guardian,
- (xv) who is found having in his possession any obscene picture, drawing or printed material,
- (xvi) who, being under the age of sixteen years, is employed anywhere between the hours of nine o'clock at night and eight o'clock of the following day,
- (xvii) who,
 - (A) being a female,
 - (B) being a male under twelve years, or
 - (C) being a male between twelve and fourteen years old and without the written consent of his parents or guardian, is found selling newspapers or other related articles in a public place,
- (xviii) in respect of whom an offence under subsection (4) or (5) of Section 4 of The Adoption of Children Act, 1972 or the equivalent provisions of any predecessor Act to that Act has been committed,

Chapter II

- (xix) whose parents are dead, and who has no relatives liable to support him, or
- (xx) who is illegitimate and whose mother is dead, incapacitated or without means or unwilling to support him, or who is brought before the Court with the consent of the mother for the purpose of transferring the guardianship of him to the Director."

It will be seen that subparagraph (xiv) provides a firm legislative sanction against all the types of abuse which have been explored by this commission and by those witnesses and organizations whose business it is to define and analyze them. Part II of the act deals with neglected children and section 10 provides:

- "(1) Where it is believed, on reasonable or probable grounds, that a child is a neglected child, the Director or a welfare officer or any person authorized by the Director in writing may apply to a Judge for a declaration that the child is a neglected child.
- (2) The Director or a welfare officer or the person authorized by the Director to make the application under subsection (1) shall, at least ten days prior to the date set for the hearing of that application, notify the child's parents or guardian, if known, of
 - (a) the name of the child in respect of whom the application is being made;
 - (b) the subparagraph of paragraph (p) of Section 2 under which the child is considered to be a neglected child; and

The Guardians

- (c) the time and place of the hearing of the application.
- (3) The Judge shall forthwith hear the application and may compel the attendance of witnesses on the hearing.
- (4) If the Judge, upon the hearing of the application, finds that the child is a neglected child, he may so declare and may make an order in respect of the child."

These sections bring the department of social services and the department of justice on to the scene, and section 11 thereupon gives the judge and other officers additional powers contained in the first three subsections which need especially to be noticed.

- "(1) Where he has reasonable or probable grounds for believing that a child is a neglected child,
 - (a) a constable or other peace officer;
 - (b) a welfare officer;
 - (c) the Director; or
 - (d) any person duly authorized by the Director may apprehend that child without warrant.
- (2) Where it appears to a Judge, on information laid before him on oath, that there are reasonable or probable grounds for believing that there is a neglected child at any place under his jurisdiction, the Judge may issue a

Chapter II

warrant authorizing any person referred to in subsection (1) to

- (a) enter, by force if necessary, any building or other place specified in the warrant and search for the child; and
- (b) apprehend the child if, in his opinion, the child appears to be a neglected child,

and it is not necessary to describe a child by name in an information or a warrant laid or issued under this subsection.

(3) A child apprehended pursuant to subsection (1) or (2) may, pending enquiry, subject to subsection (4),

- (a) be taken into custody and detained in
 - (i) a receiving home, or
 - (ii) be permitted, if the Director consents, to remain with his parents or either of them or with the guardian or other person in whose care the child may be found at the time of apprehension,

and, where a child is detained in a hospital pursuant to subparagraph (ii) or paragraph (a) and the medical superintendent or senior medical officer of the hospital advised of such detention, thereafter, for the purposes of this section and the disposal of the case of the child under this Act, the hospital shall be deemed to be a receiving home."

The Guardians

Section 12 provides that a person who has apprehended a child shall within ten days notify the parents or guardians, if any, informing them of the time and place for a judicial investigation of the facts of the case which shall not be more than twenty days from the date of apprehension, and requires such person to make a written report to the director, giving him the circumstances of the case and the same information to be conveyed to the parents or guardians. Subsection (4) is as follows:

"The Judge, in an investigation under this section, shall investigate the facts of the case and ascertain whether the child is a neglected child, his age, name and residence and the religion of the child and of his parents or guardian."

Subsections (5) and (6) provide that in a case where the judge finds that the child is not neglected he must order him ("her" implied) returned to the parents or guardians or guardian, but if the finding is positive a declaration may be made in which event an order may be made under section 15. Before turning to section 15 which is extensive and important, subsection (7) must be noticed:

"An order made under Section 15 shall recite the facts so far as ascertained in an investigation under this section and the Judge shall deliver a certified copy of the order to the Director."

Compliance with this requirement is the subject of comment in chapter VIII.

Then section 15 gives comprehensive instructions for the judge conducting the investigation who, by section 14 is

Chapter II

empowered to consult the wishes of a neglected child in the matter of his own disposition. The first eleven subsections of section 15 are material.

- "(1) Where it appears to a Judge that the public interest and the interest of a child declared by him to be a neglected child or of any child against whom an offence has been committed may be best served thereby, the Judge may, subject to subsection (7) of Section 12, make an order
- (a) that the child be returned to his parents or guardians or other person in whose care he may be, subject to supervision by the Director;
 - (b) that the child be committed temporarily or permanently to the care and custody of some suitable person, subject to supervision by the Director; or
 - (c) that, subject to subsection (3), the child be committed temporarily or permanently to the care and custody of the Director, who in his discretion may order that the child be placed in a foster home, training school or other institution which has been approved by the Minister for the care of delinquent or neglected children.
- (2) Where a child is, by order under subsection (1), committed temporarily or permanently to the care and custody of
- (a) a person under paragraph (b) of that subsection; or

The Guardians

- (b) the Director under paragraph (c) of that subsection,

the Judge may in such order, or any later order, order any parent or guardian or other person responsible for the maintenance of that child to provide maintenance for that child in such weekly, bi-weekly, semi-monthly or monthly sum as he considers reasonable and payable to such person or persons on behalf of that child as he may direct, and

- (c) the Judge may make any such order for maintenance retroactive to any date not sooner than the date of the committal under the said paragraph (b) or (c),

and the provisions of this subsection shall, *mutatis mutandis*, apply to orders made under subsection (4) or (7).

- (3) A neglected child who is or is apparently under the age of twelve years shall not be committed to an institution unless an attempt has first been made to provide for that child in his own home or in a foster home.
- (4) Where a child has been committed temporarily to the care and custody of
 - (a) a person under paragraph (b) of subsection(1); or
 - (b) the Director under paragraph (c) of that subsection,

Chapter II

the Director or welfare officer or some other person authorized by the Director in writing shall during the period of temporary commitment or at or after the expiration of that period bring the matter again before the Judge for further and other consideration and action and if the parents or guardian of the child have been notified in accordance with subsection (5) the Judge shall thereupon enquire and determine whether the circumstances justify an order returning the child to his parents or guardian or other person in whose care he may have been or a further order under this section, and the Judge shall make such order as the circumstances of the case require.

- (5) The Director or a welfare officer or some person authorized by the Director in writing shall notify the parents or guardian of the child of the time and place of the enquiry referred to in subsection (4).
- (6) Evidence taken at a prior hearing and the order of temporary committal made after the prior hearing may be admitted as evidence in an enquiry under subsection (4) without proof or on such proof as the Judge may require,
- (7) At any time pending the final determination of an enquiry under subsection (4) the Judge may make such order for the temporary detention and care of the child as he deems proper.
- (8) Notwithstanding any other provision of this Act, when a child is committed temporarily under this Act to the care and custody of the Director, the commitment shall be made for a fixed period not exceeding twelve months, but in no

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oj auuij uiojj japjo aqi A"JBA (B)

'p|i qo jBqt jo padsaj ui o; panjjua uosjad ,<UB jo
jo aqj uioqM oj pnqa aqj jo UBipJBn\$ jo juajBd B jo
jo jopajip aqi Iq asodjnd aqj JQJ pa;eu\$is3p AUB jo jo
jaoijjo ajejpAv B jo jo jopajip jo uoi;B3i[ddB uodn
'^BUI aSpnf B 'uoipas siqj japun apBiii uaaq SBq
japjo UB uoqM (6)

siq joj japjo jsjy aqj jo ajBp aqi UIQJJ squioiu
puoXaq puq³ ^qi jo Uiouijuiuiua
snouijua aq^ HI jjnsaj PJUOA\ aiuij
A"UB JB apeui aq japjo UB UBqs

Chapter II

- (e) the welfare of such child is for any reason best served by such
 - (i) variation,
 - (ii) termination, or
 - (iii) termination and further order,and the provisions of this subsection apply to any further order made under paragraph (c) of this subsection, and
 - (f) evidence taken at any prior hearing and any prior order relevant to the matter being considered by the Judge may be admitted as evidence for the purposes of this subsection (9) without proof or on such proof as the Judge may require.
- (10) Without limitation of the generality of his powers, a Judge making an order for maintenance under this section may, in any case where there is a pension or income payable to the person against whom the order for maintenance is made and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, order that such part as the Judge may see fit of the pension or income be attached and be paid to such person or persons as the Judge may direct, and such order is authority to the person by whom the pension or other income is payable to make the payment so ordered, and the receipt of the person or persons to whom the payment is ordered to be made shall be a good discharge to the person by whom the pension or other income is payable.

The Guardians

- (11) Subject to subsections (15) and (16), if a child who has been committed to the care and custody of the Director reaches the age of sixteen years while in such care and custody, the Director may, if he considers it advisable so to do,**
- (a) continue his care and custody of that child until that child reaches the age of nineteen years or until some earlier date considered advisable by him; and**
 - (b) continue his maintenance of that child until that child reaches the age of twenty-one years or until some earlier date considered advisable by him."**

Subsection (5), limiting as it does the length of a period of temporary wardship to a maximum of three years, and requiring renewal at the conclusion of each twelve month period, has presented problems; owing to failure to observe its provisions strictly the status of certain wards of the director has been compromised, although not as far as the commission knows attended by any harmful results. Generally the practice at wardship hearings before a Provincial Court judge, and involving an application for either temporary or permanent guardianship for the director, required the attendance of the social worker investigating unassisted by counsel if uncontested, and in a case where the application was contested by the parents or other interested parties, the director would ask a solicitor on the civil side of the department of justice to provide counsel. In 1975, and for years afterwards, this solicitor was Mrs. Mary Elizabeth Noonan (now the Honourable Madam Justice Noonan of the Unified Family Court located in St. John's) whom F.J. Simms

Chapter II

regarded as his appointed legal adviser.

The only other section of the statute as it stood in 1975 requiring notice here was section 49 providing as follows:

- "(1) Every person having information of the abandonment, desertion, physical ill-treatment or need for protection of a child shall report the information to the Director or a welfare officer.**
- (2) Subsection (1) applies notwithstanding that the information is confidential or privileged, and no action lies against the informant unless the giving of the information is done maliciously or without reasonable and probable cause.**
- (3) Any person who fails to comply with or otherwise contravenes any of the provisions of this section is guilty of an offence."**

The commission's inquiries indicate that this section, so critical as a sanction in the procedure for protecting children, was virtually a dead letter; where prosecution had been suggested the department of justice had in almost every case declined to proceed.

On October 10, 1975 Mr. Murphy, who had resigned in the spring, was succeeded by the Honourable R.C. Brett as minister of social services and continued in that office for three years, almost to the day. He had himself been a social worker for ten years and found his experience as minister, repeated in the years 1985 - 1988, to be "rewarding and awesome". He had the highest regard for his deputy minister, H.V. Hollett, by whom, and by George Pope the assistant deputy minister, he was briefed on taking office, although he heard nothing from his departing colleague. Since the departments of education, health and social services regularly

The Guardians

presented the largest estimates to the House of Assembly the "awesome" appears to have been justified. He had no direct contact with F.J. Simms unless the latter was accompanied by the deputy minister, and generally speaking he had difficulty, as he looked at it in retrospect, receiving information from his permanent officials and knew nothing of any of the sensitive matters with which this commission is concerned transpiring in 1975 and 1976 and involving his own department and that of justice.

A list of the administrative staff of the department appears in the 1975 annual report cited above, and shows in addition to Hollett, Pope and Simms, already identified, the Assistant Director of Child Welfare, Sheila Devine who was herself assisted by Neil Hamilton as Co-ordinator of Child Welfare and Child Protection Services. The administrator of the St. John's region was Jerome Quinlan. In November 1972 Catherine Cahill (now Sinclair) became supervisor for child welfare and corrections at the St. John's district office which administered the department's programmes over an area from Pouch Cove to Mount Pearl, and held this position until July 1975, being succeeded by Sharron Callahan. Both these officers were experienced social workers who, in accordance with the practice of those days, had borne a mixed caseload in various parts of the province outside St. John's. Catherine Cahill had begun as a welfare officer in 1965; in 1969 she went back to Memorial University and obtained a Bachelor of Arts degree with a social work major. Sharron Callahan obtained a similar degree before entering the service in 1968. Their experience illustrates a process which was consciously pursued by the department in allowing social workers and others to acquire their university qualification after entering the service in cases where there was none, and indeed none

Chapter II

had been required at the time of their recruitment. As time passed the academic qualification of a baccalaureate in arts with a social work major, later becoming the degree of Bachelor of Social Work, was the preferred qualification for entry and later the requirement. In the case of Robert Bradbury, though specializing in corrections, his position as liaison officer with Mount Cashel gave him a foot in the child welfare camp after the corrections function had been separated from it.

The Police

In more ways than one the Royal Commission is indebted to Superintendent Leonard Patrick Power of the Royal Newfoundland Constabulary, who testified on four occasions and was a member of one of the panels of experts which advised the commission at public sessions in June 1990. He joined the force in 1964 as a constable in St. John's having undergone recruit training at Fort Townshend. After two years of uniformed work in the Patrol Division he became a plain clothes officer in the Criminal Investigation Division which was not reorganized into specific sections until 1973. He remained a detective, as constables in the C.I.D. were styled, until 1982 when he became a detective sergeant and then rose rapidly, becoming lieutenant in 1984 and superintendent as officer in charge of the division in 1987. It fell to him, and he was specially charged by the Chief of Police to investigate from the point of view of law enforcement, the whole ground covered by this commission's mandate under article I of the terms of reference, in the

The Guardians

course of which there was a fruitful exchange of information between him and his officers and the commission's counsel and investigators. I have relied with confidence on his testimony, and that of the current Chief of Police Edward J. Coady and his predecessors E. Donald Randell (1984 - 1987), Richard J. Roche (1980 - 1984), Allan Dwyer (1970 - 1972) and Edgar A. Pittman (1956 - 1970) to name them in an order receding in time, all of whom testified to the commission. Missing from the list are John R. Browne (1976 - 1980) deceased, and John F. Lawlor (1972 - 1976) who did testify on two occasions, but on whose evidence, for reasons which will be made plain, I cannot rely in important particulars. In addition to this counsel have placed materials in my hands that have fleshed out the *viva voce* evidence of police witnesses. Since this report is not directed to the uninformed reader, it is perhaps only necessary to note that the Newfoundland Constabulary (since 1981 the Royal Newfoundland Constabulary) has a history almost coinciding with that of the Northwest Mounted Police in Canada, and until the establishment of the Ranger Force by the Commission of Government, was responsible from 1871 for the policing of all of Newfoundland and its dependencies. Thereafter the system which reduced the Constabulary to a municipal force, confined to the city of St. John's and its immediate surroundings, and consigned the vast rural and wilderness part of the colony to the Ranger Force, was extended by provincial acceptance in 1950 of contract police services provided by the Royal Canadian Mounted Police as in the case of all other provinces of Canada except Ontario and Quebec whose provincial forces alone survived the stringencies of the great depression. The commission was also furnished with evidence from officers of that force, and

Chapter II

particularly as to the broad picture by Superintendent Emerson Havelock Kaiser, Criminal Operations Officer for "B" Division and, as it were, Superintendent Power's opposite member in the contracting service. But here again the commission must take its stand first in the temporal environment of 1975.

In that year the Constabulary's C.I.D. as organized under the chief and assistant chief of police presented a picture illustrated by chart 2²¹ in appendix A. J.F. Lawlor was chief of police; J.R. Norman was assistant chief and the deputy assistant chief was J.R. Browne who was to succeed Lawlor, himself predeceased by Norman. In the Constabulary's annual report to the Minister of Justice and Attorney General as at December 31, 1975 the officer in charge of the division was shown as Inspector Chesley Yetman. There were twenty-one detectives in 1975 distributed among the various sections of the division shown at the bottom of the chart; these were reinforced by an additional ten in 1976. Over each section was a detective sergeant, usually, as Superintendent Power told the commission, not assigned to any particular investigation, but receiving from the officer in charge or his lieutenant cases for investigation to be assigned to his section staff individually. Caseloads were heavy, averaging thirty-eight to forty investigations per man. Names of future significance to the commission occur in the Assault Section presided over by Detective Sergeant Arthur Pike and containing Detectives Robert Hillier and Ralph Pitcher. The force considered itself very much part of the department of justice to whose head it reported, and whose minister, the Honourable T. Alexander Hickman, Q.C., and deputy

Exhibit C-0028D.

The Guardians

minister Vincent P. McCarthy, Q.C. had their photographs in the annual report of 1975 preceding those of the chief, assistant chief and deputy assistant chief.²"

The Constabulary Act R.S.N. 1970, c.58 which reconstituted and continued the Constabulary Force of Newfoundland referred to in the *Constabulary Act* R.S.N. 1952, c.26, charged the minister with its administration, and provided in section 8:

"Subject to Section 28, the Chief of Police has, under the direction of the Minister, the control and management of the force and of all matters connected therewith."

Section 28 conferred on the Lieutenant Governor in Council the power to make regulations in certain enumerated matters.

Although the evidence given by police officers aware of the situation prevailing in 1975 and 1976 indicates that they regarded the Constabulary as an integral part of the department, the *Department of Justice Act* R.S.N. 1970, c.85 does not lend authority to that view. Section 9 outlines the duties of the minister and subsection (c) says that he shall "have the superintendence of all matters connected with the administration of justice in the province not within the jurisdiction of the Government of Canada." Subsection (a) of section 10 similarly outlines the powers and duties of the attorney general who is by law the minister of justice in terms which may be unique in Canada:

Exhibit C-0029.

Chapter II

"The Attorney General shall

- (a) be entrusted with the powers, functions and duties which belong to the office of the Attorney General and Solicitor-General of England by law or usage, so far as the same powers, functions and duties are applicable to the province, and also with powers and duties which belong to the office of the Attorney General and Solicitor-General under the laws of Canada and of the province to be administered and carried into effect by the Government of the province."

The minister, by this enactment, may well have been vested with powers enjoyed by no other provincial attorney general in Canada, yet he was not granted the powers of the Secretary of State for Home Affairs in England, more familiarly known as the Home Secretary, who is responsible to Parliament for the Metropolitan Police in London as well as constabulary elsewhere. Thus, other than the provision in the *Constabulary Act* giving him its administration, and doubtless making him the spokesman for the force in the House of Assembly, any legislative sanction for the close control over the Constabulary which his department undoubtedly exerted was confined to the provision of funds, which in practice may be sufficient. Nevertheless the applicable legislation was conducive to no such independence for the Constabulary as was enjoyed by the R.C.M. Police. In the case of the latter force the evidence indicates that its behaviour toward the minister and his officers was correct, but unbending in some particulars, where the Constabulary was accustomed to be more compliant.

During the year 1975 the department was suffering from certain critical shortages of staff and the need to expand. For

The Guardians

instance John Connors, Q.C., recruited from Nova Scotia by Mr. Hickman to be Director of Public Prosecutions had left in mid-year to take up a post in Alberta. He was replaced by John Kelly in March of 1976; in the meantime, and in a critical period as far as this inquiry is concerned, his functions were discharged by the deputy minister himself whose experience was largely on the civil side of the department's work. The only assistant deputy minister in 1975, George B. Macaulay, Q.C. was an experienced Scottish draftsman whom Hickman had recruited to strengthen the department in that technique. It goes without saying that Mr. Macaulay, who testified to the commission, was not and did not claim to be particularly conversant with the criminal law. When Lillian Dingwell, the departmental personnel clerk, gave her evidence she was able to furnish an alphabetical list of the whole staff of the department numbering forty-nine persons, of whom six were Crown prosecutors answerable to the director of public prosecutions, and thirteen solicitors reporting to the assistant deputy minister. One member of the department, Frederick Squires, the inspector of legal offices, was pressing for a reorganization, and memorialized the deputy minister to that effect with the strong support of Macaulay.²³

* * *

Education

No inquiry into the condition of children generally or as wards of the state would be complete without reference to the

²³ Exhibits C-0180 and C-0227B.

Chapter II

system of education peculiar to Newfoundland. Here again I must resist the temptation to explore history and origins within the too brief compass of this report but, once again taking a stand at 1975 - 1976, we find as successor to the much amended *Education Act* R.S.N. 1952, c.101, the *Education Act 1960*, S.N. 1960, No.50, amended almost annually until in turn superseded by the *Schools Act*, S.N. 1969, No.68 which was incorporated in the revision of 1970 as amended and as chapter 346. The peculiar structure of the system of education prevailing in the province which, because of entrenched sectarianism is not likely to be disturbed in the foreseeable future²⁴, is embodied additionally in the *Department of Education Act*, S.N. 1984, c.46, but in 1975 - 1976 it was the *Department of Education and Youth Act*, R.S.N. 1970, c.80, the title of which was altered to delete the words "and Youth" *inter alia* by S.N. 1973, No.35, s.2. The statutory sanction for the denominational partnership over which the minister presided then and presides now is to be found in section 16, which, as amended in 1971, read at the conclusion of 1975 as follows:

"(!) A religious denomination for which there existed, immediately before the date of the enactment of this Act, legislative provision for a Superintendent of Education in the Department of Education, as such Department existed immediately before the date of the enactment of this Act, shall

(a) alone; or

²⁴ Written before the appointment of the Royal Commission in that behalf.

The Guardians

- (b) jointly with any one or more or all of the remaining such religious denominations

establish a Denominational Education committee outside the Department for the purpose of representing, and of being recognized by the province as representing, the religious denomination or denominations for which it is established, as the case may be, in carrying out its powers, functions and duties under this Act and any other Act in which reference is made to such Educational Committee.

- (2) Each Educational Committee shall appoint as an employee thereof an Executive Secretary to act as the official channel of communication between the Educational Committee and the Minister and the Department, and such Executive Secretary shall
 - (a) be a member of the Educational Committee; and
 - (b) be a person acceptable to the Minister and be paid such salary as the Minister may approve.
- (3) The Minister shall from moneys provided by the Legislature make to each Educational Committee an adequate annual grant, based on a non-discriminatory formula, for the purpose of paying the salary of the Executive Secretary and of remunerating other necessary employees of the Educational Committee and meeting administrative expenses of the Educational Committee.

Chapter II

- (4) An Educational committee shall, subject to any Act of the Legislature prescribing powers, duties or functions of any or all such persons, prescribe and assign the duties and functions of its Executive Secretary and its other employees and notify the Minister as to what duties and functions have been so prescribed and assigned.
- (5) Before establishing an Educational Committee under subsection (1), the religious denomination or denominations concerned shall furnish the Minister with any copy of any proposed constitution, regulations bye-laws and rules prepared for such proposed Educational Committee.
- (6) Upon the establishment of an Educational Committee, the Educational Committee shall furnish the Minister with a copy of the constitution, regulations, bye-laws or rules thereof then in existence.
- (7) As often as any constitution, regulations, bye-laws or rules of an Educational Committee are amended or made, the Educational Committee shall furnish the Minister with a copy of the constitution, regulations, bye-laws or rules as so amended or made.
- (8) The financial year of the Educational Committee shall correspond with the financial year of the province.
- (9) Each Educational Committee shall, not later than the thirtieth day of September in each year, prepare and submit to the Minister a financial statement, on a form prescribed by the Minister, setting forth the assets and liabilities

The Guardians

of the Educational Committee and the receipts and expenditures of the Educational Committee for the previous financial year, together with a report concerning the work of the Educational Committee during the previous financial year.

- (10) Nothing in this section shall prevent any Educational Committee from
 - (a) according representation on it to; or
 - (b) permitting observers at its meetings from religious denominations not referred to in subsection (1), and where representation is accorded to any religious denomination under the provisions of paragraph (a) of this subsection (10), the Educational Committee may, unless the Educational Committee otherwise directs, represent that religious denomination as if it were one of the religious denominations for which it is established under subsection (1).
- (11) Every Educational Committee is a corporation.
- (12) A member of the House of Assembly or an employee of the Department shall not be a member of any Educational Committee."

The revised statutes of 1970 did not come into force until 1973, so that amendments made by the *Stature Law Amendments Act*, S.N. 1971, No.32, s.2 were incorporated in chapter 80 of the revision.

In the schedule to the *Schools Act*, R.S.N., 1970, c.346 the names and boundaries of the educational districts are given at length as follows:

Chapter II

"Part I: The Integrated Districts (for group composed of Anglican Church of Canada, United Church and Salvation Army religious denominations);

Part II: The Roman Catholic Districts;

Part III: The Pentecostal Assemblies of Newfoundland District;

Part IV: The Seventh Day Adventists District; and

Part V: The Presbyterian District."

This provision was in place in 1975 - 1976 and has not been amended although in fact the Presbyterian District has ceased to be operational and has become the responsibility of the Integrated Districts. The schedule contains the names and boundaries of twenty districts for the Integrated Districts and fifteen for the Roman Catholic Districts. For the remaining denominations the school districts were described as "the whole province". Each of these districts was administered for educational purposes by a school board and the Roman Catholic School Board for St. John's had jurisdiction over an area described as follows:

"St. John's Educational District shall extend from Indian Pond exclusive in the Electoral District of Harbour Main northward to Cape St. Francis and then southward to the south head of Petty Harbour, then inland to Indian Pond exclusive in the Electoral District of Harbour Main and shall include Bell Island."

The Guardians

Nevertheless in the course of the evidence given by William Whelan, superintendent of that board since 1982, he said that there were only twelve Roman Catholic School Boards and, since the terms of the statute were not put to him, it may be concluded that at least three of the districts have been subject to amalgamation, joint administration or extinction. In 1975 there were he said, twenty-one members of the St. John's board, three of whom were nominated by Archbishop Skinner and eighteen elected at dates coinciding with the regular municipal elections.

The board's functions, exercised in the administrative sense by the superintendent, included the hiring of teachers and for all practical purposes their termination in a proper case; these consisted of religious and lay employees. All those hired had to be certified by the Teachers Certification Committee situated within the department approved by the Roman Catholic Education Committee (now Council) being one of the denominational committees established by law and representing the Roman Catholic community across the province. Statutory authority for the exercise of its functions by this body is contained in the *Education (Teacher Training) Act*, R.S.N. 1970, c.103 which in section 6 provides for a board of examiners for each "recognized denomination", required to adopt its own constitution subject to the approval of the government and of the appropriate denominational education committee. Each board was responsible for recruiting and selecting pupil teachers "from persons who are adherents of the recognized denomination requested by the Board"; examining candidates for positions as pupil teachers and for teaching certificates but not including inquiries into academic or professional qualifications; "for recommending to the Committee" - and here by reference to the definition

Chapter II

section one finds that this is the teachers certification committee the establishment of which does not appear until section 9 - the cancellation of a certificate in the case of a teacher who is guilty of "drunkenness, gross misconduct or incompetence"; and recommending to that committee the suspension of any such certificate.

Section 8 creates the office of Registrar of Teachers to be appointed by the minister and to act as a member of the committee, his principal function being to examine the qualifications of all those aspirants recommended by the board of examiners. Then at last section 9 establishes the teachers certification committee to include the registrar, the executive secretaries of all of the denominational educational committees, a departmental officer and four others appointed by the government, two of whom represent the faculty of education of Memorial University and the other two the Newfoundland Teachers' Association. The denominational education committee in the case of the Roman Catholic community was of course the Roman Catholic Educational Committee, familiarly known as the "C.E.C."

Detailed evidence as to the constitution and practice of this body was given by its current executive officer William O'Driscoll, from which was developed together with that of Mr. Whelan, chart 3²⁵ in appendix A showing the organization of the St. John's Roman Catholic School Board in 1975 and chart 4²⁶ showing the organization of the Roman Catholic Education committee and the communication with the teachers certification committee. What emerges for the period 1975 - 1976 at least, is a patriarchal system originally, i.e. before

²⁵ Exhibit C-0032B.

²⁶ Exhibit C-0033B.

The Guardians

1968, not only presided over but dominated by the Archbishop of St. John's who was closely involved with the board and attended its meetings. After 1969 the Roman Catholic Education Committee took his place and that of the Bishops of Grand Falls and St. George's, but he and his fellow bishops in Newfoundland - by 1975 joined by the newly appointed Bishop of Labrador - Schefferville, formally presided over the committee as co-chairmen. These prelates were also honorary chairmen of the board of examiners which was in all respects tributary to the denominational committee, the executive secretary of which was chairman, and the executive officer secretary of the subordinate board, the remaining membership being appointed by the committee itself.²⁷ It came as somewhat of a shock to Mr. O'Driscoll when Mr. Day pointed out that appointments to the board of examiners were in the last analysis made by the Lieutenant Governor in Council as provided in the *Education (Teacher Training) Act*, section 5. As to the membership of the all-powerful committee its constitution²⁸, as amended in 1984 but in essence the same in 1975, provides in section 6 that "the Council shall consist of not more than twenty-seven (27) members comprising the following:

- "(1) The Archbishop of St. John's;
- (2) The Bishop of Grand Falls;
- (3) The Bishop of St. George's;
- (4) The Bishop of Labrador-Schefferville;

²⁷ Exhibit C-0035.

²⁸ Exhibit C-0034.

Chapter II

- (5) Nine members appointed in writing by the Archbishop of St. John's, this number to include one Roman Catholic nominated by and from each Roman Catholic School Board in the Archdiocese and approved by the Archbishop;
- (6) Five members appointed in writing by the Bishop of Grand Falls, this number to include one Roman Catholic nominated by and from each Roman Catholic School Board in the Diocese and approved by the Bishop;
- (7) Five members appointed in writing by the Bishop of St. George's, this number to include one Roman Catholic nominated by and from each Roman Catholic School Board in the Diocese and approved by the Bishop;
- (8) Two members appointed in writing by the Bishop of Labrador-Schefferville, this number to include one Roman Catholic nominated by and from the Roman Catholic School Board of Labrador and approved by the Bishop;
- (9) The Executive Director of the Roman Catholic Education Council;
- (10) One member nominated by the Association of Roman Catholic School Boards of Newfoundland and Labrador and appointed by the Roman Catholic Education Council."

In 1975 - 1976 the member nominated by the last named association, also appointed by the committee, was not provided for.

The Guardians

Mr. Whelan's evidence made it clear that for historical reasons there was a double standard in hiring teachers. The religious, being Jesuits, Christian Brothers, Sisters of Mercy and Sisters of Presentation, were naturally assumed to be of good character, and were put forward by, or sought from their respective congregations by the school board on a regular basis; the lay applicant had to supply evidence of good character, usually from the parish priest, before a recommendation for certification would be made. In his eight years experience Mr. Whelan had never known the nomination of a religious to be rejected, and he had only asked the congregations to remove two persons who had proved to be unsuitable. Nor were these witnesses aware of any decertification of a teacher occurring in their experience, except in one isolated case not associated with any of the events examined by this commission.

Mr. Day's questions were directed to examination of the mechanism of response in cases where teachers were the subject of complaints of child abuse. Not to put too fine a point upon the answers he received from both Mr. Whelan and Mr. O'Driscoll, the legislative framework made ample provision for the consideration of complaints against certified teachers actually teaching, but until the last year or two there had been little done in the way of disseminating information as to complaints, or resulting decertification, to educational authorities outside the province, doubtless because of the almost complete absence of decertification in any event. Legislative provisions and organization charts tend to conceal the fact that power, if not authority, was, in practice, in the hands of the permanent officials; the executive officer as far as the Board of Examiners was concerned, the executive director in the case of the Roman Catholic Education

Chapter II

Committee and the departmental official, the registrar, for the all-denominational teachers certification committee. The registrar, indeed, considered all applications for teaching positions, assembled the documents in each case and sent them down to the boards of examiners to await the upward process through them and the denominational committees. Analysts of constitutions might be dismayed to know that Mr. O'Driscoll was not only a voting member of the board of examiners of which he was secretary, but also of the teachers certification committee; nor was this exceptional or confined to the Roman Catholic aspect of the system. But the mechanism of response was rarely tested and in the case of the Christian Brothers teaching in 1975 and 1976, not at all.

Additional evidence from the point of view of the non-sectarian department of government was given to the commission by Dr. Boyce T. Fradsham and through him a third chart, chart 5²⁹, appendix A, was entered in evidence showing the minister and deputy minister in succession and, as responsible to the latter, two assistant deputy ministers and a director of administration to whom the registrar and the teachers certification committee appear to be tributary. Dr. Fradsham himself when he testified was assistant deputy minister of Educational Operations and was at one time a superintendent of education for the Pentecostal School Board. His post was not in existence in 1975, the two assistant deputy ministers then in office being entitled "academic" and "vocational and technical" respectively, the former in charge of whatever functions were exercised within the department in relation to primary and secondary education and the latter having some of the responsibilities for vocational and

Exhibit C-0036.

The Guardians

technical educational programmes of a post-secondary school nature. His evidence confirmed, and indeed enhanced the primacy of the registrar who acted as chairman of the teachers certification committee which met some twelve to eighteen times a year, but in the main performing himself the functions which are designated by section 12 of the *Education (Teacher Training) Act, supra*. The witness was quick to say that if a matter of unusual importance or difficulty was laid before the registrar he would consult the committee. Where suspension or decertification was contemplated it would be initiated by a board of examiners and disposed of by the full committee. In 1975 and, perhaps, even today there was no provision in any legislation, either substantive or subordinate, for informing the registrar where a board of examiners had considered an application by a superintendent for suspension or decertification and dismissed it, and there was no way in which he might entertain such an application in the first instance, being obliged to refer the matter to the board of examiners if an application was made to him direct. Moreover a dialogue between the departments of education and justice had developed over the question of whether the teachers certification committee could decertify in the case of a certified teacher who was not teaching. Justice had expressed the opinion that there was no authority to do so, and amending legislation was, so Dr. Fradsham believed, being contemplated at the time he gave evidence in September 1989. He thought, however, that the process of exchanging information by registrars and certification committees across Canada as to suspension and decertification had been begun before he joined his department in 1981 and was now fully operative.

Chapter 11

I must now turn to the events of late 1975 and early 1976 which article I of my terms of reference expressly provides for, but not overlooking an earlier event in October 1974 which cast a shadow, brief and quickly fading, from Mount Cashel to Harvey Road.

Chapter III: De Profundis

Brenda Lundrigan and Johnny Williams

Brenda Ann Marie Lundrigan came from Ontario to testify to the commission on September 20, 1989 immediately following the evidence of John Cyril Williams and Dereck O'Brien. Fourteen years and eleven months before all three had been involved in an episode of juvenile initiative without precedent in the latter-day annals of Mount Cashel. Brenda was sixteen or seventeen years old, had been in care in a foster-home but was going to school in St. John's, and had connections in Mount Cashel in the shape of two brothers, two young cousins, Johnny and Jerome Williams, and her friend Dereck O'Brien about a year or two younger. She was familiar with the orphanage since she went there for swimming lessons, and was in the habit of frequenting it, as she said, sometimes three or four times a week. On one such visit at the end of October she learned that Dereck's young brother Ronnie had been beaten, as had Johnny Williams in a more spectacular fashion, by Christian Brothers. Dereck O'Brien had seen extensive marks and bruises on Johnny Williams' back, arms, legs and hip and he reported this to Brenda whose immediate reaction was to suggest a visit to the St. John's district office of Social Services at Harvey Road. Brenda's inspection of some of these marks enraged her, and the next day, after school, she met Dereck and Johnny and took a taxi cab to Harvey Road. There they were referred by an unidentified female supervisor to Robert Bradbury, who about two months previously had been appointed social services representative for liaison with Mount Cashel.

Chapter HI

Robert Bradbury, later a school counsellor in Placentia, left the department in 1978 and when he first testified had considerable difficulty remembering this visitation - a difficulty aggravated by the fact that no documentation could be produced because no record of it has survived. Finally he did under helpful questioning, but had evidently taken no action, at least no recorded action, as a result of hearing Johnny Williams' story, remarkable as it was. Williams testified on oath that he had told Bradbury the story that in essence he told in his evidence. On a Thursday night earlier in October he had observed Brother Edward Patrick English, while saying good night to some forty boys in St. Joseph's dormitory, trying to put his hand into the pyjamas of one of the younger boys who resisted and told him to stop. Although the light was out there was sufficient from the bathroom for him to see what was happening and he thereupon called out "Queer!" at which Brother English turned on the lights and demanded to know who had made the remark. Nobody spoke, and the next morning when getting ready for school Johnny alleged that he was attacked by English in the dormitory and had his shirt torn off. Then, when at the wash basin, he was struck on the back by a massive blow and a fight ensued between Brother and boy in which English was worsted according to Williams, but he himself was kicked and struck and suffered many abrasions and bruises. Williams perhaps forcibly induced English to accompany him to the superintendent's office, from which the boy was peremptorily ordered out by Brother Kenny after an exchange between him and English in which the latter accused Kenny of being "gay" also.

Brenda Lundrigan and Dereck O'Brien had seen these bruises in the gymnasium at Mount Cashel perhaps a day or two later.

De Profundis

At first Johnny refused to go to Harvey Road when urged to do so but later agreed. How much later was not clear, but at least when the expedition to Harvey Road took place a hand-print had disappeared from his back, but he said he had shown the bruises to a teacher, Mrs. Wall, at St. Pius X school. She had shaken her head, at which he burst into tears.

According to Brenda and Johnny, Robert Bradbury listened to their story which included allegations of sexual abuse and took a few notes, said the department had previous complaints and further that he would be looking into affairs at Mount Cashel. No doubt he was wary of this recital, particularly since the bruises had become less conspicuous. In view of his limited responsibility for what transpired in Mount Cashel, confined to documentation of placements and transfers, provisions for clothing allowances, health care certificates and so forth, and the undoubted fact that all questions of the quality of care were ordained to be the sole concern of social services headquarters at the Confederation Building, it is not surprising that he did not intervene in person at the orphanage to investigate this complaint. His supervisor, Catherine Cahill, had no recollection of Brenda Lundrigan, Dereck O'Brien and Johnny Williams visiting Harvey Road.

The testimony of Johnny Williams delivered with great earnestness, but with a certain air of bravado which left me with mixed feelings, was dramatically corroborated in important particulars when its second day concluded on September 20, 1989. Overnight a Mr. Christopher James Hatch, then teaching at Bay de Verde, had listened to the telecast of Johnny's evidence the night before, and had applied urgently to commission counsel to testify forthwith. In September 1974 he had been a substitute teacher at St. Pius X school in St. John's in the field of "special education",

Chapter III

or instructing pupils with learning disabilities. Johnny was not in his class but in that of Marcella Whalen; yet he and Johnny had become friends. In the first term Johnny had come into Mr. Hatch's classroom crying and saying "Mr. Hatch, he beat the shit out of me". Hatch said there were many bruises on his body and when asked who had done it Johnny said "Brother English". Hatch then took him to see Mrs. Whalen who eventually said, "What can I do about it?" and as he ruefully admitted he did not do anything himself. He was not aware of Section 49 of the *Child Welfare Act, 1972* as he said when it was put to him by counsel, but he had thought about it, and talked about it many times since, and had made inquiries about Johnny Williams among the staff. At the time Hatch testified he had not seen Johnny since 1975, but described his experience as a "thorn in his side" something which he had never forgotten. He was clearly much moved by the desire to make amends for what he had considered an injustice and an inexcusable failure on his part to press the matter in 1974. It should be remembered in his favour that he was only twenty-five years old and on the verge of his first permanent teaching job, something which was all the more desirable in view of his experience as a substitute teacher. He commented on the welts on Johnny's chest when he opened his shirt, which appeared to be inside rather than outside his skin; he had not seen anything like it before or since.

On another occasion Johnny Williams told circumstantial and disturbing tales about sexual abuse, and implicated a Christian Brother by the name of Gordon Buckingham which produced an immediate reply before the commission from Brother Buckingham who came all the way from Vancouver to pronounce any association of this kind on his own part as

De Profundis

completely false. Brother Buckingham was respected and trusted by many other former residents of the orphanage who testified and the type of aberration attributed to him by Johnny Williams was completely out of the character thus given to him. But Brother Buckingham, in spite of his shock at the accusation, spoke compassionately of Williams who was only a little boy when Buckingham had last seen him at Mount Cashel; a little boy who had first entered the orphanage from a broken home in Placentia at the age of seven. He described him as a difficult child, given to emotional outbursts, and one who had been avoided on this account even when very young. There is no doubt that as he grew older he became a terror to the staff at Mount Cashel, and this, no doubt, had been one of the reasons for Brother English meekly accompanying him to the superintendent's office after the vicious encounter which had caused Johnny's injuries. There is no question in my mind that Johnny's account of this episode in October 1974, corroborated by Dereck O'Brien and Brenda Lundrigan and given eventually cautious confirmation by Robert Bradbury, was sincere and not mischievous.

Williams said that from that day to this he had never heard anything from the department of social services although he had given statements to the police. What is to be made of this unaccountable silence? Robert Bradbury remembered a visit from a young girl and a boy but had no memory of any complaints of sexual abuse. He felt sure that a report had been made although the department's file on Johnny Williams did not contain one. As to this it was a headquarters file from the Confederation Building which had eluded search by commission investigators till the actual time of Bradbury's second appearance as a witness on September 22, 1989.

Chapter III

There was nothing in it dealing with the incident of Brenda Lundrigan's visit with the boys, or in any Mount Cashel file either at headquarters or the district office, not even the fugitive notes which he evidently made.

But Mr. Bradbury was to get another chance.

Although Johnny Williams said that he had told the story of his visit to Harvey Road in 1974 to half the people in Placentia in the summer of 1975 and to two politicians who had befriended him, the local member for the House of Assembly and the minister of mines, the commission, with the hundreds of files put at its disposal by government departments and combed by its investigators has been unable to find any document alluding to it. The department apparently continued to keep a respectful distance between its officers and the directing staff of Mount Cashel. There was indeed a complaint that summer by a Mrs. Ruth Williams who attended at the district office at Harvey Road and told social worker Alice Walters - of whom more will be heard - about her nephews at the orphanage, placed there through a "non-ward" agreement with the director by their mother who was dying of cancer. Mrs. Williams had visited the dormitories at Mount Cashel in the normal course and had discovered that one of her nephews was sleeping in filthy sheets on the floor. This produced a long and circumstantial report from Mrs. Walters to Mr. Simms and evidently handled by Neil Hamilton, third in line in the child welfare establishment. The report by Mrs. Walters was dated July 25, and on August 12 Hamilton requested her supervisor to have Robert Bradbury investigate and report, clearly

disregarding the limitations of the latter's instructions. Nothing transpired and eventually in October an exasperated Mrs. Williams, who was Simms' neighbour in St. John's, called him on the telephone and was with difficulty placated.

The Earle Family

A more significant complaint must be recorded for early September of 1975. William Michael Earle, now 51 and at the time he testified employed as a security guard, completed grade 11 at St. Bonaventure's College in St. John's. He married Carol Summers at the age of nineteen. They had four girls and three boys, the latter being Richard born 1959, William Ronald known as Billy in 1964 and Shane Michael in 1966, then separated after ten years of marriage. William Earle, a large and susceptible man, soon found himself in difficulties trying to support his family as well as children of his mistress, and looked to Mount Cashel as a solution of his problems. He had always been taught by Christian Brothers and held them in high regard. He knew the superintendent Brother Kenny, Brother Buckingham and Brother Thorne, and he preferred Mount Cashel to a foster-home. He would probably have allowed matters to drift if Carol Earle had proved equal to supporting herself and six children, one being with a grandmother. One by one the Earle boys went into care and were admitted to the orphanage; according to Richard, generally known as Rick, he and Billy had been in a foster home in St. Thomas before going there. In any event Rick went to Mount Cashel in 1968, and was followed by Billy and Shane in 1973. Rick was reasonably happy at Mount Cashel. He liked Brother Connors who was in charge of his dormitory and particularly Brothers Thorne,

Chapter HI

Buckingham and Barren who he said treated him well, and as long as they were in charge he would not have wanted to leave. Brother Ralph was a different story and gave numerous examples of paedophilia, hugging a naked boy in front of some twenty others with the result that the boy in question, who was a friend of Rick, discussed it with him and they complained to the assistant superintendent, Brother Thorne. Shortly after Brother Ralph left the orphanage, but returned somewhat less than a year later, when his peculiarities again became manifest, to such an extent that, according to Rick, everybody tried to avoid him. After himself being the target of an attempt at sexual contact he left Mount Cashel the next day, and went to live with his father at Queens Road in St. John's.

Billy and Shane Earle stayed in Mount Cashel, and it was not until September 1975 that the former planned to leave after having been punched in the face by a Christian Brother, as alleged, because of an accident for which he did not consider himself responsible. After his friend Bobby Connors complained of having been hit over the eye for something even more trivial, the two boys, at Billy's urging, decided to leave the orphanage and go and tell their story to Billy's father, who was again a married man after obtaining a divorce from Carol in the previous year. The next morning they went down the fire escape and made their way to 32 Franklyn Avenue - Earle's new address - where Bobby Connors had somewhat more sexual abuse to report than had Billy Earle. Physical abuse at Mount Cashel was to be taken for granted according to Bobby; sexual molestation was in his case confined to the activities of Brother Kenny and Brother Ralph, particularly in the swimming pool and basement where showers were taken by boys over the age of nine. Drying

Be Profundis

naked boys after swimming or showering and fondling their genitals, sometimes putting a tongue in the mouth of the victim was, he alleged, the usual practice. Bobby's mother was dead and he never saw his father, nonetheless living in St John's. He had no one to look to and nowhere to go and was accordingly ripe for Billy Earle's suggestion. The boys were not exactly at one as to what then happened, but evidently William Earle Sr. reacted vigorously according to Bobby, Rick and his father going to Mount Cashel to confront the staff and the next day taking the boys to Harvey Road, but according to Billy doing both on the same day. Rick recalled the expedition to Mount Cashel where he had words with Brother English and his father with Brother Ralph, but he did not specifically recall the sequence of events involving Harvey Road. These discrepancies are not serious, although I prefer Bobby Connors chronology as being more reasonable since he recalls spending the night at Franklyn Avenue before he was taken to Harvey Road.

The Bradbury Report

William Earle and the two boys were received in much the same fashion as Brenda Lundrigan had recounted about the episode of 1974; first by a woman and second, upon assignment as it were, by Robert Bradbury as liaison officer with Mount Cashel. The boys told their stories and they both had the impression that there was either an investigation going on about some previous occurrence, or Bradbury was not inordinately surprised at what they said. According to them he indicated that there had been other complaints and he would see about the matters they were raising. He appeared to be taking copious notes as the narratives proceeded.

Chapter HI

William Earle was under the impression that Sharron Callahan had been the little party's first contact; she at the time was Supervisor of Child Welfare and Corrections at Harvey Road and had no recollection of the events of that day but, as will be seen, agreed that at the time she had knowledge of what was afoot. And on this occasion there was a document in the form of a letter to FJ. Simms: Robert Bradbury drew it and he and Sharron Callahan signed it. It is reproduced^{.30} in full:

"October 23, 1975

**Mr. F.J. Simms Director of
Child Welfare Department of
Social Services Confederation
Building St. John's,
Newfoundland**

Re: Mount Cashel

Dear Sir:

This report is being submitted for your information concerning allegations recently made against Mt. Cashel by two wards presently there.

A visit was made to this office in early September 1975 by William Earle, his 12 year old son William and a friend of this boy. At that time, they met with Mrs. Sharon (*sic*) Callahan, social worker supervisor and related the following story. Apparently the night before William Junior and, this other boy who is also at Mt. Cashel, had been at the orphanage and waiting in the TV room; they had been requested to do so by one of the Brothers. At that time, Brother English

Exhibit C-0049.

De Profundis

came to the room also and asked the boys to leave. When they told him that they were waiting for another Brother, he did not believe them and allegedly struck William in the face several times with his fist. The boys then left the orphanage and went to the home of William Earle Sr. to report the incident. Mr. Earle then accompanied (*sic*) the boys back to Mt. Cashel and spoke with Brother English and Brother Kenny but felt that they both would not admit the reality of what had happened.

This accusation by the Earle boy is undoubtedly partly on emotional reaction to the punishment deemed justifiable by the brothers; and since the boy had few marks as evidence for severe beating, perhaps little can be accomplished by bringing strong charges at this time. But just the same charges of severe punishment by the Brothers are not new and could indicate a limited but still present level of child abuse in the institution.

Along with this charge the boys further alleged (*sic*) that 2 of the Brothers were known (to most of the boys) homosexuals and that occasions of sexual advance toward boys had occurred. (*sic*) They further reported that it was their knowledge that a brother who had been suspended from the orphanage in the past for unacceptable behaviour of this kind was again back.

It must be stressed that these boys were only young (approximately 12) and therefore corroboration would have to be present before their accusations could be taken seriously. However, it would seem to be neglect on our part if some action was not taken at this time. Therefore, it is requested that your consideration be given to the aforementioned events; and the appropriate action suggested. It might be noted that

Chapter III

we have spoken to Mr. Earle once since September but that he is now working in Corner Brook. However, he will be in St. John's again November 14 if further information is required from him.

Yours truly, 'Robert

Bradbury'

R. Bradbury

Corrections Social Worker

'S. Callahan'

**S. Callahan (Mrs.) Social
Worker Supervisor**

RB/pw''

This letter deserved and was given careful study by commission counsel and investigators on various grounds:

1. Two handwritten notes appeared below the signatures of Robert Bradbury and Sharron Callahan, his supervisor, at the end of the second page of the letter. One read as follows:

"Note

**Discussed with Brother
Kenny who will be
investigating.**

FJS

12-11-75."

This was in the handwriting of the addressee F.J. Simrns. Under that was the following unsigned note,

**"Minister,
Brother Kenny has now
been charged."**

An undecipherable date stamp appears below the second note but suggests to sharp eyes an impression of "12.75", not necessarily associated with the note to the minister.

2. In the second paragraph references to the alleged striking by Brother English are not entirely consistent with Billy Earle's story and omit any mention of Bobby Connors.
3. Bradbury's statement that "charges of severe punishment by the Brothers are not new and could indicate a limited but still present level of child abuse in the institution" suggests the existence of previous complaints, and as he said, perhaps is an echo of the Johnny Williams complaint of the previous year. His explicit use of the term "child abuse" is significant, particularly in view of the circular of April 1973 distributed to field staff by the director entitled "Guidelines Relating to Child Abuse". These guidelines were comprehensive, describing typical symptoms and the reactions of abusing parents, normal parents, abused children and normal children and obviously compiled by professional advisers. The director's covering letter said in part as follows:³¹

"During recent months the number of cases, involving child abuse reported to the Director of Child Welfare has increased substantially. It is not believed that this

Exhibit C-0043.

Chapter III

is indicative of an increase in the incidents (*sic*) of child abuse but rather an increased emphasis on detecting and reporting such cases by doctors, nurses, teachers, welfare officers, and other interested citizens. Whatever the reason, incidents of child abuse presently being reported in the province of Newfoundland is somewhat alarming and intensifies the need for a well-organized and effective child care and protection program."

4. The fourth paragraph mentioned the allegation that two Christian Brothers were known homosexuals and "that occasions of sexual advance towards boys had occurred". It would seem that sexual advances were not considered to be child abuse by the writer, and indeed he is justified in that dissociation if one considers the circular of 1973 authoritative.
5. The apparently leisurely response indicated a lapse of at least six weeks between the date of the complaint and the submission of the report. Bradbury suggested that he might have received verbal instructions from the director or one of his assistants after making a verbal report shortly after the interview. But the tone of the letter from him to Simms does not suggest that. He said that he might have paid a visit to Mount Cashel and have asked the superintendent for an explanation, but if this were so he might have been expected to refer to such an unusual occurrence in his report. No doubt both social services headquarters and the St. John's district office were perplexed as to how to proceed, the director having no troops, as it were, to send into the field, other than those from district headquarters, and district headquarters having been instructed not to interfere with Mount Cashel, but

De Profundis

refer all matters of the kind to him. In any event there was a further peculiarity in the nature of the document not associated with its contents.

6. The document quoted above was found in the Mount Cashel file at the department's headquarters in the Confederation Building. It was not an original but a photostatic copy, and as to the incident under consideration here it was all by itself. F.J. Simms, for eighteen years the head of the division of child welfare, retired on March 31, 1989 on the eve of the appointment of this commission. There is no dispute that at some point shortly before his retirement he decided to gather under his hand all the files and their contents for the purpose of segregating reports of complaints about the sexual and physical abuse of children. Assisting in this task was Roberta Joyce Dunne, a social worker (now a supervisor) in the child welfare field at Harvey Road who was brought into headquarters on January 16 of that year to fill the position of co-ordinator of child welfare. She found the files in a state of some disorder, but identified in her evidence a report by a social worker named Stead Crawford in 1982, about which more must be said, and the Bradbury report reproduced above. She said Mr. Simms' note about the reference to Brother Kenny was on it when she saw it in the course of her examination. The original of the document was apparently then in place and Mrs. Sheila Devine, by now assistant deputy minister, also testified that she had seen the document, and that Mr. Simms¹ note was in blue ink. Superintendent Leonard P. Power, head of the C.I.D. in 1989, also had access to the documents in connection with the reopened police

Chapter III

investigation referred to earlier, and observed Mr. Simms' note, being of the opinion that it was in photostatic form, and had been there when he first broached the subject with Simms at an interview. Well after being involved in the police investigation, and providing what information he could to Superintendent Power, Frank Simms had a strange brainstorm about this document and consulted Alphonsus Faour, deputy clerk of the Executive Council, at the time engaged in considering an action brought by Shane Michael Earle against the Government of Newfoundland and Labrador. Mr. Faour made the following note:³²

**"1430-208 SHANE EARLE
NOTE TO FILE:**

89-06-09

2:40 P.M.

I had a telephone call from Frank Simms this date who expressed some concern about a report concerning the situation at Mount Cashel from Mr. Bob Bradbury dated sometime in October, 1975.

It appears that during the month of March, while Frank was preparing for retirement, he was asked to review his files for the purposes of the police investigation into the Mount Cashel incidents. During the course of reviewing the October 1975 report, he said to me that he discussed it with Mr. George Pope who told him that he remembered the report coming in in 1975, it was discussed with the executive at that

Exhibit C-0402.

De Profundis

time and it was decided to discuss the implications with Brother Kenny. Following discussions with Mr. Pope, Mr. Simms said that he penciled a note on it which read approximately as follows:

"This report was discussed with Brother Kenny - he agreed to investigate the allegations of abuse",

Mr. Simms also said that the note was dated November 1975, even though it was actually written in 1989.

He expressed concern that Superintendent Power, in the investigation of this matter in March 1989, may have obtained the impression that he, Frank Simms, was alleging that the note was actually written in 1975. He wanted to correct that impression and insure that the parties concerned were aware that the note was written in 1989 following his review of the file. He said he could not recall why it was dated November 1975.

I advised him that I was not involved with the criminal investigation of this matter but only in the Defence of the possible civil action against government. In view of this, it would be very helpful in my opinion if he contacted Superintendent Power to discuss the possible misunderstanding with him. Mr. Simms agreed that this was the proper course of action and said he would telephone Superintendent Power shortly. He asked if I knew the telephone number for Superintendent Power and I gave him the general line for the constabulary.

He also indicated a wish to get together with us to discuss this whole episode. I explained that I would be away for the following week, but that Dianne Smith

Chapter III

and I, who are handling this matter jointly, would be most interested in getting together with him and other persons concerned once we have had an opportunity to review the documentation on the file.

A. Faour"

Faour said he made this memorandum for the file within ten minutes of talking to Simms at 2:40 p.m. on June 9, 1989. Superintendent Power said he had discussed the matter with Simms and was confident that the note referring to Brother Kenny had in fact been written by the former at the time it was dated. Although Simms had said that he had shown the Bradbury report to his "supervisor", assistant deputy minister George Pope, the latter said he had never seen it either in 1975 or in any discussion in 1989 such as Simms had testified to. The last word, although not the last reflection, might be with the present assistant director of child welfare, Elizabeth Crawford, who did an analysis of the Mount Cashel files for Sheila Devine and wrote *inter alia* on March 31, 1989:"

"With the exception of a report dated October 1975 from Mr. Robert Bradbury regarding possible physical abuse of William Earl and sexual advances toward boys by two of the Brothers (who are not named). There is no specific reference in our files to incidents that may have occurred. The files indicate that this was brought to the attention of the Superintendent and no other action is mentioned."

Clearly the first two apparent sentences are one, but it must

Exhibit C-0403.

De Profundis

be concluded that Mrs. Crawford found the file as arid as did the commission's investigators.

Frank Sinims eventually, in testimony given on April 5, 1990, assured the commission that the note referring to Brother Kenny's investigation was contemporaneous, made on November 12, 1975 and that he was not uncomfortable about having given that direction at that time. He agreed that it appeared to be inconsistent to have the Christian Brothers community investigating itself, when in the case of a foster home the investigation would be conducted by a social worker. Although he had discussed the Bradbury report in 1975 with George Pope he denied having done so with him in 1989 prior to or after retirement. After retirement he had heard from Sheila Devine that the original of the Bradbury report was missing, and from Roberta Dunne that the original of the Stead Crawford report was also missing after she had seen it in the file. He said that he had not been interested in the Crawford report and after he had examined these files he had "probably" sent all reports back to Mrs. Dunne. As to Ivy Burt's evidence that she had observed two accordion files on the director's desk after he had left the service, he recalled how on his last departure he had looked back and had not only seen nothing, but observed that this was the first time since his appointment that there was nothing left on it.

By the time Simms retired on March 31, 1989 Sheila Devine was, at least in his eyes, his supervisor and has since been appointed a member of the Public Service Commission. Although George Pope, assistant deputy minister in 1975, had no memory of the Bradbury report of October separate from the later events in that year which must next be described, Mrs. Devine assured the commission that he had seen it. She was equally positive about the state in which it went to the

Chapter III

C.I.D. in 1989 - an original with the Simms notation in blue ink. The question must be asked: what has happened to the original of this document and indeed that of the Stead Crawford report of 1982, dealing very specifically and disturbingly with homosexual activities among boys at Mount Cashel? In view of the state of the files generally, and Mrs. Devine's emphatic statement that child welfare files were not subject to any office policy of weeding or stripping, it is difficult to resist the conclusion that these documents have been removed. In any event no action was taken by the department of social services. No other department or agency of the government was informed. This may have been due to the fact, as Frank Simms testified, that this was the first complaint about Mount Cashel that he had received since becoming director. It may also have been due to the privileged position of the Christian Brothers as compared with foster-parents of his wards. In any event he had not heard the last of the family of William and Carol Earle.

Shane Michael Earle

Shane Michael Earle was placed in Mount Cashel Boys' Home and Training School, as it had been officially known since 1969, on April 4, 1973 at the age of six. On May 18, and pursuant to an order of the Family Court made by Judge M.L. Roberts, he was made a temporary ward of the director of child welfare for one year beginning May 9. Sheila Devine expressed her distress at the practice of placing boys of tender age in an institution like Mount Cashel where there was a very limited teaching female presence, and no "nurture"

De Profundis

in the form of affection could be counted on from among the hard pressed Christian Brothers. As Dereck O'Brien said with all his appalling experience of childhood, "little kids need a hug". To be sure Shane's brother Rick was there but soon to leave; also his brother Billy who probably accompanied him and was nine years old but never particularly close to him. The two boys were different, in temperament, Billy being rebellious and at least once a truant in his first two years; Shane was quiet and inoffensive. According to Shane the sexual molestation began as soon as the boys arrived - at the hands of the superintendent. Shane was brought down to the basement to be fitted with clothes and was hugged and fondled, and after being taken for a drive in the country with another boy a more serious invasion of his person was attempted. He found refuge from this sort of attention with Brother Burke who treated him with the greatest kindness as he thought. Shane greatly admired this tall, red-haired figure but his befriending became complicated by sexuality, as to which Shane as a witness gave precise details, culminating perhaps in sadism. He said that for a trivial offence involving a library card he was mercilessly beaten by Burke with the buckle end of a belt. He confided in Billy Earle showing him the injuries. Billy had found a friend in Chesley Riche, an adult who had volunteered to do some maintenance work at Mount Cashel at the behest of the superintendent's brother. Billy and other boys told him of beatings and sexual advances as prevalent in the orphanage, and he had already mentioned the matter to Brother Kenny who said that the children were simply looking for attention. Riche took the two Earle boys on a weekend in early December to Bell Island to see their sister who was in a foster-home. He found Shane withdrawn and Billy told him

Chapter III

about the belting by Brother Burke after which Riche took both boys to their mother's house on Duckworth Street.

Chesley Riche

Carol Earle was at a loss, except to examine Shane's black and blue back and buttocks. Chesley Riche, not on good terms with the Constabulary, bethought him of a Corporal McGuire of the R.C.M. Police. McGuire being off duty - and about to have Sunday supper - was good enough to go over to Mrs. Earle's residence and observe a situation out of his jurisdiction. Remarkably enough he had preserved his notes³⁴ which fixed the date at December 7, 1975 and the time at 4:35 p.m. reading as follows:

"75-059-42 - around town.

7/12/75,

4:35 **P.M.** Carol Earle, 360 Duckworth St. Shane Earle, age 9, hit by Brother Burke on bottom for losing a library card & telling a lie. Billy Earle, age 11 is in Brother Ralph's Dorm & Brother English a fellow Bobby Connors in Brother English's dorm they are also fooling around with.

Shan (*sic*) was beaten in close (*sic*) closet on 6/12/75 after breakfast."

A curious but not significant difference of recollection between Riche and McGuire, was the former's belief that the officer had taken pictures of Shane's injuries with a polaroid camera. Corporal (now Sergeant) Gerald T. McGuire denied

Exhibit C-0050.

De Profundis

having done so, or ever owning a polaroid camera. But Carol Summers said that a camera was delivered, pictures were taken by her and given to the Constabulary, as indeed was the case.

The next day - Monday, December 8 - Chesley Riche went to the Confederation Building to see "the Minister"; in due course he saw Frank J. Simms. Riche made no mention in his evidence of a preliminary telephone call, although Simms testified that a call was made and that he had invited Riche to come to his office. The interview, somewhat difficult for Simms because of the indignation which was not far below the surface of Riche's approach, lasted, according to the latter, about fifteen minutes; according to the director, about one hour. Riche said that Simms protested that the "Catholic church was on a pedestal" and that there was little he could do. Riche then observed that he would put him and the pedestal on the front page of the Evening Telegram if something were not done. Simms recalled neither of these observations. The contrast between Riche's explosive comments and Simms' precise, even oracular delivery must have been remarkable. At all events the director undertook to do what he could and advised his visitor to go to the district office at Harvey Road in St. John's; he said that after Riche left he had called that office and advised them of what to expect, although he did not remember to whom he spoke. He did remember, however, confiding in Brother Nash. It was common ground that Chesley Riche told the director not only of the physical assault on Shane Earle and other boys, but made "very serious allegations" of child sexual abuse by Christian Brothers in Mount Cashel.

Chapter III

At Harvey Road

The scene shifts to Harvey Road and to the case, or "running" record kept by Mrs. Alice Walters (now Crewe), a child welfare social worker, with responsibility for foster homes but not in the area of 360 Duckworth Street, although temporarily assigned to it in the absence of Mrs. Geraldine Stapleton. Her account of what transpired from the arrival of Mr. Riche to the end of the day at the Charles A. Janeway Child Health Centre in the Pleasantville district of St. John's being contemporary, and recorded as she said very shortly after the events occurred, should speak for itself:³⁵

"December 8, 1975

4:45 p.m. Ms. S. Callahan came to my office to acquaint me with the following: A Mr. Chesley Riche was on his way here from H.Q. where he had seen the Director of Child Welfare about a complaint of alleged child abuse in Mount Cashel Orphanage. Mr. Riche arrived shortly after. He said that Shane Earle age 9 had been beaten by Brother Burke at Mt. Cashel on Saturday, Dec. 6 and that the child had various bruises on his body as proof. Mr. Riche also said that he had worked at Mt. Cashel for 2 weeks and seen a lot of things he did not like. He also said that he had volunteered his services to install heating for the swimming pool. ... He later changed the work period from 2 to 4 weeks or a month. Together with B. Bradbury I visited Shane's mother at her apartment at 360 Duckworth St where we met Shane and also Mrs. Earle (*sic*) common-law husband ... The apartment has 3 rooms, living room, kitchen,

Exhibit C-0056.

De Profundis

bedroom and bathroom and was spankingly clean. Sheanc (*sic*) was asked to show his bruises to Mr. Bradbury, which he did and which appeared to be located mostly on the lower part of the right butt. After discussing the matter somewhat, I requested Mrs. Earle and shane to accompany me to the Janeway Hospital for a medical. I explained that this was regular procedure in a case of suspected child abuse. They agreed to come, while Mr. Riche invited himself along. While waiting at the Janeway, Mrs. Earle told me some of her past history in order to explain why she did not have custody of her 7 children. ... Mrs. Earle said that all of her children had contact with her as 3 of her daughters lived with a aunt on Bell Island, 1 with her grandmother in town, and the oldest boy was with his father in Pasadena, but had been in town 3 weeks ago and came to see her, and 2 boys in Mt. Cashel. Shane who was the cause of our present concern and Billy age 11. These two apparently visit their mother whenever they can.

Dec. 8, 1975

Shane said he had been beaten by Brother Burke with a belt on Saturday morning, because he had lost his library card and consequently lied about a book which he should have returned or borrowed. I'm not sure which. I had explained to the Nurse on Duty why we were there and she contacted her superintendent for instructions as to how to handle the case. She was advised to get an outside MD for the Janeway did not wish to get involved. She contacted Memorial University Family Medical Sercice (*sic*) who apparently have an MD available on after hour calls and sometime later a Dr. Patey arrived (I think that's the correct name). I spoke to him separately and explained the matter to him, he said he'd had to notify the C.I.D. as that was the normal procedure on after hour calls. He

Chapter III

then examined Shane. He later informed us that though small for his age Shane's development appeared normal in every way nor was there any evidence of injury either new or old.

He said it appeared that the boy had been hit with a blunt flexible object (most likely a leather belt) about six times and that the bruises were more than a day old but less than a week. During the Dr.'s examination I spoke with the 2 men from the C.I.D., Pitcher, who did all the talking and Cocrane (*sic*). Mr. Pitcher seemed to recognize, Mr. Riche from somewhere and asked whether his first name was Ches to which Mr. Riche replied, "Right on first time", after that they seemed to be on somewhat familiar terms. During the two hours or so we were at the Janeway, Mr. Riche kept barging into rooms and interrupting conversations. The C.I.D. appeared to be more interested in the Homosexual allegations made by Mr. Riche and I had to clarify several times that the present complaint only concerned a beating not homosexual advances. Home 8:20 p.m."

'AW^H

At the "Janeway"¹

As to who first informed the police of the case of Shane Earle - and Mr. Simms claimed to have done so after discussions with his assistant deputy minister - it would appear from the evidence of Detective Inspector Chesley Yetman, then officer in charge of the C.I.D., that it was Dr. Paul Patey, Assistant Professor of Family Practice at Memorial University. Dr. Patey was a native of St. Anthony and at the time material to this narrative, pursuing a distinguished career in teaching and practice which ultimately led to his being a member of the Newfoundland Royal Commission on Hospital and Nursing Home Costs and

De Profundis

national president of the College of Family Physicians of Canada. He testified that he was called into consultation by the casualty officer at the Janeway Child Health Centre on the evening of December 8, examined Shane Earle and made a tracing of the bruises on his lower back and buttocks. There he obtained a history from Alice Walters, Carol Earle and Chesley Riche. Shane Earle demonstrated the position which he said he adopted when being put over the lap of his adult assailant, consistent according to Dr. Patey with the incidence of blows as indicated by the bruising. Although the skin was not broken, in his opinion considerable force had been used in the infliction of at least six blows and possibly many more of lesser severity; the marks indicated an irregular shaped end of a flat instrument. He had preserved the tracing, his notes and his report, which were entered in evidence, in a confidential file.³⁶ The report made for the hospital with copies provided to Mrs. Alice Winters (*sic*) and Detective R. Pitcher, is an illustration of the studied moderation with which an experienced physician describes injuries, and in fairness to all concerned should be recorded here:³⁷

"The patient was examined at the request of Mrs. Alice Winters, Child Welfare Social Worker, and the child's mother. He was examined in his mother's presence at the Janeway Children's Hospital between 7:00 & 8:00 P.M. on December 8, 1975.

Examination showed a normal co-operative, calm, nine year old boy. There were no abnormalities of the internal organs evident on examination. There was no

³⁶ Exhibits C-0059 to C-0061.

³⁷ Exhibit C-0061.

Chapter III

evidence of bony injury or bony abnormality. The skin was clean. His hair was clean.

He had a 1 cm. diameter bruise on the medial aspect of the left calf. This appeared to be a week or more old.

On his buttocks there were several superficial bruises. The skin was intact. There was minimal swelling. These bruises were approximately an inch in circumference but had a linear extension from them. They were red with very slight green coloration suggesting more than one but less than five day old bruises.

There were more on the right than the left side.

These bruises could have resulted from pressure from a flexible strip of material between one and two inches in diameter; the bruises occurring (*sic*) when the skin was contacted by the tip and adjacent three or four inches on the strip. Six blows could have accounted for all the bruises on his buttocks. Other possible mechanisms of injury cannot be excluded.

No medical treatment was required. Spontaneous healing can be expected without leaving any permanent damage.

'Paul Patey M.D.'

Dr. Patey said that if he was making such a report now he would be obliged to send it to the department of social services as well as the police, but in 1975 he was only obliged to notify the latter. Sending a copy to Alice Walters therefore would appear to have been a commendable courtesy. Detective (now Inspector) Ralph Pitcher of the

De Profundis

Newfoundland Constabulary was working with Detective Corcoran of the same force on that Monday evening and both attended at the "Janeway". Pitcher testified at length about the procedure that should have been followed, but was unable to explain why a Citizen's Complaint Form³⁸ which he would have completed and the file which he would have created to contain it, could not be found. The original Occurrence Book³⁹ maintained by the police at Water Street was produced to him by commission co-counsel Clay M. Powell, Q.C.; nothing in it had been recorded referring to an assault on Shane Earle or any reference to Mount Cashel for December 8. In any event, it is clear that the police response was provoked by the combined action of Chesley Riche and Carol Earle at the district office of social services in St. John's and the consequential visit to the Janeway Hospital at which Detectives Pitcher and Corcoran appeared.

Detective Jerome Joseph Corcoran who accompanied Detective Pitcher to the Janeway Hospital was a very junior officer at the time and was not a member of the Assault Section but served according to his deposition taken before Mr. Day on January 17, 1990, as either a member of the General Investigation Section or of the Break and Enter Section. The explanation for his association with Detective Pitcher on Sunday, December 7 is that he was on the night shift with the latter and went along as "backup". He had no personal recollection of the events described in Mrs. Walters case record⁴¹¹ or of anything untoward at Mount Cashel. He

-* Exhibit C-0064.

³⁹ Exhibit C-0065.

⁴⁰ Exhibit C-0056.

Chapter III

eventually obtained commissioned rank as a Lieutenant in the Royal Newfoundland Constabulary in 1986 but had to retire in 1988 because of heart surgery. His deposition contains at paragraph 23, a concise and clear description of the procedure for receiving and recording complaints which is^{.41} as follows:'

"23. Handling of complaints by Detectives in the C.I.D. on the night shift in 1975 was as follows. If we got a complaint, we typed up a citizen complaint form. We typed up the complaint ourselves. If a complaint about a person being assaulted, came from the Janeway, for example, and Detective Pitcher and I responded by going to the Janeway, he was most likely the person to type up the citizen complaint form. Unless we knew that the matter we were doing on a shift had been the subject of an earlier complaint to another member of the C.I.D., we did up the citizen complaint form. The person taking the lead in the response to the complaint would type up the citizen complaint form. On the night shift at C.I.D. we also wrote up a report called the "Night Duty Report" of all complaints we responded to and all other work we did on the shift, and left it for the Inspector in charge of the C.I.D. when he came in the next morning. The citizen complaint forms filled in during the night shift of the C.I.D. up to midnight would be taken down to the police station at Water Street by one of the uniformed service members, such as from the Street Patrol Division, at midnight which was when they changed shift. Their shifts were 8 a.m. to 4 p.m., 4 p.m. to 12 midnight and 12 midnight to

Exhibit C-0239.

8 a.m.. When they were taken down to the police station on Water Street, the complaint forms would be recorded in summary on the occurrence sheets that were done up at that location. The occurrence sheets covered complaints handled by all Divisions, including the C.I.D., both night and day. Any complaints we received on the night shift in the C.I.D. from midnight to 2 a.m. were typed up by us in the usual way on the citizen complaint forms and we dropped the complaints down to the police station to be put on the occurrence sheets. Occasionally, information on complaint forms we typed after midnight was phoned down to the police station to make sure it got on the occurrence sheets and we dropped off the complaint forms the next day."

The Constabulary Investigation: December 1975

On Tuesday, December 9, Detective (later Inspector, now retired) Robert Hillier of the said assault section was detailed to conduct the investigation of the complaint of Mrs. Carol Earle. Here some preliminary observations should be made. The assault section was headed by Detective Sergeant Arthur Pike under whom, in order of seniority, were Detectives Robert Hillier, Ralph Pitcher and Allan Thistle, the last named having joined the section only on December 1, 1975. At the time Detective Sergeant Pike was engaged in a prolonged arson investigation and that of the fishing gear replacement irregularity which, generally speaking, pre-empted his time and energies throughout the period of what may be called the first Mount Cashel investigation by the police; Hillier therefore, though not in charge, was the senior officer in the section with ten years service. He was

Chapter III

accustomed to work in criminal matters with Detective Pitcher, as he said, "throughout his career", and in this case saw to it that the latter would be working with him. As was made perfectly clear by Pitcher it was Hillier's investigation and in due course this officer prepared two reports, the two reports in fact referred to in the commission's terms of reference, dated December 18, 1975 and March 3, 1976. In point of fact the first version of his report, as will be seen, was considered by his superiors as unacceptable, was returned to Hillier and destroyed by him. The report of December 18 was accompanied by statements arising from interviews with twenty-six boys and three adults under circumstances which will be examined.

It must also be noted that Hillier did not give his evidence to the commission until November 21, 1989 after all those former residents of Mount Cashel who had been interviewed by him and Pitcher, and who responded to the commission's invitation to testify, had identified before the commission the statements that had been given to the two officers in December 1975. The decision thus to proceed was a reversal of that proposed in the opening addresses of Mr. Day and Mr. Powell and was taken in order to delay these statements becoming public property until they could be released in edited form as adjuncts to Hillier's reports. This provoked vigorous objections in public session on October 17, 1989 by Mr. Jack Lavers, counsel for Douglas Kenny and Mr. M. Francis O'Dea, Q.C., for the Congregation of Christian Brothers as an unjustifiable change of front from the original position stated by commission counsel. Mr. Lavers urged that Mr. Hillier be called forthwith, the reports with attached statements entered in evidence, and that subsequent witnesses to whom the statements were attributed should be confined to

De Profundis

giving evidence strictly arising from their contents. As will be seen from the transcript of my ruling on the various points raised which may be found at appendix B, the argument was wide-ranging, particularly on the part of Mr. O'Dea who made an eloquent protest, not only against the change of position by commission counsel, but also the whole process of the commission's inquiry which he said was contrary to the rule of law. I quote one short passage from my reasons for ruling in favour of the position taken by Messrs. Day and Powell, who both addressed the question at length;

"What we are to proceed with is the evidence of witnesses who made complaints. I am convinced that for their protection it should be given on the basis that commission counsel have outlined, and that the evidence of Mr. Hillier and the production of his report should be postponed to hearing this evidence in the course of which I understand that the individual statements will be presented to the complainants and they will be asked to remember in fact. Here I have already spoken about the tricks of memory, and particularly as to events that take place in the childhood of people who have now reached the prime of life. I do not know whether I will be offered any evidence from professional witnesses as to what those tricks may be, but I think our common experience suggests that memory is sometimes fallible, and I would say almost notoriously misleading in the case of recollection of adults as to what transpired in their infancy. If as I think, I must from time to time make findings of fact which are of relevance to the terms of reference of the inquiry, I hope it will be agreed that the recollections of these witnesses must be very closely examined as to what statements were given and as to any other relevant evidence."

Chapter III

To return then to the narrative of what transpired in December 1975 in connection with the Constabulary investigation, it would appear that Detectives Hillier and Pitcher visited Mount Cashel to discuss with the superintendent, Brother Douglas Kenny, how and where interviews with the boys and the Brothers should proceed. As to the boys, it was arranged that these should take place at police headquarters (Fort Townshend) and surprisingly enough the superintendent was permitted to arrange transportation from the orphanage to the place of interview. I say surprisingly because the evidence is that he personally drove the boys selected to Fort Townshend, and made suggestions as to what they should not say with, as some testified, limiting effect upon what they were prepared to vouchsafe to the police. But Hillier said he was reluctant to employ police cars to convey the boys to and from the station.

It should be noted here that Robert Hillier, who testified at considerable length before the commission, had no recollection of making any remarks about complaints coming in about Mount Cashel and emphatically denied that he had said "I'll get them this time" as Mrs. Crewe testified, dealing with a visit by Hillier and Detective Allan Thistle (now Deputy Chief of Police) to Harvey Road on the following day (December 9, 1975). No doubt a remark of this nature would not be considered entirely appropriate by the sort of dedicated police officer that Mr. Hillier certainly was, but there is no possible reason, short of unlikely malice, why Mrs. Crewe should attribute a remark to him cut out of entirely whole cloth; it is probable that something of the kind was said in her

hearing. In any event in her case record for December 9 she made the following entry:⁴²

"Dec.9, 1975

Office visit from C.I.D. officers Thistle and Hillier. more questions about yesterday's happenings. Mr. Hillier said complaints about Mt. Cashel had been coming in steadily for the last two years, and he would not be surprised to see the lid blown off this time. I advised him to contact Mr. Riche as to me he had seemed like a man with a vengeance. Mr. Hillier said they would and they would also investigate., Mt. Cashel. He also said I'd be hearing from them. After this visit case was handed over th (sic) Mrs. G. Stapleton, worker for Mrs. Earle's district. (AW)"

Hillier's programme of investigation may be said to have begun on Tuesday, December 9, when he and Detective Thistle interviewed Mrs. Walters at Harvey Road and Shane Earle at his mother's residence on Duckworth Street. They took no statement from Shane Earle at this time because, as Hillier testified, he was in a highly emotional state, but no doubt obtained names upon which the selection of witnesses could be initially based.

There were no interviews on December 11 and according to Hillier it was on that day that he began to hear directly from either the chief of police, John Lawlor or the assistant chief of police (as the second-in-command was then called) John Norman. This exception to the customary adherence to communications through the chain of command evidently continued while he was engaged in his investigation,

Exhibit C-0056.

Chapter 111

effectively bypassing the head of the C.I.D., Detective Inspector Yetman. My impression of the evidence is that Hillier dealt directly with Norman more often than with the chief but everything that Norman conveyed by way of instruction or explanation was attributed to the chief himself, probably in the hallway between the detectives' office and those of Lawlor and Norman which Hillier was apparently never expected or invited to frequent. He was told there was a "dialogue" in process between the Constabulary and the Department of Justice as to how the Mount Cashel matter was to be handled, that the minister was away from St. John's, and that the deputy minister was hesitating. If this had not been so, said Hillier, the interviews would have proceeded on December 11 and did proceed the following day when eight boys from Mount Cashel, delivered by Brother Kenny, were interviewed between 10:00 a.m. and 2:40 p.m. by Hillier and his partner, either jointly or severally. Five more boys told their story on Saturday, December 13; seven on Sunday, December 14 and three on Monday, December 15. Hillier said at the end of each day he gave at least some of the statements taken to either Lawlor or Norman.

There were no interviews on December 16, apparently because of some delay in arranging for the production of Brothers English and Ralph for the questioning upon which Hillier was insisting. He was of the view that they were on the point of leaving the province, and was not aware, as he had certainly not been advised, that arrangements for their being interviewed by the police under circumstances quite different from those imposed upon the boys had already been made in an unexpected quarter. Brother Gordon Raphael Bellows gave sworn evidence to the commission on January 29, 1990. At the time of Detective Hillier's investigation

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De Profundis

Brother Bellows was director of education for the Canadian province and lived at its headquarters at Mono Mills in Ontario. He testified to his belief that he was in St. John's between December 7 and 9, 1975 and had a limited recollection of what had transpired while he was there, except that while staying at Brother Rice monastery he had received a telephone call from Brother Dermod Nash on behalf of Brother McHugh, the provincial superior, or perhaps from Brother McHugh direct, informing him that there were allegations of sexual abuse of boys at Mount Cashel made against two Christian Brothers. He was asked to interview one of them at the monastery, and if he is correct in his statement that this man taught at St. Pius X School, one must assume that it was Brother English. Brother Nash, also resident at Brother Rice Monastery at the time was asked to do the same, and, on the same assumption, must have interviewed Brother Ralph. Both Bellows and Nash, highly respected and influential Christian Brothers were told that the allegations were, in the main, true. Then and only then were the detectives permitted to proceed with the questioning of English and Ralph, not as one might expect, in the same circumstances and at the same location, with the bustle and coming and going of regular police business such as had animated Fort Townshend when the boys made their statements, but in the seclusion of church premises known as MacAulay Hall. Instructions to do this clearly came to Detective Hillier from the office of the chief of police. As to whether he negotiated with the congregation himself or received instructions from someone in the department of justice to produce this result is unknown; the evidence of Lawlor as to the whole episode is negative, and expressive of his present-day belief that he did not know or could not recall

Chapter HI

what was happening, having left the whole matter in the hands of Norman, since deceased. He would not deny having received a visit from the provincial superior at this time; indeed he knew Brother McHugh and many other Christian Brothers as friends and "Patricians".⁴³

But Brother McHugh, since elevated to the position of Superior General of the Congregation of Christian Brothers, came from Rome and testified to the commission on December 14, 1989. He of course had been advised about Mount Cashel, was profoundly shocked and came forthwith to St. John's, also taking up residence in Brother Rice monastery. He was forthright in saying that he had paid a visit to the chief of police, promising the co-operation of his order. It was a short meeting and McHugh had no recollection of making any arrangement as to when boys - and presumably Christian Brothers - would be interviewed, and he was not aware of any of the latter having seen Lawlor other than himself, although he did not exclude the possibility of Brother Nash having done so.

Brother Nash, whose health did not permit him to testify at a public hearing of the commission, but who gave sworn evidence to Mr. Day and counsel for a number of participants in the West Indian island of Antigua on May 12, 1990,⁴⁴ confirmed the fact that he had had a brief meeting with the chief to discuss the manner in which the Mount Cashel boys should be interviewed, making no specific reference to arrangements made at the time for police access to the suspects. At all events Brothers Ralph and English were interviewed at MacAulay Hall on December 16. Brother

⁴³ Alumni of St. Patrick's High School in St. John's. ⁴¹

Exhibits C-0495 and C-0495A.

De Projundis

Ralph signed a statement written out by Hillier: Brother English declined to do so, but made a verbal statement. Both amounted to admissions of guilt although heavily qualified in the case of Brother Ralph's. Although Brother English was more forthcoming, Hillier's recollection of what was said was impaired by the destruction of his notebooks when he later became a commissioned officer, a practice which appears to have been universal in the force at the time. Hillier and Pitcher both recalled that the Brothers were equipped with luggage as if about to leave Newfoundland, but it seems to be common ground that Brother McHugh had given instructions that they should be moved from Mount Cashel, one to Corner Brook and one to Grand Falls, and that they were either then on their way to these destinations or had just returned for the purposes of the interviews. What is also uncontested is that Ralph and English had already been questioned by Brothers Nash and Bellows, and Hillier had been instructed not to arrest them.

The Hillier Report: December 18, 1975

Then to his astonishment, and in the middle of what he regarded as an incomplete investigation, Hillier was ordered to produce his report forthwith and did so on December 18, sending it, as he thought, to Inspector Yetman, perhaps by the hand of Sergeant Pike. To his dismay the assistant chief returned it to him with a request that he rewrite it, and delete all reference to sexual abuse. Hillier demurred, and Norman thereupon said he had no choice other than to make it an order by direction of the chief of police. Hillier returned to his office much upset. Confronted with what he considered to be a lawful order and the sanctions of the regulations made

Chapter HI

under the *Constabulary Act*, R.S.N. 1970, s.28 (1)(5)(a), he was determined to leave as much as possible of the allegations of sexual abuse in the new version. No doubt the fact that Norman visited his office, put his hands on the younger man's shoulders and said: "Bob I am putting you in an awkward position but I have no choice" tipped the scale and he prepared the fresh report still dated December 18,⁴⁵ an edited copy of which may be found at appendix C. Hillier's impression was that Norman was sympathetic to the idea of leaving in as much as possible. Four copies were made of the report, the original for the department; one for the chief; one for the records department and one for its author, who subsequently destroyed it.

Digression is necessary to interpose a comment on the form of the report and of the statements attached to it. The edited version at appendix C with the names and ages of the twenty-four boys at Mount Cashel from whom statements were taken shows nine names deleted except for the initial letter of the surname. The deleted names are those of boys interviewed who did not subsequently wish to testify. The legible names are of those who complained to the police and testified on oath to the commission⁴⁶.

In addition, there is a statement signed by Carol Earle (Summers) and one by Brother Allan Ralph. According to

Exhibit C-0137.

To these must be added the names of Craig English, aged 8 who testified subsequent to the entering of the report in evidence and Roy O'Brien, aged 12 who gave a deposition. Edward Strickland did not testify although his half brothers Malcolm and Frank Baird did. These boys were interviewed by Hillier and Pitcher in their mother's house in Mount Pearl and as stated, written statements were not signed.

De Profundis

the practice of the day the statements were written out in the thoroughly legible handwriting of either Hillier or Pitcher and the person interviewed was invited to sign. This was, according to both officers the police practice of the time, the typed copies being appended later. Also in accordance with the accepted practice boys under the age of ten years were not asked to sign. Several boys who later gave evidence mentioned what they perceived as recording devices in the interview room. Police witnesses were unanimous that none were used. Johnny Williams said he initialled each page of his statement, but in fact no such initialling appears; his statement is contained on one page and his signature appears at its foot.

The Provincial and the Deputy

In the meantime Brother McHugh, after consultation with Brothers Nash and Bellows, both members of his provincial council, visited Mount Cashel to find out what he could about the truth or otherwise of the allegations of sexual impropriety. From his evidence it would appear that he was received in silence. Nor was the superintendent Brother Douglas Kenny, any more forthcoming in private consultation. Brother McHugh said that then and subsequently he learned nothing about the allegations from the Mount Cashel community. Altogether he spent, as he said, at least ten days in St. John's. At some point which the evidence indicates must have been after December 18 he received a telephone call from a woman he believed was the secretary of Vincent P. McCarthy, to arrange an appointment at the seat of government.

Chapter III

Vincent Patrick McCarthy was born on Red Island in Placentia Bay on September 6, 1919 and at the age of twenty served briefly as a constable in the Newfoundland Constabulary. His service was interrupted by his resignation to join the Royal Artillery as a member of Newfoundland's first contingent proceeding overseas in the Second World War and serving as such until its conclusion. He returned to Canada to complete the remaining year of his secondary school education at St. Bonaventure's College in St. John's, after which he entered Dalhousie University in Halifax proceeding to the degree of Bachelor of Arts in 1949 and Bachelor of Laws in 1952, then being admitted to the bar of Nova Scotia, and the following year to that of Newfoundland at the age of thirty-two. From then to the end of his life at the age of sixty-seven, Vincent McCarthy served his native province, first as a legal officer of the department of justice where after twenty five years he reached the summit as deputy minister and remained there until February 11, 1977. On that day he was appointed a judge of the District Court of Newfoundland in the Judicial District of St. John's West. He died on June 24, 1986.

The Provincial Superior made no difficulty about responding to this summons and in due course, accompanied by Brother Nash, paid a morning visit to McCarthy's office at the Confederation Building. Although the commission has the evidence of Brother McHugh given at a public hearing, and that of Brother Nash by deposition, the air of mystery which still surrounds the meeting which ensued could only have been dispelled by that of the lamented judge. According to the two eminent Christian Brothers they were graciously received and the deputy minister soon got down to business. There was, so they said, no negotiation and they were told that Brothers

De Profundis

Ralph and English must leave Newfoundland; they responded by assuring McCarthy that treatment of the Brothers' aberrations would be forthcoming. Brother McHugh had the "clear impression" that the removal of Ralph and English would not close the case, but that charges might be laid in the future. At the meeting Mr. McCarthy had a file on his desk to which he gestured occasionally but did not offer for inspection by his visitors. Brother McHugh refrained from asking to see it, although he suspected it was a report from the police. He testified that he was under the impression that what had transpired was the usual procedure, and acquiesced in the deputy minister's direction. That evening he left for Grand Falls and three days later returned to Ontario.

The Evidence of Pearl Bursey

Commission counsel and investigators assembled evidence, either at public hearings or by deposition, from every occupant of the offices of the department of justice beginning with the deputy minister's secretary, and it was this evidence which contributed more than anything to the air of mystery which I have alluded to. Brothers McHugh and Nash came and went unseen by the occupants of the department's fifth floor offices. Elaine Peet, Mr. McCarthy's secretary at the time had no recollection of making an appointment for the Christian Brothers to see him and had no record of their appearance in the office. Other than what the commission derived from the evidence of Brothers McHugh and Nash only a single ray of light appeared to penetrate the cloak of silence or incomprehension enveloping the departmental personnel. Marion Pearl Bursey was formerly private secretary to three ministers, the Honourable T. A. Hickman,

Chapter III

the Honourable Leslie R. Curtis, the Honourable John Mahoney and again Mr. Hickman. Now living in Mississauga, Ontario she read about this commission's inquiry in the newspapers and found her memory stirred as to one occasion which she thought might be significant. She had heard nothing about physical or sexual abuse of children at Mount Cashel, but she recalled one day, when the minister was absent from his office, a party of four, two policemen and two Brothers or priests, waiting to see Mr. McCarthy whose office was adjacent to Mr. Hickman's outside which her desk was placed. Mrs. Bursey said that she knew Lawlor and Norman; she was sure Lawlor was of the party and thought that the other police officer was Norman. She was shown photographs by Mr. Powell of Brothers McHugh and Nash and the chief of police himself in the book recording the Christian Brothers Centennial published under the name, "*The Brothers Are Coming!*"⁴⁷ and thought, without being sure, that the religious in the group were those two Brothers. She had no certainty as to date, but since the members of the party were wearing overcoats she was sure it was in the winter. The occasion was unusual - indeed it was unique in her experience. Although she had seen Lawlor and Norman from time to time as visitors to those offices, she had never seen or recorded any visitation by members of the clergy. When the party arrived and began talking among themselves, she automatically looked over at the office of the minister and noted that the door was open and the light out, as was always the case when he was absent.

This testimony, resulting from an interview of Mrs. Bursey by commission investigator G. Frederick Home, was given on

Exhibit C-0135.

De Profundis

January 22, 1990. The following day John Lawlor appeared before the commission at his own request and Mr. Powell led evidence from him as to what Mrs. Bursey had testified to. He felt that it was a misunderstanding on her part, and that the meeting in fact was of a committee set up by McCarthy to consider the chiefs successor, consisting of Magistrate Hugh O'Neill, Superintendent K. Fraser of the R.C.M. Police, the deputy minister and himself; this had occurred some time in January 1976. Norman had been one of the applicants for the position of chief of police; there had been no meeting attended by him with any Christian Brothers and he had not been, as he told Mr. Horan, in McCarthy's office during the five years of his tenure. He said further that Mrs. Bursey was mistaken about him and Norman being in uniform, since this was only worn at the opening of the House of Assembly and similar formal occasions. On re-examination by Mr. Powell he explained that he had really meant to say he had not been in McCarthy's office during the time of the Mount Cashel investigation.

Pearl Bursey spoke warmly of the efficiency and devotion to duty of Vincent McCarthy and the good relationship he had with the minister in contrast to that which prevailed between a former minister and his deputy. She described McCarthy as a "very private man" who suffered from a malignant affection of his eyes and nose for which he had surgery. She also testified to his friendly relationship with the late Eileen Maloney, the chief clerk and head of the registry in the department. In her opinion Mount Cashel had been a respected institution at the time, and she knew nothing about the allegations current in December 1975 and the resulting police investigation.

Chapter III

I have mentioned the unfortunate impression made upon me by the evidence given by Mr. John Lawlor on the first occasion of his appearance before the commission. It was confused, and he appeared to be taking refuge in a failing memory induced by surgical intervention to eliminate an aneurysm, a proposition of some novelty. The question of a successor was indeed under consideration in 1976 when both the chief and assistant chief retired. When Lawlor testified he was seventy-eight and due allowance must be made for failing memory and a not unnatural desire to dissociate himself from the Mount Cashel aspects of this commission's inquiry. I have heard both Pearl Bursey and John Lawlor giving their evidence on oath and I have had the unusual advantage, not until recently enjoyed by judges and commissioners of playing video tapes of what they said at the time of their testimony, and observing at leisure their demeanour when they said it. I am of the opinion that what Mrs. Bursey testified to was inherently probable and believed by her, and that Mr. Lawlor on several occasions and probably on this, was not a reliable witness. For example it seems highly unlikely that Mrs. Bursey could mistake Magistrate O'Neill and Superintendent Fraser for Brother McHugh and Brother Nash. It is true that she was a native of the Burin Peninsula, as was Mr. Hickman, and that in 1979 when she remarried he was master of ceremonies at her wedding. This information was volunteered and she was not cross-examined on it.

The Evidence of Chief Justice Hickman

On March 29, 1990 Mr. Powell called the Honourable Thomas Alexander Hickman, Chief Justice of the Trial Division of the Supreme Court of Newfoundland, to testify

De Profundis

before the commission. His evidence took the greater part of two days. He also had the greatest admiration for Vincent McCarthy who was his deputy minister until February 1977 when the latter was appointed to the bench. Mr. Hickman's first tour of duty as minister of justice was performed as a member of the ministry of the Honourable J.R. Smallwood, and his second as a member of that of the Honourable Frank Moores and, for a brief period, that of the Honourable Brian Peckford until his appointment as chief justice in December 1979. Several members of his staff testified to his "visibility" in contrast to the relative seclusion of McCarthy; they said he was a hard worker and unusually willing to let them use their own discretion and to back them up when the exercise of that discretion was called in question. Because of his unusual experience of the political life of the province since Confederation and his knowledge of so many personalities and situations, the Chief Justice's testimony was apt to be discursive, but he made two points which at this stage of the narrative can be isolated for immediate reference. First, he dwelt on the fact that from September 1975 to March 1976 the office of director of public prosecutions had been vacant following the resignation of John Connors, and the appointment of John Kelly. McCarthy was mostly concerned with civil matters, but in the absence of an incumbent he assumed the duties of the position himself; he was accordingly clothed with the mantle of prosecutorial discretion which as deputy minister he would never have assumed. Second, he as minister knew nothing of what was alleged to be happening at the orphanage or of a police investigation of these allegations, and their existence was never mentioned to him by anyone nor had he been subsequently made aware of them until 1979 under circumstances which will be examined. All the

Chapter III

evidence and common experience point to the prevalence of the practice of informing a minister in matters of this kind against the possibility of being taken by surprise in the House of Assembly, and the failure to do so in the case of a potential bombshell of the kind discerned by the police and the deputy head of the department must be considered extraordinary.

Mr. J.R. Chalker, Q.C., who had appeared at the beginning of the commission's proceedings as counsel for the Law Society of Newfoundland, made two successive applications for standing for the estate of Judge McCarthy. The first on September 11, 1989 was rejected for reasons which in my opinion were valid in law, a result concurred in by Mr. Powell. The time came when the position then taken was reversed with the unanimous approval of all parties including both commission counsel; thereafter Mr. Chalker was able to devote his learning and ability as a representative of Judge McCarthy's daughter and executrix Mrs. Mary Mandville in the defence of her father's reputation. On this particular point he found it difficult, if not impossible to believe that an experienced deputy minister would not have at least discussed the matter orally with his minister, if not advising him of it in writing. There is no evidence in writing of any such communication and I accept Chief Justice Hickman's assertion that there was no information given to him at all about the allegations, about the report of December 18, and about a subsequent report by Detective Hillier dated March 3, 1976 which must now be considered.

The Second Hillier Report: March 3, 1976

According to Robert Hillier, and in contrast to the silence prevailing in the department, the termination of his investigation on December 18, 1975 was the subject of copious conversation at least in the lower ranks of the C.I.D. Then, after the triumphant and unclouded conclusion of the celebrations of the Christian Brothers centennial in Newfoundland, Hillier was asked by Chief Lawlor to make another report, excluding details of sexual abuse, "at the request of the Minister of Justice". This second report, and indeed the third which he had produced, was addressed in due form to the chief as follows^{4*}:

"Sir:

I respectfully report that as requested by the Minister of Justice I am forwarding this report on child abuse regarding assaults on a number of children by Christian Brothers at Mount Cashel Orphanage."

In accordance with his determination to alert higher authority and in this case, as he believed, the minister himself, he headed the document:⁴⁹

"Re: Further to my report dated December 18th 1975 concerning "Corrupting of Children" at Mount Cashel Orphanage, Torbay Road, St. John's, Newfoundland. (Refer Br. Sec. 168(1) C.C.C.)"

Exhibit C-0138.

Ibid.

Chapter 111

This reference is to a little-used section of the Criminal Code then reading:

- "(1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and is liable to imprisonment for two years.**
- (2) No proceedings for an offence under this section shall be commenced more than one year after the time when the offence was committed.**
- (3) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years.**
- (4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court. 1953-54, c.51, s.157."**

The report which may be found at appendix D⁵⁰, contains two statements signed by Brenda Lundrigan and dated January 11, 1976. The first recounted the episode already referred to of the visit she made with Johnny Williams and Dereck O'Brien to Harvey Road in September of the previous year, as well as an incident involving Jerome Williams. In this she

Exhibit C-0138.

De Profundis

expressed her belief that the boys were being badly treated at Mount Cashel and that her mother, Veronica Tobin, had as a representative of the Anti-Poverty league - not the Human Rights Association as Detective Hillier believed - made recordings of what certain boys had told her and a male associate. The second statement was a general reference to "homosexual acts" of which she had heard and a specific reference to a story told to her by Johnny Williams. Both statements were signed and witnessed by Detectives Hillier and Thistle and Hillier gave an explanation of how they happened to be taken on January 11 when the Mount Cashel investigation had officially concluded, saying that he might have left messages for Brenda at her parents' home on St. Clare Avenue in the previous month, or perhaps that he was proceeding on his own and unauthorized. In any event Brenda's second statement, as may be observed, concludes with the sentence:⁵¹

"The boys are in a position whereby there is very little they can do about what's happening but a lot of people know about it now and something should be done to help them."

Here indeed was a notable appeal.

Other annexures to the report of March 3, 1976 were Dr. Patey's memorandum and the polaroid photographs of Shane Earle's buttocks which were taken at Carol Earle's house in December. Hillier's reference to Andre Walsh, his hands cracked and peeling from a strapping of clearly excessive severity, and the tears with which he displayed them to the detective, have stayed in his memory to this day, although, as

⁵¹ Ibid.

Chapter III

he said, all the boys were either nervous or crying at one time or another as they made their complaints to him. It may reasonably be asked why no statement was taken from Chesley Riche; according to Hillier he approached him in the course of the December inquiries and had an unsatisfactory conversation in the street at which time Riche seems to have declined to give information and to have stated that it was up to the police to find out the facts. This was quite consistent with Riche's stated dislike of the Constabulary at this time, and which moved him to call on an R.C.M. Police officer for help in the case of Shane Earle. Riche testified that he had told Simms, on December 8, about an occasion when he observed Brother Kenny with a twelve-year-old boy on his knee, and subsequently found the superintendent banging either this or another boy's head against the walls of his office.

This report is distinguished by an apparent anomaly in that it bears the initials "AP/cp" in the margin of the first page. The capitalized initials are those of Detective-Sergeant Arthur Pike and those in lower case are of Carol Power, secretary to the chief of police. It is clear from the evidence of Hillier, Pike and Carol Power that it was typed by her, presumably at the request of Pike, and that this practice was not unusual in the case of reports on sensitive matters. Hillier thought that he saw the report being taken by the police courier out of Fort Townshend and was confident that it was destined for Mr. Hickman. When asked why, he said that the chief of police had told him so. It is perhaps unnecessary to say that Chief Justice Hickman denied on oath ever having received this report or its predecessor, and I find this to be a fact.

No Charges

It may be permissible here to pause and consider the information, albeit in the form of allegations taken seriously by members of the Constabulary and the department of social services, at this point in the hands of the deputy minister of justice acting as director of public prosecutions. The report of December 18, 1975 contained allegations by young children and adolescents, wards of the state and under the guardianship of the director, that they had been in varying degrees ill-treated by at least five and perhaps six of the ten Irish Christian Brothers appointed to supervise their living conditions and physical and moral development. Those implicated were Brothers Kenny, Ralph, English, Burke and Short and the misconduct alleged ranged from excessive corporal punishment, obscene language and assault and battery to inappropriate kissing, feeling of the private parts of the boys and inducing similar feeling in return, and to forced fellatio and forced masturbation. The second report was clearly an extension of the first to which its author explicitly referred, and if it was genuinely intended by Lawlor and Norman for the eye of the minister its perusal would have compelled the production to him of the first report. Neither report was signed in the space provided for "J.F. Lawlor, Esq., J.P." although both were signed by "C. Yetman, Detective Inspector I/C Criminal Investigation Division".

Both Robert Hillier and Ralph Pitcher testified that they felt charges could and should have been laid, and yet it is uncontested that fifteen years ago, and even more recently, the accepted practice was to submit reports to the department of justice in all but routine proceedings for direction as to

Chapter HI

whether charges should be brought. Correspondingly all the evidence from officers of the department at that time who testified to the commission was that "prosecutorial discretion" was exercised at the point of decision as to laying of charges and was generally exercised against doing so in cases which did not seem likely to be won. The reaction against this procedure has been recent and sharp, and will be considered at a later stage of this report. Section 244 of the Criminal Code with respect to assaults of the type complained of, and sections 156 and 157 for sexual improprieties, were in place in 1975 and 1976. If the investigation had been carried to its normal conclusion with police interviews of all the boys at Mount Cashel and of all the Brothers involved with their care, something like the one hundred charges now laid as a result of the reopening of the investigation on February 15, 1989 might have been contemplated, the current charges being of course laid under the sections of the Criminal Code then in force. There would have been difficulties because of the age of some of the complainants and the necessity of corroboration. In the event no charges based only on Hillier's two reports and the complaints assembled there were ever laid. But the narrative must be pursued if only to seek to explain why this momentous decision was made.

The Confederation Building Meeting

When Brother McHugh returned in January 1976 for the purpose of attending the centennial celebrations of the arrival of the first Christian Brothers from Ireland he was greatly concerned about the future of Mount Cashel. In a letter to the Reverend Brother D.F. Nash dated January 10, 1976 whom he addressed as "Dear Felim" - perhaps a nickname

De Projundis

since Brother Nash gave his name to Mr. Day in the Antigua deposition as "Dermod Pearse" - referring to the establishment of the Mount Cashel advisory board established by the provincial council of the order which asked that Brother Nash be chairman and Brothers A.F. Brennan and J.I. Gale be members, he proceeds to set out "some of the suggestions and terms of reference which arose during the council's discussion":⁵²

- "1) You will write the Deputy Minister of the Department of Social Services asking him to appoint a member of his staff to the Board,**
- 2) The Advisory Board may suggest increased membership.**
- 3) The Board is not a decision-making body.**
- 4) A copy of the minutes of all meetings should be forwarded to the Provincialate.**
- 5) The Board is instituted in order to assist the superintendent of Mt. Cashel in formulating and applying policy in the areas of discipline, admission, departure, etc.**
- 6) All terms of reference for the Board should receive the approval of the Provincial Council."**

Although there was already in place a liaison committee sponsored by social services to assist Mount Cashel, which had for some years been advocating the full-time attachment of a social worker to the orphanage, McHugh said he had had

Exhibit C-0260, p. 100.

Chapter III

difficulty with the idea of a government-appointed social worker in this role. As to this he may have been influenced by Brother Kenny, and the advisory board had a brief existence, its functions being shortly taken over by the provincial council which was indeed a decision-making body. In any event the provincial superior sought a meeting with appropriate officers of the department, and on an unspecified date in January this was convened in the deputy minister's boardroom and was initially attended by H. Vernon Hollett, George Pope, Gabriel McHugh, and Dermot Nash. A particular invitation to attend was issued to Frank J. Simms and his assistant director Sheila Devine which was accepted. In his evidence before the commission Brother McHugh said that he wanted to know where the congregation stood with the department concerning the incidents of December 1975 about which all present were informed. He referred to the work of renovation at Mount Cashel, to be accompanied by a change of direction, in routine, in accommodation, supervision of the boys, and the establishment of the advisory board. According to Sheila Devine, whose attendance Brother McHugh did not recall, he assured the meeting that no charges had been laid against the two Brothers involved. McHugh himself testified that he "had an impression" that there was a statement about Ralph and English being removed from Newfoundland. This *demarche* was met by expressions of confidence in the work of the Christian Brothers by the departmental representatives, a reminder of the fiduciary obligations of the director and Mrs. Devine's request for the names of the boys affected, a request which Brother McHugh did not recall, and which evidently was ignored or forgotten by everybody else. It must be said in fairness to him and Brother Bellows that both of them in their testimony deplored the lack of concern for

De Profundis

the alleged victims on the part of their order at this time, and until comparatively recently, and it must also be said that significant efforts and expenditures have been made by the Christian Brothers since this commission was constituted for the provision of counselling and other assistance for victims of sexual abuse at their hands, and at the hands of others.

Brother Nash Reports to the Provincial Superior

Brother Nash said that he was profoundly relieved by the atmosphere prevailing and the expressions of confidence at this meeting. But he was to have another encounter with Mr. McCarthy. Evidently as a result of the police report of March 3, 1976 the deputy minister had expressed additional misgivings, the nature of which were revealed by a memorandum sent to Brother McHugh by Nash dated March 18, 1976 and here reproduced:⁵¹

"18 March 1976

TO: Br. G.G. McHugh
FROM: Br. D.F. Nash
SUBJECT: Reminders re Mt. Cashel

At the most recent meeting with the Deputy Minister of Justice, Mr. McCarthy, the following points were raised. I have already communicated such to you by phone and am including such again as reminders re situation at Mt. Cashel:

Exhibit C-0221.

Chapter HI

- 1...Brs. Ted English and Gerry Ralph are not to return to the Province of Newfoundland.**
- 2...Brs. Kenny and Short are not to be assigned to Mt. Cashel.**
- 3...Br. Burke's continuance at Mt. Cashel is questionable re record of punishment incidents. (*sic*)**
- 4...There seems to be a need (strongly expressed) that the Congregation make public in some form the fact that the Mt. Cashel scene is very definitely under change and review. This will serve to assure all (friends and otherwise) that the "situation" at Mt. Cashel is definitely at an end and that definite action has been taken,"**

The date of this "most recent meeting" is not apparent, if Nash communicated the substance of his letter by telephone it must have been on or before March 18. Obviously the involvement of Brothers Kenny, Short and Burke had become clearer to readers of the two Hillier reports together, so that it may have taken place subsequent to the receipt of the March 3 report. However that may be, it is astonishing that the provincial superior addressed from St. Joseph's Provincialate at Mono Mills a warm letter to Brother Kenny then in Rome, dated April 10, 1976⁵⁴ saying *inter alia*:

"The final report on the "Mount Cashel affair" is completed. You will be happy to know that no accusations have been levelled against you whatsoever. As you recall our discussing so many times, your only

Exhibit C-0222.

implication was not moving on the situation soon enough. That was an error of judgement which any of us could have and may have made. I pray that you will have peace of mind now over the whole matter. Many thanks for your support and cooperation during that difficult time and indeed throughout your term of office in Mount Cashel. You have much to be proud of and thankful for.

Dip, your assignment for next year will be Vancouver College. It is our hope that you will be able to assist with the boarders. We also need a strong replacement for Paul Nolan who has been appointed superior of St. Mike's. Grand Falls. So, in both cases you fit the bill perfectly, I feel sure, also, that for awhile you will not want too many reminders of the painful experience of December. Vancouver will take care of that too."

Brother McHugh, however, testified that he had been told nothing about any misbehaviour on Kenny's part and assumed the suggested exclusion of Brother Kenny from Mount Cashel was a result of his handling of the "painful experience of December". The former superintendent was at this time enjoying what was known as a "tertianship", the exact nature of which is unexplained but was evidently some form of spiritual renewal undertaken in Rome.

That the silence which descended on the interrupted Hillier investigation was not complete can be judged from the evidence of Mr. John W. McGrath, at the time a prosecutor in the department of justice, and Mr. Albert John Noel, then a young draftsman and subsequently legislative counsel to the House of Assembly. McGrath remembers being told about the Mount Cashel investigation on the fifth floor, but could not recall the name of his informant. Noel's was none other than Miss Eileen Maloney, to all intents and purposes the

Chapter III

office manager for the department and already referred to. Noel said that she was upset about the suppression of the investigation, and he as a young lawyer was appalled at the apparent interference.

Disclosure Forestalled

A curious incident almost precipitated full disclosure. Carol Baird, formerly of Mount Pearl and mother of the three Baird boys whom she had withdrawn from Mount Cashel, shortly after the visit from Detectives Hillier and Pitcher was forced to vacate her house in Mount Pearl by a fire. Social Services thereupon transported her and five children to the Welcome Hotel where she spent some seven weeks in highly adverse circumstances. Reading a newspaper story about the department's lavishness in putting a family up in a hotel suite she telephoned the Evening Telegram "to put them straight". A newsman called Kelly, with a female assistant, came to observe the suite which Carol Baird said was "a hole".

William Patrick Kelly was employed by the Evening Telegram from 1969 to 1977 and was at this time, evidently in late January, the news editor. He received Carol Baird's telephone call and testified about it to the commission on November 30, 1989 together with Robert Joseph Wakeham, at the material time a reporter under Kelly. Kelly said that he would not ordinarily get involved in such a situation but the woman had made a personal call to him. During his conversation with her she mentioned the Mount Cashel orphanage and referred to the boys being physically abused and that they had been "touched". Two of the Brothers had been involved and would be sent out of the province. Kelly's evidence differed from Mrs. Baird's only in that he placed the

De Profundis

event before Christmas 1975. He proceeded on the same day to call the police, who would not comment but referred him to the department of justice where he spoke to John Kelly to whom he had frequently directed inquiries and who told his namesake that there were no grounds for criminal charges against the Brothers, the conduct having been inappropriate but not criminal. The news editor thereupon assigned the story to Wakeham, and the two of them went to Mount Cashel to see the acting superintendent, Brother Moore.

The journalists were courteously received by Brother Moore who offered to show them around Mount Cashel, but would not supply any details of what they were really interested in. Kelly then called the Provincial Superior at Mono Mills and found that he was on that day in Newfoundland, where he was eventually located by telephone. Brother McHugh urged Kelly not to use the story without consulting his editor, but, if he had to, he offered to supply some information, the difficulty being caused by two "misfits" who had engaged in excessive punishment together with some minor problems including the fondling of some boys. Their activities had been quickly spotted and dealt with and treatment would ensue. Kelly asked Wakeham to write the story and then went to talk to Stephen Herder, publisher of the Evening Telegram. He told him that he thought the story should be used, but Mr. Herder disagreed and took Brother McHugh's position. He had no wish to damage an institution with a record of a hundred years of good works. He was confirmed in his view by what William Kelly told him about the information given by John Kelly in the department, as was William Kelly himself who thought that Herder's position was justifiable under the circumstances. The story was "killed". But on reflection William Kelly felt that he and the Telegram

Chapter HI

had been victimized by Brother McHugh and John Kelly, and resented being referred to as part of a "cover-up" as indeed he might.

A more determined stance was taken by Vincent McCarthy when, in accordance with the anxieties of Sheila Devine, she and Frank Simms attempted to see the police report of an investigation which they had been partly instrumental in provoking, and which appeared to be complete. At that time it was a matter of routine for social workers who had a valid interest to review police reports, and perhaps to obtain copies. Routine inquiries in this case were unanswered and finally Mrs. Mary Noonan, of the civil side of the department with special responsibility for child welfare cases such as wardships, and described as "my solicitor" by Simms, was asked for her personal intervention to obtain copies of the reports. Mrs. Noonan, after making inquiries of the police, approached Vincent McCarthy and put her "client's" request directly to him. She was astonished and dismayed to be told by the man who had held her articles, and whom she admired, that the matter had been disposed of and that "she did not need to see it".

This must be the place, at the risk of putting a strain upon chronology, to pursue the fate of Hillier's reports to what might well have been their final resting place had the interrupted police investigation of 1975 not been reopened by the Honourable Lynn Verge, Q.C. in February 1989 and this commission constituted. No charges had been laid against the Brothers Ralph and English or against any of their colleagues. In March 1976 John Geoffrey Kelly had relieved Vincent McCarthy of his unaccustomed duties and been appointed director of public prosecutions. Nevertheless the Hillier reports, which may have been seen by Eileen Maloney, were

not processed as she would normally have required, and remained, as already noted, in McCarthy's office and in his personal filing cabinet. Spring, summer and autumn of 1976 came and went and in the depths of the winter of 1977 McCarthy's burdens and his discharge of them were alleviated and rewarded by his appointment to the District Court bench.

Sergeant Pike and John Kelly at the Soper Inquiry

On April 10, 1979 Detective Sergeant Arthur Pike gave evidence *in camera* to His Honour Judge Lloyd Soper (now the Honourable Mr. Justice Soper of the Supreme Court of Newfoundland) sitting as a commissioner to inquire into a fire at the office and apartment complex in St. John's known as Elizabeth Towers. I have no intention of examining the proceedings which he conducted in more than one connection, nor is it my proper function to dwell upon a series of events which terminated at least two political careers of promise in provincial politics and perhaps accelerated the retirement of two of the most influential officers of the department of justice. As for the witness Pike who had "leaked" to a St. John's newspaper information derived from one of his subordinates the substance of a report later given by him to the leader of the opposition in the House of Assembly, he was disciplined by demotion and his conduct condemned in measured terms by the commissioner. Judge Soper, who thought he had been leniently treated, had permitted him to testify as to examples of what he claimed had been "cover-ups" effected by the department during his experience as a police officer. These included investigations of the Fishing Gear Replacement programme and Calvert Fish Industries, which he finally agreed under questioning by counsel was not

Chapter III

a "cover-up", and one by Detective Hillier of complaints by residents of Mount Cashel Orphanage. The transcript of evidence⁵⁵ contains this at pages 291-3 and 294-5:

"F. Woolridge, Q.C.:

Any other incidents?

The Witness:

Yes. I think one which was conducted an investigation which was conducted by Detective Hillier, the date I can't be sure but I think it was either late 1975 or 1976, an Investigation which started out as an Assault charge, or Assault Complaint against a child who was a resident of Mount Cashel Orphanage. The investigation was completed by a Detective Hillier. I didn't have any involvement in this investigation but it lead to alleged sexual activities between Sexual Activities and Assault on the children by three brothers Christian Brothers in the Orphanage.

Q. How did you get your information in this case?
Was it first-hand?

A. In this particular....yes ...I got the information first-hand from Detective Hillier who complained to me. I was tied up completely on the Fisheries Investigation at the time and Hillier complained to me that the Chief of Police at the tune had asked him to change the report to make two reports out of the one, to separate the Assaults from the Sexual Activities. And he

Exhibit C-0142.

De Profundis

didn't feel that he should do this because it was all contained in the one, it all resulted from the one complaint and it was sort of combined thing. I in turn spoke to the Assistant Chief at the time and he told me that this request had come from the Deputy Minister. Now this is not the present Deputy Minister, it is the former Deputy Minister, to have it changed. And I expressed my opinion to the Assistant Chief that it shouldn't be changed because of the nature of the whole investigation. And as far as I know the reports were not changed. The Chief of Police at that time was Chief Lawlor and the Assistant Chief of Police at the time was Assistant Chief Norman. The Deputy Minister at the time was Deputy Minister McCarthy. After this ... after I had talked to the Assistant Chief the next I heard about this was a call which I received from Mr. Kelly at the Justice Department requesting some information that was on the report. So I thought this was unusual and I said sure the report I said should be in your office concerning this matter and he said that he hadn't seen the report, that the Deputy Minister had the report and he couldn't get it. But he was requesting the names ... or he asked me to check he gave me two names of children and asked me to check to see if these two children were two of the children involved in the investigation because I think it was Mrs. Noonan he told me, another lawyer at the Department was ... had a custody case in family court and she was wondering if the custody case involving these children were the same children involved in the investigation.

- A. In regards to this latter one I have since been told that these three brothers who were

Chapter HI

involved, three Christian Brothers who were involved were transferred outside of the Province. I think to some other areas.

Q. Was that as the result of some internal proceedings, possibly disciplinary nature within the Church?

A. I don't know.

Q. You have no idea?

A. I have no idea what happened to this investigation afterwards. To my knowledge there was nothing ever came back from the Department of Justice relating to this investigation.

Q. Were any charges laid?

A. Not to my knowledge.

Q. In other cases where charges may not have been laid, to your knowledge, was it customary for the Prosecutors or Mr. Kelly to give reasons for not laying the charges?

A. Yes we usually we get a reply by letter saying that if there is insufficient evidence, saying that there may be insufficient evidence, then charges won't proceed. In just about all cases we received letters saying that we should proceed with charges.

Q. Could that be the case Sergeant with respect to this last incident you've described?

De Profundis

A. No. I have no reason to believe that anything ever came back. Not to my level, in the department. However, shortly before this In (*sic*) Inquiry was appointed, Chief of Police Browne called me to his office one day and asked me what cases I was referring to when I mentioned during the preliminary hearing in the Farrell case when I said I was aware of other investigations that were conducted and no charges laid. He asked me which ones I was referring to and I brought up this one. And he said I remember something about that but I wasn't Chief at the time and he said these Brothers were sick and they were sent away for treatment or something. And I said we were never notified about it. Well he said I wasn't Chief then but from now on I will make sure that we get a reply from all investigations that are sent in.

Q. So in these ... in this case you didn't receive any written reason?

A. No.

Q. But might the written reason be that there was insufficient evidence? Or might the reason be there was insufficient evidence?

A. I can't remember what was on the report. That's possible. I do remember seeing a photograph of one of the Children that came with the complaint. I am pretty sure it was this complaint, showing the marks of the child. I was led to believe by Detective Hillier that some sort of action should have been taken in this matter. He was concerned about it.

Chapter HI

Q. So he felt he had a good case? A.

Ves.

Q. But it is conceivable that whoever in Justice had control of the matter, might disagree with that?

A. It is quite possible."

Later in his evidence he was asked at page 297 and answered at page 298:

"Q. Did ... in these three episodes here you told us that you bought (*sic*) the matter up with Mr. Kelly on the first incident about a year ago and at that time he told you all fishermen will be charged. Did you make any complaint about the second incident involving the orphanage?

A. No. I didn't make any complaint about that. Like I say, Mr. Kelly had nothing ... I have no reason to believe that Mr. Kelly even saw the report on the Mount Cashel investigation. Otherwise if he had seen the report he wouldn't have called me to get some information that was in the report."

In his report which was the first of six volumes, five of which were confined to reproducing the transcript of evidence, the learned commissioner said that John Kelly as director of public prosecutions, who also testified in the *in camera* hearing, had "in each instance (been) able to give a creditable reason for not prosecuting". He expressed the view that the only possible criticism was the failure of the department to inform the police of its reasons. As to what was evidently

De Profundis

acceptable in the case of sexual abuse of children Kelly may be heard as he spoke on that occasion.⁵⁶

"Q. Now the second incident he tells us about occurs in late 1975 or '76 and he indicates that it started as a result of a complaint against a child, a resident of Mount Cashel Orphanage, are you familiar with that particular incident?

A. I'm familiar with it but not directly involved in it.

Q. Sergeant Pike tells us that he was not involved directly in the investigation and he gets his information from Detective Hillier who apparently was doing the investigation. There were alleged sexual activities and assaults on some of the boys at that institution, apparently by three Christian Brothers, and it is alleged that Detective Hillier complained to Sergeant Pike that nothing had been done about that and that the Chief at the time asked him to make two reports, to separate the assault from the alleged sexual activity and Sergeant Pike says he spoke to the Assistant Chief but that that was not done; in other words the report was not changed into two reports and at that time the Chief was Lawlor, the Assistant Chief was Norman, and the Deputy Minister of Justice was Mr. McCarthy, that he received a call from you requesting information on the report and you mentioned that the Deputy Minister had it and you couldn't get it and you were looking for the names of the children in order that another solicitor involved with the case had information

Exhibit C-0264.

Chapter HI

concerning another case and so on. Then he says that the three Christian Brothers were transferred outside the Province and that Chief Brown made some comment to the effect that they were sick and that was the reason why no charge was laid. He says he didn't complain about this and he suspects that you probably never did see the report that went into the Constabulary. Now that's a long recital of what we were told but I think that sums up what we were told and can you comment on this ... on these particular allegations?

I remember I was working in the Civil Division at the time. I can remember the Solicitor for Social Services who was Mary Noonan said to me ... asked me did I know about the Mount Cashel incident. And I said no. So I don't know how I found out. I can't remember making a telephone call to anybody. *I* can remember ... or I learned from somebody and I think it was a year or so later that the Deputy Attorney General at the time a Mr. McCarthy had agreed with the Chief of Police that no charges would be laid, that they had an undertaking from the Christian Brothers Association or whatever the body is called that they would be transferred back to the United States. I think one was silenced, it's a term they have. Another was put in hospital in the United States and that they would never again be in a position to have anything to do with young boys. Now I don't know whether they were transferred when the investigation started. But I can't remember ever having a phone call. I have never seen the report, other than knowing or hearing from one of the Detectives that no action was ever taken on that report but

De Profundis

again that is a prosecutorial discretion that ...
and I never did question the then Deputy
Attorney General about it. I took no more
interest in it.

**Q. Yes there is no suggestion from his evidence
that you had very much to do with it.**

A. No I ...

**Q. But I think the point he was making was that it
happened at all and you are aware that
something along the line**

**A. Oh, oh undoubtedly it would not be unusual in
the exercise of discretion in a case of that
nature that yes charges would not be laid if
physiatric steps were taken or if sometimes if
the accused gets out of our jurisdiction. You
know he is out of our hair. This is a decision
that prosecutors make quite often.**

**Q. And it is not unusual to be faced with a
situation like this?**

A. No."

To be fair to the witness he did not, on reflection, think that
this was a considered opinion.

Before this commission Kelly had testified that he had no
knowledge of the Hillier report of March 3, 1976 - coincidentally
the day of his appointment as director - and of the first report
only what he had learnt from Mary Noonan at the time of her
frustrated attempt to satisfy the requirements of the child
welfare division. But he said he "accepted" the transcript of
evidence when it was put to him by Mr. Powell and that he

Chapter HI

could only explain his apparent knowledge in April 1979 by having had access to a "reading file" circulating among offices of the department for information as to current correspondence. He did not suggest what pieces of correspondence he could have seen.

Although Judge Soper did not submit his report to the Lieutenant Governor in Council till August 16, 1979 he decided to make the *in camera* evidence public and did so on March 16 of that year, expressing, according to an Evening Telegram report, "some apprehension about releasing this evidence".⁵⁷ In a long dispatch the Telegram reporter confined his observations to the following guarded language:

"The second case Pike brought up was one involving an investigation into alleged assault and sexual assault incidents on the part of three men against young boys. No charges were laid as a result of the investigation although, Pike reported, the investigator thought there was sufficient evidence."

The Daily News listed the allegations as to concealment on the front page of its issue of May 17 and referred to what was unidentified in The Evening Telegram as:⁵⁸

"The case of three Christian Brothers alleged to have sexually assaulted two children at Mt. Cashel Orphanage in 1975;"

⁵⁷ Exhibit C-0212.

⁵⁸ Exhibit C-0211.

The Letter to Rome

It is difficult to measure the impact of these disclosures over ten years ago of something that occurred four years before that and some observations on this point must be made below. Nevertheless it produced a striking communication from Brother Bellows the Provincial Superior to Brother McHugh the Superior General in Rome:⁵⁹

"May 26, 1979

Dear Gabe:

I have the sad task of informing you that the Mt. Cashel incident of the fall of 1975 (involving three monks) became public last week in St. John's and was reported in the media. It happened this way:

A Sergeant Pike of the St. John's police force -- who did the original investigation of the Mt. Cashel case — was involved in the Dr. Tom Farrell episode concerning a Tire in Elizabeth Towers. Before the Justice Department's report on the Farrell case was officially released, Pike slipped a copy of it to Bill Rowe, Leader of the Opposition, on the pretext that the Justice Departmentintended (*sic*) to bury the Farrell Report. After Rowe had given the details of the Report to the media, there was a hue and cry in the police department about the release of confidential documents and Pike was identified as the "leak". He was demoted consequently suffered a loss in salary. In retaliation, he indicated that he had acted to prevent

Exhibit C-0224.

Chapter III

"cover-ups" similar to ones that he alleged had taken place in the past. Because of this allegation, he was called before an "in camera" court session presided over by Judge Lloyd Soper. Later, Soper released Pike's testimony which identified three cases of "cover-up": including that of Mt. Cashel. In reference to Mt. Cashel, Pike revealed that "three American CB's had been involved in improper behavior, that their Superior had acted immediately and that one was sent to a psychiatric institution and the others sent back to the U.S." CBC-Radio repeatdthis (*sic*) item verbatim, the Telegram edited it circumspectly to render it harmless, but the Daily News quite clearly reported it unchanged.

You can imagine the shock and embarrassment of the monks in Newfoundland at this unexpected revelation—since so many of them had absolutely no inkling whatsoever of the episode. Over a week has now passed since the news outbreak. At the moment all appears calm. However, last night Premier Peckford called a Provincial election for June 18. I'm worried that in the hurly-burly of politics the Liberal Party may play it "dirty" and the Mt. Cashel episode (together with other confidential Justice Department Reports) used to embarrass the Government, and still further embarrass our Congregation.

I'm afraid we're in for a very difficult month of June.

Please keep us in your prayers as we try to weather the shocking revelation. I'll keep you posted on any further happenings."

When Brother Bellows testified to the commission he admitted

that his statement that so many of the "monks" not knowing anything about the "episode" was an assumption only.

The Mount Cashel File in Justice

Robert Hyslop, Q.C. (now Judge Hyslop of the Provincial Court) as senior Crown attorney in 1979 had conducted the preliminary hearing for the Crown on the charge of arson with which the Soper inquiry was concerned. Pike was a witness and at the time told Hyslop that he was aware of other investigations that had been shelved. This was in December 1978 and Hyslop did not see Pike again until 1986, saying that he had no confidence in him, and had given him a wide berth since he felt that he himself had been a suspect at the time of Pike's purloining and disclosure of the reports on the Elizabeth Towers fire. He was not involved as a witness before Judge Soper but he testified that he knew there was evidence being given *in camera* as to "cover-ups" and, because child abuse was Mrs. Noonan's speciality, he approached her and asked to see whatever was extant. He was positive that she opened the drawer in a filing cabinet in the main office of Justice at the Confederation Building and showed him a file⁶⁰ which was put in evidence during the uncommunicative testimony of Elaine Peet, who disclaimed any knowledge of its creation although she acknowledged her initials on one of its folios. When Madam Justice Noonan testified to the commission on February 20 and 21, 1990 she was greatly troubled by Judge Hyslop's testimony, vigorously

Exhibit C-0179.

Chapter HI

insisting that she had never seen the file until Mr. Powell had shown it to her during a preliminary interview. She described Judge Hyslop as a valued colleague but asserted that she would never take a file out of the registry herself, and in reply to a question put by me she said that any knowledge of the file and its contents would have engaged her close attention in view of her abortive effort to obtain the police reports from Mr. McCarthy.

This apparently flat contradiction in the sworn evidence of two highly-placed judicial officers would be troublesome if anything vital turned upon it. Judge Hyslop testified that he noted at the time the absence of police reports in a file labelled "Mount Cashel re Child Abuse". Since he was explicit in identifying the documents which he saw at the time when the file⁶¹ was put to him by Mr. Powell, it is appropriate to set out here the correspondence contained in it. The top folio was a carbon copy of a letter dated January 26, 1977 marked "despatched" on the same day reading as follows:⁶²

"McC/ep

January 26, 1977

PERSONAL AND CONFIDENTIAL

**Mr. John R. Browne,
Chief of Police.**

I return herewith your reports dated September (*sic*)

Exhibit C-0179.

Exhibit C-0179A.

De Profundis

18, 1975, and March 3, 1976, respecting child abuse at Mount Cashel.

I also enclose copies of letters received from Brother McHugh and Reverend Dr. Thomas A. Kane which are self-explanatory. In view of the action taken by the Christian Brothers further police action is unwarranted in this matter.

**Vincent P. McCarthy, Deputy
Minister of Justice.**

ends.

JAN 26 1977

DESPATCHED"

This carbon copy was on the yellow flimsy paper used in the days before the more expensive but perhaps more durable photostatic copies were generally in use. The second folio lying beneath this was an original letter written to McCarthy on the letter paper of the Congregation of Christian Brothers, St. Joseph's Provincialate at Mono Mills, superimposed upon which is the stamp of the department of the attorney general indicating that it was received on January 28, 1976 and dealt with on January 26, 1977. The line drawn by this stamp indicating receipt is initialled by Eileen Maloney, and that opposite "dealt with" by Vincent McCarthy. The text is as follows:⁶³

Exhibit C-0179B.

Chapter HI

"January 23, 1976

Mr. Vincent McCarthy, Q.C.
Department of Justice
Confederation Building St.
John's, Newfoundland

Dear Mr. McCarthy:

I wish to keep you informed of the community's action concerning Brothers Ralph and English.

Br. Ralph was interviewd (*sic*) by Drs, Hughes and Eveson of Emmanuel Convalescent Home, Aurora, Ontario. It is the opinion of both doctors that Brother is in need of psychiatric care. He has entered the Convalescent Home and will probably need from three to five months treatment.

Br. English received a three-day intensive evaluation from doctors of the House of Affirmation in Warwick, Massachusetts. It is the opinion of Father Kane that Brother will require at least six months therapy. I am enclosing a copy of one of the letters received in reference to Br. English.

I thank you sincerely for giving Br. Nash and myself the opportunity to discuss the Mount Cashel situation with you. Whenever it is appropriate, I will appreciate hearing from you.

Asking God's blessing on you and your work, I remain,

Respectfully yours,

'G.G. McHugh' Br.

G. G. McHugh"

De Profundis

The third and bottom folio is an early example of photostatic reproduction and is a copy of the letter which Brother McHugh referred to as enclosing, and evidently proceeds from the Reverend Doctor Thomas A. Kane of the House of Affirmation in Whittensville, Massachusetts in the United States. This letter⁶⁴ reads:

"15 January 1976

Brother Gerard G. McHugh, **C.F.C.**
Provincial
Congregation of Christian Brothers
St. Joseph's Provincialate
R.R. #5
Orangeville, Ontario L9VV 2Z2
Canada

Dear Brother McHugh:

This short communication comes in reference to Brother Edward English, C.F.C., who recently was here for complete psychological testing and evaluation.

It is the opinion of the Clinical Staff that he would definitely benefit from a period of residency here at the House of Affirmation and his name has been so noted on the waiting list.

A detailed report will follow shortly.

Exhibit C-0179C.

Chapter HI

Let us continue to pray for one another. I remain

Fraternally yours,

'Father Tom /gpp'

(Rev. Dr.) Thomas A. Kane

TAK/gpp dictated/not read"

Judge Hyslop said that he noted two unusual aspects of this file: first, as noted above, the absence of copies of the police reports usually kept in the department once sent, and second, the category "personal and confidential" adopted by the deputy minister in his letter to the chief of police, one unknown to the Constabulary and virtually unknown to the department although used by the R.C.M. Police. The term "child abuse" did not suggest sexual abuse to him at the time and he thought that physical abuse only was involved. He believed that the file had been "concluded" by his superior at the time, and his curiosity was allayed.

The R.H. Kelly Case

I shall return to the critical part played by Mr. Hyslop as he then was, but at this point it is necessary to refer briefly to two occurrences which might have led the administration of justice back to 1975 at Mount Cashel. In May 1979 there occurred the prosecution of Father Ronald Hubert Kelly, parish priest at Cape St. George since 1973 on ten charges of indecent assault on males contrary to section 156 of the Criminal Code to which he pleaded guilty. The victims were juveniles, the charges were serious and the case had some unusual features which included the attempted intervention of

De Profundis

the then Roman Catholic Bishop of St. George's who appeared at the residence of Magistrate Seabright in the course of the proceedings, the holding of court in Corner Brook at eight o'clock in the morning and the fact that Father Kelly in due course departed by aircraft for "Southdown", otherwise known as the Emmanuel Convalescent Centre in Aurora, Ontario where Brother Ralph of Mount Cashel had been sent for treatment some three and a half years before. Father Kelly was defended by two lawyers in Corner Brook, Michael Joseph Patrick Monaghan and Gerard Joseph Martin. He was prosecuted by William Michael Roche, now a judge of the Provincial Court, then Crown attorney stationed in Corner Brook, who testified to the commission on March 15 and 16, 1990. In the course of his evidence he had the following to say about the opening of the proceedings against the accused:

"Q. Did something happen that you particularly recall at 20 minutes past 4:00 p.m. on May 11, 1979?

A. Yes.

Q. What happened?

A. Quite frankly I was mystified at the fact that since the case was set for 4:00 that afternoon, there were only three people present in the court room that afternoon which was courtroom number two which would be Judge Seabright's court. Judge Cramm, the other judge, had courtroom number one. There were only three people in the courtroom at 4:00. Sergeant Ken LeBreton, Constable Murray Urquhart and myself. At approximately 4:20 that afternoon

Chapter HI

Judge Gordon Seabright entered the courtroom to advise me that there was a telephone call for me outside of Provincial Court. So I left the courtroom. I believe I went into Judge Cramm's office at that point which was empty and I was left alone in privacy by Judge Seabright. I closed the door and the call was from John Kelly, the then director of public prosecutions. His first question to me, and I can't possibly forget this, was what is going on out in Corner Brook. I explained to Mr. Kelly that there was a Roman Catholic clergyman charged with 10 counts of section 156. I explained briefly to him the circumstances of the case and I then asked Mr. Kelly why he had phoned me because I was obviously a little concerned at that time that there might have been some political interference. He advised me that the two defence lawyers, Mr. Monaghan and Mr. Martin had telephoned him in an effort to reach then the Attorney General in Newfoundland, T. Alex Hickman, in an effort to get the charges withdrawn. I explained to Mr. Kelly that in my opinion at least, after having explaining to him briefly the facts, these charges were simply too serious to be withdrawn. That explained to me why neither Father Kelly nor the two defense lawyers were in the courtroom at 4:20, they were absent even though the court case was supposed to proceed at 4:00. Basically Mr. Kelly concurred, gave me full consent to proceed with it and there was absolutely no political interference whatsoever. Now I'm not 100% certain whether he told me, but I believe I may have asked him where were the two lawyers phoning from, but in any event I am not 100% certain of that, but I do recall this. I knew at the time that there was this telephone

De Profundis

in the Barristers' robing room on the sixth floor of the Sir Richards Squires Building. I left Judge Cram's office after the telephone call from John Kelly and proceeded by the elevator to the sixth floor where I discovered the two lawyers in the Barristers' robing room. I can't recall saying anything to them, no discussion was made by them to me or by me to them with respect to what had been attempted behind my back. They had not given me any inkling whatsoever that they were going to make these efforts to get the charges withdrawn, but then it became palpably obvious to me that this case was taking a turn for the worse."

In his evidence given to the commission, on March 29 and 30, 1990, Chief Justice Hickman said that as minister at the time he recalled being telephoned by Mr. Monaghan who advised him of the situation of Father Kelly, said he had made certain proposals to the local prosecutor and to the director of public prosecutions who had rejected them and would he, the minister, be prepared to review Mr. John Kelly's decision. The minister's recollection of what followed was as stated by Chief Justice Hickman:

"I said Mr. Monaghan the answer is no. I have never reviewed a decision with respect to the laying of charges of a director of public prosecutions. And he said I suspected that would be the answer, but you can appreciate I am obliged to carry out my instructions. That was really the end of the conversation and I was anxious, as I say, Mr, Monaghan acting very professionally and didn't try to press his clients case, he just simply did that. As we were sort of signing off he mentioned to me, either he mentioned the words Mount Cashel or he mentioned the word Christian

Chapter HI

Brother. I am not sure which. I had no idea what he was talking about and I certainly didn't say well what's all that. We hung up. I immediately called in John Kelly, not because of that last comment, but having been advised that the director of public prosecutions was aware that counsel for the accused was going to try and contact me, I wanted the director of public prosecutions to be made aware immediately of my decision. So Kelly came in and I said to him, "John I just had a call from Michael Monaghan who is representing a Roman Catholic priest on the West Coast and he asked me to review your decision and I simply want to tell you that the answer is no, I was not prepared to review it nor did I ask for any of the details" nor did I ask John Kelly either. He said fine. We started to walk out together and as we were partially out the door I said, "John, he also mentioned something about, I can't remember if he said Mount Cashel or Christian Brothers, but either way John's reply to me was well that was a case that was handled by Mr. McCarthy two or three years ago involving a Brother or Brothers at Mount Cashel. He said I don't know any of the facts surrounding the case, but as far as I know it was properly handled. And we parted company. That was the one and only time. It was the first time that I had ever heard of Mount Cashel. He was very reassuring. He may have said to me at the same time that it came up at the Soper Inquiry. I don't know. If he did, if he had said it well I would have found that very reassuring because as you know under the Soper Inquiry one of his terms of reference was to find out whether there was any justification for the improper release of the police report. So if he did tell me I would have felt very secure in knowing that if there was any problem with whatever it was that transpired at Mount Cashel Judge Soper would deal with it."

De Profundis

Curiously enough in his evidence to the commission Mr. Monaghan said that it was his co-counsel Mr. Martin who had spoken to the director and the minister and Mr. Martin adopted what he said. It is difficult to believe that the chief justice would introduce the name "Monaghan" unless it was actually given, and it is possible that Martin said that he was calling *for* Monaghan or something of the kind. What is certain is that Mount Cashel and the Christian Brothers were mentioned by the caller and I find what had happened in December 1975 and January 1976 was being suggested as a solution to Father Kelly's problem.

The Burton Case

The idea that perpetrators of sexual assaults upon children in breach of the enacted law should be entitled to treatment rather than condemnation by the courts was to persist. On December 11, 1989 Ronald James Richards, Q.C., a member of the legal staff of the department of justice in Newfoundland since 1978, and from July 1985 to May 1989 deputy minister, testified before the commission. In a letter dated November 2, 1982 while he was senior crown attorney for the eastern district of Newfoundland (for practical purposes the Avalon Peninsula) Mr. Richards, after reading a "justice report" by Detective Sergeant Leonard Power⁶⁵ and a report by Mrs. Karen Alexander, social worker,⁶⁶ directed that a charge of gross indecency, to wit; the act of oral intercourse with a

*- Exhibit C-0201. ⁶⁶

Exhibit C-0206.

Chapter HI

juvenile contrary to section 157 of the Criminal Code be laid against Brother David Jerome Burton.⁶⁷ Brother Burton was a resident of Mount Cashel in charge of twenty boys at a time when important reforms had been undertaken in the institution, the size of dormitories had been reduced, and the dormitories redesigned. On being interviewed by Power, Brother Burton had written a statement in his own hand admitting the truth of the charge that his relationship with the juvenile in question - a delinquent child welfare ward resident in Mount Cashel - had lasted about a year and oral sex as well as attempted buggery had taken place. Burton's solicitor and ultimately counsel, William English, intimated to Richards that his client would plead guilty provided that a conditional discharge would be recommended to the court and that the proceedings be held *in camera*. This suggestion was declined, but Mr. English advanced the proposition in an application to Judge E.J. Langdon of the Provincial Court before plea or election on November 17.

The learned judge dismissed the application after lengthy argument, and after taking an election of trial by him alone and a plea of guilty, sentenced the accused to four months in Her Majesty's Penitentiary and three years probation, during which time he was to seek psychiatric assistance and be guided by his psychiatrist's directions. In his reasons Judge Langdon pointed out that the act of gross indecency alleged was not "a single isolated incident, or as one of the witnesses indicated a moment of weakness, but some fifty or more single incidences (*sic*) over a period of time". This observation was derived from the accused's statement to Detective Sergeant Power and written by himself. The judge

Exhibit C-0203.

De Profundis

then adverted to the situation of the accused in relation to his victim as being a position of trust and in charge of children compelled to submit, as wards of the director, to the guidance of the Christian Brothers, saying " these children as the evidence disclosed are placed there with that in mind to rebuild their trust in people, to rebuild their broken lives as was indicated by the witnesses". In view of the general consensus that the effect of sexual abuse on a victim was not taken seriously until almost the present day, what fell from the judge at the end of 1982 on the subject should be quoted.⁶⁸

"Has W.N. been hurt physically or mentally? Well, there is certainly no evidence that he was hurt physically. There is no direct evidence that he was hurt mentally. However, evidence from the brothers who gave testimony in this case and the argument presented in the accused (*sic*) brief to the court very strongly in application to have this case closed to the public and to the press, indicated that very explicitly that any publicity about this case could have a very serious, detrimental effect on the 85 or 90 boys that still live at Mount Cashel. It would have a shattering effect I think were the words used. Now, that's hearing about it. but one of the witnesses wasn't prepared to say that W.N., who was the victim in this case, would have any effect on him at all. That is certainly not consistent with logic or common sense in this court's opinion. If hearing about a matter is going to cause some shattering of a person's rehabilitation, then certainly being a victim obviously must."

Exhibit C-0204A, p. 174.

Chapter III

Under the circumstances reviewed by Judge Langdon a sentence of four months imprisonment and three years probation for an offence attracting a maximum penalty of five years may not appear to be excessive, but the Court of Appeal per Mifflin, C.J.N.; Gushue, and Mahoney, JJA.,⁶⁹ considering Burton's appeal no later than December 1, reduced the sentence to time served - twelve days - and varied the probation order "to the extent that the appellant is ordered to subject himself to such psychiatric and other rehabilitative measures as deemed necessary by the Brother Provincial in the order of Christian Brothers".

Mr. Powell suggested to Mr. Richards that when he, Powell, had first read the transcript of Richards' vigorous cross-examination of Brother Bellows at the trial it was motivated by some knowledge of the aborted investigation of 1975 - 1976. But Richards had been in Corner Brook, far removed from the gossip of that day, and felt as he said that in Burton he had "the bad apple". This no doubt explains why he was incredulous as to how the demand for concealment by *in camera* proceedings could be supported by the view that one disclosure could fatally prejudice the reputation of an order like the Christian Brothers of Canada, but Brother Bellows was better advised. Richards admitted that this was probably the most aggressive appearance he had ever made in a courtroom and there is no doubt that his advocacy was sharpened by the audible comments of Christian Brothers inside the court protesting the position taken by the Crown as if it were a safe assumption that the congregation could look after Brother Burton in its own way. Richards was particularly disturbed both in the proceedings before Judge

De Profundis

Langdon and those before the Court of Appeal where much emphasis was laid upon the importance of rehabilitating the offender and, with the exception of the judge's perceptive comments which I have quoted, nothing was said about the plight of the retarded victim who was referred to in the latter court as a "punk".

The Stead Crawford Letter

Nevertheless the bitter harvest of 1982 was not yet reaped. Just as the Burton prosecution was the result of a painstaking investigation by social worker Karen Alexander, that of an experienced colleague, Hugh Stead Crawford, in association with Mrs. Alexander and Mrs. Sandra Morris of the St. John's East district office of which Neil Hamilton, formerly co-ordinator in the office of the director, was the supervisor, was equally critical. Their investigation began with consideration of a letter written by Mrs. Sarah Murphy of St. Bride's, the grandmother of one of two boys who had run away from Mount Cashel, had slept out of doors and had finally taken refuge with her, to the Honourable Thomas V. Hickey, minister of social services. The letter was dated February 11, 1982 generally and haltingly informing him of rigorous treatment at Mount Cashel provoking other runaways, a sample of which is as follows:

.70

"I kept those boys for twelve days which cost me a nice price to feed them I also bought inside clothes for them to change Hope the whole matter would be

Exhibit C-0294, p.1.

Chapter III

looked in too by the time the boys would go back and very little as far as I know was done about it I do know [Boy 1] got to set on his bed for 30 days Some people don't get that punishment for robbery and I think those poor children are hurt enough by being sent from their parents and home not to be treated like this by Christian Brothers where is charity our government pay 60 per cent of the cost of running that place."

On March 31 the matter was handled by Sandra Morris, acting social work programme co-ordinator at headquarters of the department, referring this letter to the Placentia district office manager and asking for comments from social worker Shirley Stephenson, who had already interviewed the runaway boys at St. Bride's, and in her reply to Mrs. Morris commented:

"from observing the boys facial expressions and body movements it appeared that they were telling the truth. However when considering the home's good reputation and the valuable service which has been and is presently being provided, these complaints are indeed questionable."

No doubt this not untypical departmental attitude would have prevailed since the boys in question were returned to Mount Cashel, but in October superintendent Louis Bucher at Mount Cashel telephoned Mrs. Morris, now back at Harvey Road, and informed her of sexual harassment of younger boys by an older resident who had reached the age of seventeen without progressing beyond grade five special education at St. Pius X School which he had left a year and a half before to obtain employment. He was living in St. Gabriel's dormitory where older boys usually were maintained by the child

De Profundis

welfare division on an "extended care" basis. Mr. Hamilton then assigned Mrs. Alexander and Mrs. Morris to a series of interviews, reports of which were forwarded to the department of justice, with the result that Detective Sergeant Leonard Power commenced the investigation which launched the prosecution of Brother Burton already discussed. It soon became clear to both that department and social services at all levels that some twenty-one boys, independently of the two adults under investigation - Brother Burton and a civilian - were engaged in homosexual activities with a degree of persistence not hitherto suspected. Brother Bucher, who had taken charge of Mount Cashel in 1976, was an experienced boarding school teacher and administrator from the state of Washington in the United States, clearly more able and less hide-bound than some of his predecessors and associates. In conjunction with the renovation of the building he had developed much of what had been recommended in the Nelson report and the unwieldy and overcrowded dormitories were things of the past. He had broken new ground by reporting to the child welfare division suspected homosexual activity among wards of the director in his care. Furthermore, the evidence shows that he enjoyed the respect of the great majority of his charges and officers of the child welfare division who had dealings with him, particularly Neil Hamilton, supervisor at the district office involved.

Two reactions at the highest departmental level must be noticed. In connection with the several interviews by social workers, F.J. Simms, responding to a request of the assistant deputy minister, George Pope, forwarded copies of "the reports we have on file at this office pertaining to residents of Mount Cashel Orphanage". This memorandum - and presumably its attachments - was minuted to the deputy minister, Gilbert

Chapter HI

Pike, who, as the evidence of these officials and witnesses who knew the handwriting indicates, wrote on it "Minister to see 82-11-26." Two days prior to the date thus recorded Mr. Pike had sent copies to the deputy minister of justice, "Attention Mrs. Mary Noonan".

In their evidence before the commission Mr. Pope and Mr. Pike were satisfied that these reports had been seen by the minister although they were unable to describe the occasion; perhaps they had been left on his desk. Mr. Hickey vehemently denied ever having seen them when he testified on March 23, 1990. He said he had followed up the Burton matter two or three times, but that he had had "absolutely no knowledge of any other Mount Cashel incident". He was astounded and felt betrayed; he said that the Simms - Pope - Pike memorandum had never reached his desk; if it had, since it was a headquarters file, it would have contained a note from him as to having been seen or for any action required.⁷¹ He also specifically denied having seen a report by Stead Crawford dated August 11, 1982 although there is a memorandum to "The Honourable Mr. T.V. Hickey" from "Stead Crawford" with names blacked out by commission counsel in accordance with a policy of protecting the identity of persons not having appeared before the commission. It was dated August 31, 1982, signed "Stead", was attached to a letter about a family evidently known to the minister, and had nothing to do with the appalling situation disclosed by Mr. Crawford's letter to Mr. Simms of August 11, which Mr. Hickey probably did not see, because if he had, he could hardly have refrained from further inquiry. A version, edited

⁷¹ Exhibit C-0294, p.51.

De Profundis

in order to protect the identity of the youths and juveniles involved, reads:⁷²

"1982 11 08

Mr. F.J. Simms Director of
Child Welfare Department of
Social Services Confederation
Building St. John's,
Newfoundland

Re: [Boy 14], aged 12 years old
Child oft— & 1
[...] Street
File # [...-...]

Dear Mr. Simms;

The above named child has been a Temporary Ward since December 1979. In the fall of 1979, [Boy 14], then 9 years old was placed in Mount Cashel because of increased behaviour problems at home. He was constantly running away from home, using obscene language towards his mother and generally upsetting his family.

Much effort had gone into this family in trying to teach his parent (*sic*) new skills in child care and discipline but because of the parents limited intellectual abilities, little success was obtained. His behaviour did not change and though not considered serious, it continued to cause considerable stress in the family.

Ibid, pp. 34 - 36.

Chapter HI

Mrs. [...] has a very volatile (*sic*) temper and concern was expressed by her that she might lose her temper and seriously hurt him.

In October or November, the [...]s requested that [Boy 14] go to a place where someone could teach him how to behave. When the option of Mount Cashel was explored, the [...]s felt happy that [Boy 14] would go there. In November 1981, (*sic*) [Boy 14] was placed at Mount Cashel and in December, he was made a Temporary Ward for 12 months. This wardship was extended for twelve months in December 1980 and again in December 1981.

In May 1982, [mother] requested that [Boy 14] come home for good. She felt that his behaviour had improved tremendously, which it had. and that she was better able to care for him. Though I felt that she really couldn't, I advised her that we would seriously look into this at the end of the school year. However, shortly after that [Boy 14] ran away from Mount Cashel and I decided to let him move home.

[Boy 14]'s behaviour remained good for a short while but around the end of June, [Boy 14] was caught sticking a rat-tail comb in the vagina of his younger sister [...], aged six. This upset [mother] tremendously and though there was no damage, she has totally rejected [Boy 14], She does not trust him at all and feels that he is very sexually active.

Because of the total rejection of [Boy 14] by his mother, I tried to have [Boy 14] placed in a group home. However, it was decided, in consultation with representatives on the advisory committee, that his behavior at home was not bad enough for such placement and perhaps a special foster home would better meet his needs. Since this would take some time

De Profundis

I decided to talk to [Boy 14] about acceptable sexual behaviour and perhaps give him a lesson in sex education.

On 1982/11/05, I visited [Boy 14] at his home. [Boy 14] is now a tall boy about 5' 9" and is sexually mature. His voice has deepened and he is growing pubic hair. Though he is more mature than his twelve years, intellectually he is functioning at about nine or ten years. His I.Q. is around 75 - 80 which places him into the dull-normal range. He is in the grade V multi-level programme at Eugene Vaters School and is doing reasonably well academically and behaviourly.

I talked to [Boy 14] alone for about an hour that afternoon. We started off with his own physical development and what it means. During the conversation I talked about sexual contact between boys and the (*sic*) such contact is fairly normal in most boys his age. He started to talk about his own experiences, experiences he had while at Mount Cashel.

When [Boy 14] first went to Mount Cashel, he shared a room with [Boy 5] who at that time was twelve years old. [Boy 5] became [Boy 14]'s best friend then and this friendship continued until [Boy 14] left Mount Cashel in May 1982.

[Boy 14] told (*sic*) me that [Boy 5] would always grab his penis and later developed into oral sex. [Boy 14] was quite shy about telling all this, but eventually he stated that this behavior developed into mutual oral sex and eventually mutual anal sex. [Boy 14] stated that this behaviour started within weeks after he went to Mount Cashel and continued regularly later on until [Boy 14] left the Orphanage. [Boy 14] stated that sometimes [Boy 5] would hurt him, by biting his penis

Chapter III

but this didn't happen too often. In relation to the anal sex, [Boy 14] stated it would only hurt if he didn't relax, but if he relaxed, it didn't hurt at all.

I continued to talk to [Boy 14] about this sexual behaviour especially concerned if [Boy 14] was sexually active with other boys. [Boy 14] stated that one time, his roommate, [Boy 4] caught [Boy 14] and [Boy 5] engaging in sex. [Boy 4] didn't report it but became sexually active with [Boy 14] as well. That relationship continued on a regular basis as well and also involved [Boy 4]'s older brother [Boy 1], [Boy 14] stated that he was regularly involved in oral and anal sex with [Boy 1] and [Boy 4] for a long time up until he left.

[Boy 14] denied he was involved with any other boys. He did state however that [Boy 3] caught him and [Boy 5] and reported them to Brother Bucher. He stated that Brother Bucher slapped them both, but neither stopped. He also stated that [Boy 15] and [Boy 7] caught him at "it" but he was never involved with either boy. He did state that he once saw [Boy 5] masturbating [Boy 16] in [Boy 15]'s room, but [Boy 14] stated that he didn't stay but went back to watch T.V.

[Boy 14] really doesn't know the implications of this behavior. He never told anyone at Mount Cashel especially the Brothers because he performed the sexual acts on the other boys as much as they did to him. Most of the behavior happened either in the showers or in his room. He doesn't feel that it was all that wrong but is embarrassed about talking about it. He obtained pleasure out of it as the sexual behavior either oral sex or anal sex lasted until each party had reached a climax. [Boy 14] was even able to describe the flavour (*sic*) the sperm fluid.

De Profundis

In conclusion, I feel that [Boy 14] has been involved in an ongoing homosexual behavior with [Boy 5], [Boy 1] and [Boy 4] for over two years, while a resident of Mount Cashel. Though [Boy 14] is considered slow, he was able to give vivid details (*sic*) of homosexual activity including mutual intercourse. His descriptions were too accurate to be fabrications or stories told him by other individuals. The feelings he felt while engaged in this behaviour seemed to be in line with homosexual activity.

It is, however, interesting to note that there were a few things that I find very disturbing. One is that [Boy 14] was engaged in this activity for a very long time on a very regular basis. According to [Boy 14] and I have no reason to doubt what he told me, he was engaged in sexual activity every other night. Surely if this behavior was so prevalent, that some time down the road, some adult in an official role would have seen something going on? Secondly, it is a well known fact, that homosexual activity is fairly prevalent in all male institutions. Such well known institutions as Eton and Harrow have all had publicized (*sic*) homosexual behavior appear from time to time. With this knowledge, then it can be safe to say that some homosexual activity is going to occur at Mt. Cashel from time to time. However, in [Boy 14]'s case, the homosexual activity was way above what would be considered normal to expect and that I feel there seems to have been a complete neglect of acceptable sexual education in this institution and possible supervision. In [Boy 14]'s case, he did relate that he and [Boy 5] were reported to Brother Bucher which should have meant a referral to a Social Worker for counselling as well as the punishment.

I do not know if [Boy 14] was sexually active with boys outside Mount Cashel or adult males in the orphanage

Chapter III

or outside. By the time I had obtained the information I did, [Boy 14] was very tired and restless. I will visit [Boy 14] again and pursue these other areas with him at a later time.

Yours truly, 'Stead

Crawford'

**Stead Crawford
Social Worker**

'Neil Hamilton'

Neil Hamilton

Social Worker Supervisor

SC/pan

cc:Mr. J. Quinlan, Regional Director

cc:Mr. R. Barbour, District Manager (Acting)

cc:Sgt. Power, Royal Nfld. Constabulary"

In the midst of the investigation, now assuming widespread proportions, deputy minister Gilbert Pike wrote to Mrs. Mary Noonan expressing his concern that "children and young persons in the care of the Director of Child Welfare and in residence of Mount Cashel" were interviewed by the police without the knowledge or involvement of officers of his department. He added that he had "shared" with Mrs. Noonan his wish that whenever one of these was interviewed by the police a social worker should be present. As to the two interviews already completed he hoped that justice would consult with appropriate officials of social services when the reports were being reviewed, and ended by asking the solicitor to provide him with a legal opinion "in light of these

De Profundis

stated concerns". In the meantime the two departments were in close liaison on the problem of homosexuality at Mount Cashel as indicated by a memorandum from Robert Hyslop, assistant director of public prosecutions to Mary Noonan on the civil side of his department.⁷³

"1982 11 10

Mrs. Mary Noonan
Solicitor Department
of Justice

RE: Mount Cashel Orphanage Investigation R.
v. David Burton

Further to our meeting of 10 November, this is to confirm that you have been made privy to all the facts surrounding the police investigation into criminal behaviour at the Mount Cashel Orphanage.

For my records it was my understanding that Detective Power was given a clear direction as to how his further investigations should proceed since he sought our advice in that regard. We advised that older juveniles victimizing younger children and persons in authority should be clearly investigated and charges laid if warranted.

On a more serious matter, having read the memorandum of Mr. Stead Crawford to the Director of Child Welfare, it was decided among us that there were only two viable options which could be put to the Director of Child Welfare. You undertook to follow

Exhibit C-0294, p.39.

Chapter III

this up with the Department of Social Services, and I would appreciate it if you would informally advise me of any decision made by the Director in this regard.

'Robert Hyslop'

**Robert B. Hyslop
Assistant Director of
Public Prosecutions**

RBH:dac

**cc Det. Sgt. L. Power Mr.
Ronald Richards"**

Neither Madam Justice Noonan nor Judge Hyslop could recall what the "two viable options" were on which the director of child welfare might be expected to proceed and there is no further evidence on the subject. The expression may well have referred to the director's dilemma about prosecuting juveniles who were his wards.

Somewhat incongruously, on December 1, Brother Bucher addressed a long letter to F.J. Simms summarizing "concerns" raised at a meeting in the latter's office and putting forward proposals for social workers - no less than four - to monitor the progress of boys at Mount Cashel, and to discuss their problems with each boy and with the Christian Brother in charge; and increases in the staffing of the institution by Brothers and associates employed full-time. He also appended a compromise proposal in the event of the first one proving too expensive. Two days later Mr. Hyslop was still contemplating the laying of charges against the older offenders at Mount Cashel and Detective Sergeant Power was beginning to doubt the reliability of the young complainant as

De Profundis

a witness in the case of a civilian volunteer worker who aspired to become a Christian Brother. In the end all contemplated charges were reconsidered and none was laid because of the reluctance of parents to allow their sons to become involved as complainants, the unreliability of some witnesses and generally the reluctance of Power and his superiors to "criminalize" residents of Mount Cashel at the time. Any notion that these events were concealed or covered up in government circles is easily dispelled by reviewing the profuse documentation maintained by the departments involved.⁷⁴

With the exception of a situation in 1985 when two of the youths involved in the investigation of 1982 succeeded in criminalizing themselves by stealing bicycles, affairs at Mount Cashel gave no concern to the Constabulary or their mentors in the department of justice. Indeed the reforms at Mount Cashel sponsored by the provincial council of the Christian Brothers and in particular by Brother Bucher, Brother Devine and Brother Lynch in the position of superintendent were bearing fruit in a manner which bid fair to make the institution a model in the field of counselling and treatment in child welfare cases. The six years that elapsed after the conclusion of the police investigation into homosexuality among the boys at Mount Cashel were undisturbed by any further revelations. The numbers there were in decline and the circumstances of the residents were rapidly improving. Great emphasis was laid upon the work of what was called the "manor", a special unit for treating child welfare wards with marked emotional problems. Much of the progress made in this direction was due to the efforts of Brother Barry

Exhibit C-0294.

Chapter III

Lynch who became superintendent of Mount Cashel in September 1985 after being director of the Christian Brothers College at Mono Mills, Ontario which, as he advised the commission, no longer exists, there being now no college of the order in Canada for novices.⁷⁵ Brother Lynch with the exception of a year spent as director of development at Mount Cashel, continued as superintendent until it was closed. The relationship of the institution with the child welfare division became closer, more professional and more cordial, as it had begun to be under the superintendency of Brother Bucher. But there is no evidence of any "following up" in the form of counselling or other curative measures for either assailants or victims in the outbreak of homosexual activity among the boys in 1982 on the part of either the department or the Christian Brothers.

Because of this educational activity the establishment at Mono Mills was held to be a "seminary of learning" and thus exempt from real property taxes. *Christian Brothers of Ireland in Canada and the Assessment Commissioner for the Counties of Wellington and Duffenn et al.* [1969] 2 O.R/374.

Chapter IV: Dies Irae

On February 13, 1989 Robert B. Hyslop, by then Associate Deputy Attorney General received a telephone call from a Mrs. Caddigan asking for a public inquiry into "cover-ups" and specifically referring to Mount Cashel. As Hyslop said in a statement prepared for the Royal Newfoundland Constabulary "I had heard rumours about the Mount Cashel incidents and I thought it involved strapping of children and that charges had not been laid. I advised her that that was long in the past and if she wished to have an inquiry held she should talk to her MHA".⁷⁶ The next day he was called by no less than a judge of the Court of Appeal, Mr. Justice John W. Mahoney who said that his wife had called him in chambers asking about allegations on an "open line" radio programme of a "cover-up" by the department in the case of the Elizabeth Towers fire and in the case of Mount Cashel. Mr. Hyslop told the judge that he thought this referred to the statements of Sergeant Arthur Pike "formerly of the Royal Newfoundland Constabulary" and recalled looking at a file seven or eight years before about the physical abuse of boys in the orphanage. Hyslop then engaged in a flurry of activity with momentous consequences. He asked Superintendent Leonard Power for all police reports having a bearing. He summoned the director of public prosecutions, Mr. Colin Flynn, and others to a meeting and was joined by the deputy minister, Mr. Ronald Richards. There was a subsequent meeting with the minister, the Honourable Lynn Verge,

Exhibit C-0213.

Chapter IV

Clearly in response to her inquiries he delivered the following letter to her on February 15:

.77

"February 14, 1989

The Honourable Lynn Verge
Minister of Justice and
Attorney General
Department of Justice

Dear Mrs. Verge:

Re: Complaint of Homosexual Acts and
Child Abuse at Mount Cashel

I have now had a chance to review both the December, 1975, and March, 1976 file involving alleged abuse by members of the Irish Christian Brothers at Mount Cashel Orphanage. As I told you in conversation, I felt that I had seen the physical abuse file (March 3, 1976) as a result of curiosity, after the allegations made at the Soper Inquiry. It is my view that the cases of excessive discipline on the part of the Brothers might have been dealt with properly by prosecutorial discretion. They may have been difficult to make out as common assault charges and are now statute barred.

A review of an earlier report, however, dated December 18, 1975, which has come to my attention for the first time today, reveals sexual abuse by at least three Brothers on a horrifying scale. I have therefore asked the police to try and find out what

Exhibit C-0213.

Dies Irae

happened in the chain of events to preclude charges from being laid and to continue the investigation with a view to:

- (a) determining whether we can proceed with sexual abuse charges at this late date; or
- (b) determine why these people were not brought to justice..

I need only say that the amount and type of sexual abuse boggles the mind,

I have attached a few sentences should this matter be referred to you.

Yours sincerely,

'Robert B. Hyslop'

Robert B. Hyslop, Q.C.
ASSOCIATE DEPUTY
ATTORNEY GENERAL

/vjk"

The "sentences" which the associate deputy attorney general prudently provided read as follows;⁸

"As a result of suggestions which have recently been raised in the public forum, my officials have asked the police to review investigations at the Mount Cashel Orphanage which involved certain allegations of abuse of children in the mid-1970's, I am advised that the Royal Newfoundland Constabulary supplied copies of

Ibid.

Chapter IV

police reports to my senior officials on February 14, 1989, which reveal that an investigation was conducted in 1975 at Mount Cashel Orphanage. This investigation was not completed and my officials have asked the police to re-investigate it and inquire into the reasons why it was not completed. The matter is therefore in the hands of the Royal Newfoundland Constabulary and it would be inappropriate for me to comment further at this time."

The existence of a draft statement prepared for a minister for use if required serves only to emphasize the absence of any such provision by the deputy minister of the day in December 1975.

On the same St. Valentine's Day, 1989, and in the course of the excitement produced by his realization of the significance of the long-forgotten rumours of fifteen years before, Robert Hyslop wrote to Chief of Police E.J. Coady outlining the nature of the material available and still being sought, and concluded:⁷⁹

"I have reviewed this material in detail and have charted possible offences under the old legislative scheme against various persons. (The common assault cases are statute barred). I have therefore focused my mind on sexual related cases and it is clear in my mind that at least one person committed over 100 individual indecent acts on at least 15 boys.

Having discovered this horrifying fact on February 14, 1989, what cause of action is open to us?

Exhibit C-0213.

Dies Irae

I have reviewed this and it is my view that we cannot even now let this lie fallow. Where are these offenders? Who else is at risk? Who else has been molested by these people? Where are the victims of the crimes that these people perpetrated? Will they give evidence?

Who ordered this investigation terminated and why? I suspect we need to know this before we can lay charges and be confident of our ability to withstand a Charter challenge.

In accordance with our telephone conversation of February 14, 1989, I therefore ask you to assign you (*sic*) most senior and able people to:

- a. complete the investigation into sexual abuse of children at Mt. Cashel, and**
- b. determine why these individuals were never brought to justice. I need to know this in order to deal with these charges once and for all. Is there criminal liability on the part of any person(s) responsible for the termination of this investigation?**

I cannot over stress the need for urgent action on this file."

Having secured the approval of his minister and set the wheels in motion for reopening Robert Hillier's thwarted investigation - his two reports of December 18, 1975 and March 3, 1976 were found in a drawer containing disused records of unsolved murders and the like at Constabulary headquarters - Hyslop compiled a statement "for the Royal Newfoundland Constabulary", additionally as an *aide-memoire*

Chapter IV

"in the event I am called at any future judicial proceedings to account for a police investigation at Mount Cashel in the mid 1970's" and in acknowledgement of his perception of the importance of contemporary records. This document dated February 17, 1989 should be reproduced from the second paragraph, the gist of the first having already been given:⁸⁰

"On February 13, 1989, I received a call from a Mrs. Katherine Caddigan, who is a resident of the provincial riding of St. John's East Extern. She made a request for a public inquiry into cover-ups by the church and made specific reference to an incident at Mount Cashel. I had heard rumours about the Mount Cashel incident and thought it involved strapping of children and that charges had not been laid. I advised her that that was long in the past and if she wished to have to have (*sic*) an inquiry held she should talk to her MHA.

The following day, February 14, 1989, I received a call from Mr. Justice Mahoney, who had at one time sat on the Farrell defamation suite (*sic*). He inquired about the veracity of the Mount Cashel allegations, which apparently had been aired on the Open Line. As a result of his query and my inability to provide detailed answers to him, I decided to investigate further.

I could not remember the names of any persons involved or other dates, so I phoned (*sic*) Supt. Power of the Royal Newfoundland Constabulary and asked him to locate any material which he might have had on this incident. Shortly thereafter he returned my call and said that he had two reports in his department,

Exhibit C-0213.

but no correspondence existed from the Department of Justice. One report was dated December 18, 1975, and the other March 3, 1976. Supt. Power arranged to have these reports copied and delivered to my office by Lieut. Kielly. They were reviewed by the Director of Public Prosecutions and me. The Deputy Minister came in during the meeting. As I recall, Mr. Coffey of the Special Prosecutions Unit was also in my office. We perused the reports and Mr. Flynn, Mr. Richards and I all met with the Minister of Justice and advised that there were strong indications of sexual abuse charges, including confessions having been given by at least two Brothers. We also concluded that the offences were not statute barred and that we felt that we should reopen the investigation. The Minister agreed and I phoned the Chief of Police on the afternoon of February 14, 1989, and advised him to reopen the matter and that a letter would follow.

I took the file home on the night of February 14, 1989, and charted out possible offences against a number of individuals. On February 15, 1989, I directed correspondence to the Chief of Police with the chart attached. I also provided the Minister with a brief note and a copy of the chart for her information. She subsequently returned that to me on February 16, 1989. We had some difficulty in locating any material in the Department of Justice. On February 16, 1989, I was meeting with the Chief of Police in my office on administrative matters, and at that time Mrs. King indicated that she felt that she had found a file not in the criminal section, but in the wardship section at Mt. Scio House. At around noon on February 16, 1989, Chief Coady and I went over to Mount Scio House and received a file entitled "Mount Cashel - re. Child Abuse" bearing government number G-3690. In that file there were three pieces of paper only, namely a letter dated 26 January 1977, from the Deputy

Chapter IV

Minister of Justice to the Chief of Police of the day, as well as correspondence, dated January 23, 1976, and January 15, 1976, from clergy,

I recall being curious about these files at some point after the Soper Inquiry and I am virtually positive that I searched out this brief file and saw that the matter had been dealt with by the Deputy Minister of the day and concluded. It was this memory that allowed me to search diligently for the file on February 16, 1989. I also have a recollection that the file on Mount Cashel involved strapping and not sexual abuse. I can categorically state that the first time that I was personally aware of sexual abuse of any sort at Mount Cashel was on February 14, 1989, when I read the police report dated December 18, 1975.

For purposes of the investigation, I can advise that in 1975, when the report was compiled, I was an Articled Student. Mr. John Connors, Q.C., who had been Director of Public Prosecutions, left Newfoundland in September or October, 1975. Between the time that Mr. Connors left and March, 1976, the office of Director of Public Prosecutions was vacant and the duties of the Director of Public Prosecutions were fulfilled by the late Vincent P. McCarthy, Deputy Minister of Justice, who was subsequently appointed District Court Judge. I can recall this because even though as an Articled Student I was working with the R.C.M.P. Commercial Crime Section, virtually all criminal files that came into the Department in that time frame were delivered to the Confederation Building and assigned by the Deputy Minister, who usually put his initials on the upper right hand corner of all documents. Since I was involved mostly with the investigation of the John C. Doyle case, I was not privy to anything involving the Mount Cashel investigation. It is my recollection that

Dies Irae

Mr. Kelly was appointed Director of Public Prosecutions in March, 1976. I recall this because I was studying for my Bar exams, which I wrote in March, 1976, and I learned either on the radio or in the Evening Telegram that Mr. Kelly had been appointed Director of Public Prosecutions and Mr. John Byrne had been appointed Chief Crown Prosecutors, (*sic*) These dates can be confirmed by interviewing our personnel branch. I, myself, was not called to the Bar until April, 1976, in Newfoundland.

My recollection of Mr. Kelly's involvement at that time was that he was a lawyer in the Civil Division of the Department of Justice and had no involvement in the Criminal Division. Present in the Criminal Division at that time were John McGrath, Barry Hill, John Byrne, and Allister Murray. Lawyers in the Civil Division who were present in the Department were John Noel, Keith Mercer, Mary Noonan, Jim Nesbitt, Frank McLoughlin and George McAuley.

I note that the last correspondence to the police was dated January 26, 1977. It is my recollection that the Deputy Minister of Justice was appointed to the Bench at around that time. There is no doubt that this also can be investigated independently.

The Mount Cashel file, which I am prepared to turn over to the police, was retrieved by me and copied by Chief Coady at Mount Scio House. I returned it to Confederation Building and made a copy, which I provided to the Minister to advise her about what I felt had happened and retained the file under lock and key in my office. There is no reason to believe that there is further material involving this incident in our files."

Chapter IV

Curiously enough Mr. Hyslop was impelled to note on February 22 that the department only had part of the transcript of the Soper Inquiry evidence and only volume II of the five volumes which included as volume IVA the *in camera* evidence released by Judge Soper in mid-March 1979. The complete transcript was quickly supplied to Hyslop by the judge on February 20 and was in the hands of Superintendent Power on February 22. By this time the boy whose injuries had provoked the investigation of December 1975, now employed as a waiter at the Hotel Newfoundland, and till now unsought by social workers or the police, became the focus of public attention.

The Reappearance of Shane Earle

Shane Earle made no complaint of a sexual assault after his return to Mount Cashel in 1976. However he told the commission in his evidence in chief on October 17 and 18, 1989 that he had developed homosexual tendencies as a result of his experience in the orphanage; he had been approached by the police to answer questions in the November 1982 investigation but had declined on the advice of a lawyer to whom he had been taken by Superintendent Bucher. But in 1989, after pondering the cases of Father Hickey and Father Corrigan and hearing of the revival of the investigation of 1975 on a television show, he approached the Constabulary and was warmly received after being put in touch with Superintendent Power and Lieutenant Kielly who interviewed him at length. He testified that these officers had assured him that they would report any developments but after a waiting period which he thought too long, he went to Portugal Cove and spoke to Father Kevin Molloy, telling him stories of

Dies Irae

Mount Cashel that upset the priest who promised to make inquiries. Again he did not hear and on March 12 read in the Sunday Express an article by the publisher and editor-in-chief, Mr. Michael Harris, entitled "Miscarriage at Mount Cashel. Where was the rule of law?" The flavour of the article may be appreciated by reading the first four paragraphs:⁸¹

"There is a moral chancre eating away at the fabric of Newfoundland society and it is called the Mount Cashel orphanage scandal.

In 1975, the provincial Justice Department agreed not to lay charges against three Christian Brothers who were investigated for the sexual abuse of boys entrusted to their care. According to testimony at the Soper Inquiry, the decision not to charge the priests involved two things; a deal, and the exercise of prosecutorial discretion by the law officers of the Crown. The deal was that the three Brothers involved would be transferred to the United States, never again to be put in a position where they would deal with young boys. The prosecutorial discretion involved looking at a set of facts presented by the police and then deciding that in the broader interests of justice, no charges would be laid.

That is where the matter rested until a present-day sex-scandal involving Roman Catholic priests and young boys rocked Newfoundland. With each depraved revelation of how at least two priests abused their trust, abandoned their positions of moral leadership and marked several young men for the rest of their lives, a stunned community reacted first with shock and then with justifiable anger. Against the backdrop of those two convictions, three more pending cases and an ongoing police investigation, the long

Exhibit C-0069.

Chapter TV

muffled cries of orphans abused in the dark of bygone nights echoed from a sordid past that is still shrouded in official secrecy.

But this much we know. When the people in the justice department reviewed the Mount Cashel file - the precursor to the investigation being reopened - the officials involved couldn't sleep after reading what the police had reported to the authorities of the day. They couldn't sleep because they were sickened by what they read - sexual abuse linked to sadistic physical assaults on the boys who had come to the orphanage for sanctuary and found instead an anteroom of hell. Their protectors became their tormentors and there was no one to turn to, no one who cared. During the original police investigation, the boys apparently begged the investigators not to return them to the orphanage once the questioning was done. One policeman recalling the event said that they used to drive them around for hours until they reluctantly returned them to Mount Cashel, tortured by images of what they had been told was going on. These same policemen had to stand helplessly by as the Justice Department cut its deal and the alleged culprits were spirited out of the country."

There is no doubt that this article induced Shane Earle to seek out its author. There is also no doubt that it ensured the establishment of the Royal Commission as described in the Introduction to this report. Mr. Harris was now to have fresh and more detailed evidence from Shane which resulted in a further two-part work from his pen appearing in the next two issues of the Sunday Express.

Reopening the Investigation

A peculiarity of the work of this commission which could have created serious problems of jurisdiction and organization was the almost coincidental investigations of the Royal Newfoundland Constabulary. Much credit is due to Chief E.J. Coady, Superintendent Leonard Power and their colleagues on the one hand and commission counsel and investigators on the other that the operations of each were harmonious and helpful with regard to the furnishing of materials and the occasional overlapping of inquiries. The Constabulary in this respect were first in the field by some three months, but the publicity attendant upon the appointment of the commission and the activities of counsel and its experienced investigators Weldon H. Orser and G. Frederick Home, both retired officers of the Royal Canadian Mounted Police, attracted a wealth of information which made co-operation essential and the results mutually helpful. The Constabulary were no doubt heartened by a letter from Mr. Hyslop of April 25, 1989 in which the department took a firm stand on the often vexed question of the separate functions of the police and of the law officers of the Crown. Its opening sentences should be reproduced.⁸²

"The Director of Public Prosecutions and I have been reviewing past practices that prevailed in terms of the relationship between your Force and this department when the question arises about the propriety of laying charges against any person or persons. In all but the most routine matters, there has been a practice for the Royal Newfoundland

Exhibit C-0349, p.6.

Chapter IV

Constabulary to simply compile a police report and refer the matter to the Department of Justice for a decision as to whether or not to lay charges. This is a practice which can be unhealthy, both for the police and the department as it tends to interweave each of our respective roles and functions. It seems to me that it is the sworn duty of a peace officer to lay charges wherever he or she determines there has been a breach of the law. It is, therefore, in my view a police decision whether or not charges should be laid in any given case."

It was at the same time made plain that the legal staff of the department would be ready at all times to provide advice when it was asked for as to the sufficiency of evidence and like matters. On May 2 the deputy chief of police Allan Thistle advised all divisions of this change of policy and appropriate forms were produced in order to make it effective.⁸¹ Still the public was not generally speaking aware of what progress was being made, and indeed there are always difficulties in keeping it informed about police investigations; because of the necessity of anticipating every move of persons suspected of having committed criminal offences they must be conducted as much as possible in secret. An illustration is provided by a letter which Mr. Powell found it necessary to write to the chief on October 19:¹

.84

"On 18 October 1989 Shane Earle testified at the Royal Commission about his attendance at RNC Headquarters on the evening on 16 February 1989. He met for several hours with Superintendent Len Power

Exhibit C-0349, pp.15 - 18.

Ibid, pp.19 - 20.

Dies Irae

and Lieutenant Kielly and a written statement was taken at that tune.

Mr. Earle then testified he heard nothing from the RNC and when he saw an article in the Sunday Express on 12 March 1989 and decided to seek out Publisher Michael Harris because he feared, in effect, that the police were not doing anything.

I stated publicly to the Commissioner that the police were in fact, conducting an investigation although this was probably not known to Shane Earle.

This issue having been raised, I feel it would be appropriate for a report to be prepared for the Commission setting out the steps taken by members of your force following receipt of the request from Judge Hyslop to have the Mount Cashel investigation re-opened.

This should cover the time period from the request from the Justice Department to re-open the investigation until Lieut. Twyne laid charges - I believe on or about 04 April 1989, and should include statements from the various officers involved in the investigation as well as from yourself.

If this could be prepared within the next two weeks it would be appreciated."

This request was promptly complied with and it is now generally agreed that police forces must bear in mind the desirability of keeping members of the public informed particularly in the case of informants or complainants who, having made a commitment to assist the ends of justice, are anxious to be reassured that their efforts are being acted upon.

Chapter IV

On the heels of Powell's request came a *cri-de-coeur* from Power to Coady. He began:¹

.85

"As you are aware, in recent months this Division (C.I.D.) and particularly our Major Crime Section have been intensely involved with matters arising from the re-opening of the 1975 Mount Cashel Investigation. The offences and subsequent investigations relating to that institution (Mount Cashel) have attracted public attention nation-wide, especially since the commencement of hearings by the Hughes Royal Commission. Further investigations arising from evidence at that inquiry, have placed a severe burden on our already limited resources.

In recent days a number of serious complaints, arising from the Hughes Commission have been referred to our force for investigation. There is every indication that those referrals by the Commission of Inquiry resulting from anticipated disclosures of abuse will continue in the immediate future."

He continued by saying that in the light of the excessive caseload carried by the major crime section of his division as a matter of routine, he was concerned about its "ability to effectively deal with matters related to Mount Cashel and arising from the Hughes Inquiry". He therefore recommended the immediate establishment of a special investigating unit to handle all complaints of sexual and physical abuse at Mount Cashel, and any other such complaints and "other criminal matters arising from or referred by the Hughes Royal Commission". This request was supported by statistics showing an unprecedented rise in the incidents of complaints of child physical abuse and child

Exhibit C-0349, p.21.

Dies Irae

sexual abuse in the major crime section. In the meantime much had been accomplished in the process of completing the 1975 investigation into sexual abuse of children at Mount Cashel by Lieutenant Freeman Twyne and in investigating the possibility of obstruction of justice by Superintendent Power and Lieutenant Alex Kielly. All three of these officers, Power as officer in charge of the C.I.D., Kielly in charge of its operations and Twyne as officer in charge of the major crime section continued to be responsible for their regular duties.

The special investigative unit was in place by the end of November as an extension of the major crime section, staffed by five officers in part seconded from other sections of the division. A memorandum to C.I.D. personnel from the officer in charge of November 16 conveying this information includes the following:⁸⁶

"Disclosures from the Hughes Royal Commission of Inquiry have lead to a number of investigations involving Foster Homes and other child care institutions."

As a result the special unit was entrusted not only with "the investigation of all complaints of sexual or physical abuse arising from or referred by the Hughes Royal Commission", but with all complaints of sexual and physical abuse occurring in child care facilities or institutions. This development reflected the expansion of the commission's perceived obligations under article II of the terms of reference. By the end of the year the special unit had developed a new and close relationship with the child welfare division of Social

Ibid, p.42.

Chapter IV

Services, and procedure for joint interviews by its officers and social workers in cases involving the questioning of wards of the director was in the course of completion.

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Problems of the Royal Commission

In December 1975 there were ninety-one pupil residents of the Mount Cashel Boys' Home and Training School of whom all but one were wards of the director of child welfare. During the investigation conducted by Detective Robert Hillier, assisted by Detective Ralph Pitcher, thirty-one people had been interviewed in one way or another: there were five adults, including two Christian Brothers, and twenty-six boys ranging in age from eight to seventeen with an average of eleven to thirteen years. I say "interviewed in one way or another" because only boys ten years old and over were asked to sign written statements, and when they were under that age and gave statements these were written out by one or other of the investigating officers, but not signed. One at least was unfortunately written down in Detective Hillier's notebook, destroyed with all its companion books in 1986 when he became a commissioned officer. Of the twenty-six pupil residents interviewed twenty-five gave statements and three of these gave two each. Most of the boys, according to Hillier, were either frightened or in tears; the condition of one was such that Hillier was not anxious to take a statement from him. Indeed the arrangement whereby Brother Kenny was to drive the boys to the police station for the purpose of interview was enough to implant a fear in all the younger boys, several of whom testified that he had told them not to

Dies Irae

tell the police about anything he had done. I have already mentioned the tears of Andre Walsh when he displayed his ravaged hands. The reason for selecting the twenty-six boys is not easy to analyze, particularly as Mr. Hillier was not too sure himself. He felt that Shane and Billy Earle had given him some leads. There is no evidence to suggest that the boys were either volunteers or selected by the superintendent, an unlikely possibility under the circumstances. Nevertheless there is no doubt that the boys feared retaliation at Mount Cashel and this must have had a stultifying effect on many of the statements; it is surprising that so many deadly allegations were made.

It was the task of the commission not only to invite those who had made complaints in December 1975 to testify but also to locate them, not particularly easy since many of them had left Newfoundland for various parts of North America; one who testified was Leo Gerard Rice from Oklahoma, the great, great, great-nephew of the founder of the Christian Brothers of Ireland. There were two applications for hearings *in camera* which, by virtue of the terms of reference and with the advice of commission counsel, I allowed over the vigorous and sustained objections of counsel for the Canadian Broadcasting Corporation and Canadian Newspapers Company Limited (for the Evening Telegram of St. John's and the Globe and Mail of Toronto). The "demands" of the corporation and the objections of the press were subsequently reduced to an application to obtain access to the record of these hearings and to be assured of notice of any future applications for hearings not open to the public. My reasons for receiving this evidence *in camera* and maintaining its confidentiality throughout the life of the commission may be found as delivered on November 8, 1989 at appendix E.

Chapter IV

On November 17, 1989 Mr. Day was able to point out that all but eight of the twenty-six had testified in public hearings and one *in camera*. Of the eight one was yet to be heard, as it transpired *in camera*, and seven had declined to appear on various grounds, some having discussed the matter with commission investigators first, and others having resorted to evasive action. All had been served with a summons and the question at once arose: should the commission take contempt proceedings by citing those who had failed to comply with it before the Supreme Court of Newfoundland under the provisions of the *Evidence (Public Investigations) Act*, R.S.N. 1970, c.1 17? These extreme measures had so far not been resorted to, and it was decided by me on the recommendation of both commission counsel that they should not be employed in these cases; nor were contempt proceedings ever commenced, all of the men and women who testified having done so without compulsion. Of the seven remaining one finally did testify and one gave a deposition to counsel. Five remained obdurate, and all documents have been edited to delete any clues to their identities as will be seen at appendix C, the December 18, 1975 police report,⁸⁷ although "profiles" were entered in evidence, and their statements to the police at the time with the necessary deletions.

Nature of the Complaints

A more serious problem began to emerge as witness after witness in the fall of 1989 told the commission before the television camera of the indignities they had suffered as boys at the hands of Christian Brothers who were their teachers

Exhibit C-0137.

Dies Irae

and monitors and in whom parents, relatives and social workers, generally speaking, placed absolute trust. Grown men were seen to break down and weep at the recollection of the events which they were describing. The rising tide of public indignation was matched by the increasing number of charges being laid. When the complainants of December 1975 had been heard and the statements made then put to them, the work of the commission in this area was largely done. Some further residents of the period at Mount Cashel had to be heard to explain why they were not interviewed or did not come forward, and in this connection it was inevitable that complaints that might have been made in 1975 were given an airing in 1989. On January 29, 1990 a question long in doubt was resolved by Mr. Powell and Mr. Day advising me in turn that, after agonizing over many days and nights, they were of the view that the Christian Brothers implicated by the allegations of their former charges should not be called as witnesses. The door was left open, of course, for these men, all of whom at this time had legal advice and standing before the commission, to testify of their own volition, but no application to the purpose was given. This decision was received with mixed feelings and two leading newspapers of the province were sharply divided, one in its praise and the other in its condemnation. None the less concern with the historic right to a fair trial could not be overborne by transitory feelings of revulsion, nor could the prosecution be hampered by any failure to appreciate the effect of section 13 of the *Charter of Rights and Freedoms* which might deprive it of the ability to use vital evidence obtained in a forum other than that of trial.

Rather, therefore, than attributing aspects of the evidence to the men who gave it, or against any one of the men alleged

Chapter IV

to be offenders, an attempt must be made to deal with the allegations of physical and sexual abuse in general terms without attribution of any kind. The most common complaint was of what might be nicely called "excessive punishment" but to the witnesses who recalled their days in the orphanage was known as "strapping" and "beating". Strapping was often violent and insensate with bruising and blistering of hands and arms up to the elbow joint, and frequently laid on, not systematically, but with furious anger. Beating was in the main hitting the bare buttocks with a strap or stick but went as far as punching, kicking and banging heads against a wall. A common complaint was that the boys did not know why they were being punished. Sexual abuse often began with kindness and demonstrations of affection, culminating in fondling the naked bodies of the boys and particularly their genitals. Of a more aggressive nature was forcing the victims to attempt, but seldom complete fellatio, and the same applies to buggery long known to the law as the "abominable crime". Mutual masturbation and ejaculation against or on the person of the victim were also complained of and described. The younger boys appeared to suffer more from the ministrations of their preceptors both in the dormitory and the swimming pool. Complaints were not confined to what transpired within the precincts of Mount Cashel, but extended to recreational trips to Terra Nova Park and Witless Bay and excursions in motor cars which led to sexual invitations and assaults.

Testimony and Charges

After the organization meetings of June 28 - 29 and August 14, 1989 the public hearings of the commission began on September 11, and a measure of the preparation accomplished in the interval is that these continued every day without pause except for Saturday and Sunday until the end of the month when it was necessary to take a recess until October 11. The first witness among the young men who had given statements as children to the police in December 1975 was Johnny Williams on September 19 and 20, and by the end of November most of those who were willing to testify had been heard. In addition to Williams there was Leo Gerard Rice, Gerard Joseph Brinston, Andre Joseph Walsh, Dereck John O'Brien, Gregory James Preshyon, Peter Robert Brown, Robert Michael Connors, Gregory Patrick Connors, John Dwyer Pumphrey, Ian Cameron Pumphrey, Francis Patrick Baird - first interviewed with brothers Malcolm Baird and Edward Strickland at home in Mount Pearl - and Gerald Edward Nash. Two of the former residents of the orphanage were heard *in camera*; a third, Craig Edward English subsequently testified and a fourth, Roy Joseph O'Brien, made a deposition.

In 1975 - 1976, for his two reports, Detective Hillier, with the assistance of Detective Pitcher, had thirty-two people interviewed, twenty-six of whom were under the guardianship of the director of child welfare, either as permanent or temporary wards or under non-ward agreements; if his investigation had not been terminated by higher authority he

Exhibit C-0437.

Chapter IV

would have conducted more interviews and, logically, of all the boys and Christian Brothers at Mount Cashel. Upon the reopening of the investigation and the determination to complete it interviewing members of the order was not practical, but in respect of making contact with all of the ninety-one residents of Mount Cashel in care in December 1975 the commission took the initiative. By March 21 Weldon H. Orser was recalled to the stand for the seventeenth time and under examination by Mr. Day introduced three volumes of a proposed exhibit entitled "Completing the 1975 Mount Cashel Investigation", which were duly entered in evidence and explained by the witness.^{1*9} Volume I consisted of memoranda and reports passing between the department of justice and the Constabulary following the instructions to the latter to reopen the 1975 investigation on February 14, 1989.⁹⁰ Volume II contained ninety-one copies of a questionnaire prepared by the commission - one for each resident named and unnamed - as to the contacts made with each by whom, where, when and how, and as to whether each resident had been interviewed, interviews being face to face and productive of a statement.⁹¹ Volume III displayed a master file and sixty-two individual files setting out charges laid as of March 14, 1990 thirteen months after the reopening of the investigation.⁹² A chart depicting in graphic form the incidence of contacts and interviews during the thirteen months ending March 14,

⁸⁹ Exhibits C-0349, A,B. and C.

⁹⁰ Exhibit C-0349.

⁹¹ Exhibit C-0349A.

⁹² Exhibit C-0349C.

Dies Irae

1990 was prepared by Mr. Orser and Miss Patricia Devereaux and appears as appendix F⁹³ in Volume Two of this report. By the end of the period, seventy-nine of the ninety-one residents had been traced by the Constabulary and forty-four statements taken from thirty-eight individuals. The witness warned that by the end of the month of March 1990 there might be dramatic changes in these figures.

A measure of the work done by the Constabulary by March 22, 1990 is to be found in volume III⁹⁴ of the exhibit referred to where the criminal charges laid between February 15, 1989 to and including March 14, 1990 were set out as applicable to each person charged, but without revealing his name. Eighty-seven charges had been laid by the police in the reopened Mount Cashel investigation resulting from allegations made in 1975 and since, against fourteen persons of whom nine were Christian Brothers, one was a non-religious volunteer worker at Mount Cashel, one was a minor living at Mount Cashel at the material time, and three were non-religious residents of St. John's. Forty of the charges were for indecent assaults on a male under section 156 of the Criminal Code; twenty-five for gross indecency under section 157; six for indecent assault on a male under section 156; five for assault causing bodily harm under section 245(c); four for sexual assault under section 271(1)(a); three for attempted buggery under sections 155 and 421(b); one charge for touching with a sexual purpose under section 151; one charge for inviting touching for a sexual purpose under section 152, one charge for attempting to commit an indecent assault and one for buggery itself under section 155. Since the

* Exhibit C-0349B.

¹⁾⁴ Exhibit C-0349C.

Chapter IV

conclusion of the public hearings of the commission advice has been received that charges laid as of December 31, 1990 are as follows and the communication from the Constabulary is reproduced:

"As of December 31, 1990 a total of 106 charges have been laid as a result of the reopening of the Mount Cashel Investigation which started on February 15th, 1989. A breakdown of the charges are as follows:

57	Indecent Assault on a Male	(156 CCC X 52 & 148 CCC X 5)
30	Acts of Gross Indecency	
5	Assault Causing Bodily Harm	(245(2) CCC)
5	Sexual Assault	(271(1) (a) X 1 & 246.1(1)(a) X 4)
3	Attempted Buggery	(155-421 (b) CCC)
1	Buggery	(155 CCC)
2	Touching for a Sexual Purpose	(151 CCC X 1 & 140 CCC X 1)
2	Inviting Touching for a Sexual Purpose	(152 CCC X 1 & 141 CCC X 1)
1	Attempted Indecent Assault on a Male	(156-421 CCC)

Eighty-nine (89) of these charges were against Christian Brothers.

Five (5) charges were laid against a resident of Mount Cashel.

Twelve (12) charges were laid against civilian residents of St. John's."

The above figures are given to reflect the activity of the police both as a result of their inquiries under the direction of Superintendent Power and Lieutenant Twyne and of disclosures and contacts made through the commission and investigators Orser and Home, in a form designed to protect the anonymity of the persons charged and their alleged victims.

Recording Mount Cashel Residents at December 1975

An activity of even wider range culminated in the introduction into evidence of a compilation of information relating to all the residents of Mount Cashel entitled "Young Persons Residing at Mount Cashel Orphanage, December 1975". Provided were forms containing the date and place of birth, age at December 1975, approximate periods of residence in Mount Cashel and probable legal status, as to wardship or by non-ward agreement as the case might be, the date of any 1975 Newfoundland Constabulary interview, and the date and place of any similar interview by commission investigators, where currently residing, the date of testimony before the Royal Commission, exhibit numbers of profiles or statements in 1975, if any, with remarks by investigators **Orser** and Home. This important documentation of the ninety-one residents was introduced through Orser on

Chapter IV

December 4, 1989.⁹⁵ At that point the two investigators had made contact with eighty-six, and, of the remaining five, knew of the approximate whereabouts of three. Social Services files from both headquarters and district offices to the number of eighty-nine, comprising twenty-five thousand sheets of paper, were examined by them, and the department and the police were universally helpful. By and large, Orser found the social services files complete, with the occasional absence of placement reports when wards of the director were moved from one foster-home to another. It should be remembered that Mount Cashel had become an institutionalized foster-home, which by virtue of its evolution from being a private orphanage, had developed a status of its own relieving its administration from some of the requirements imposed upon foster-parents. As time passed during the course of the commission's inquiries information of the kind enumerated, was completed in relation to ninety of the ninety-one residents of December, The result may be seen at appendix G, the identities of those who testified to the commission in a public hearing being set out, and the rest indicated only by a combination of letter or number (e.g. R.12 or Mr. "D").

Exhibit C-0177.

Chapter V: The Questions in Article I

The Answers

The terms of reference of the inquiry which I was commissioned to conduct "into an investigation by the Royal Newfoundland Constabulary into a complaint or complaints of child abuse" alleged to have been committed at Mount Cashel Orphanage in St. John's which culminated in two police reports prepared and dated December 18, 1975 and March 3, 1976, and the subject of most of the foregoing pages, require in article I thereof answers to nine specific questions and these I now address.

(a) Whether the police investigation was carried out in accordance with accepted police policies?

It will be recalled that the first version of the terms of reference dated March 31, 1989⁹⁶ contained the words, "whether the police investigation was carried out in accordance with acceptable police policies *then prevailing*". If there is any significance in the omission of the italicized words it cannot be that the police investigators of 1975 are to be judged by the accepted policies of today, and my conclusion on that point is strengthened by the change from "acceptable police policies" to "accepted police policies". The answer must be partly "yes" and partly "no": "yes" in connection with the actual interviewing done by Detectives Hillier and Pitcher; "no" by the actions of Lawlor and Norman in sending the first report back for the elimination of information about sexual abuse, and Hillier's apparent

⁹⁶ See Introduction pp. vi - vii.

Chapter V

compliance with this direction, although the effect of that compliance, if any, was much reduced by the attachment of statements which complained explicitly about it. If it was accepted police policy to comply with directions from officers of the Department of Justice as to the laying of charges, it was not so in respect of interruption of a properly constituted investigation and the by-passing of the officer in charge of the C.I.D., Detective Inspector Yetman. A similar finding must be made about the report of March 3, 1976 when Hillier was instructed by Lawlor and Norman to produce a report for the minister also eliminating reference to sexual abuse and ill-treatment. It was not part of accepted police policy as represented by the training, traditions and policy manuals of the Royal Newfoundland Constabulary, then and now, to interfere with a police investigator to the extent of ordering the alteration of his report to suppress allegations of criminal misconduct.

(b) Whether the police policies were proper and adequate to ensure that the police investigation was thorough and complete,

All the evidence points to the conclusion that the handling of the investigation was contrary to police policies in Newfoundland followed by both the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police. Ordering the officer in charge of the investigation to alter his first report of December 17, 1975 and to edit his report of March 3, 1976, and conclude the investigation in mid-career, was a unique departure from accepted policy and practice. To be sure, Superintendent Power testified to what he considered at the time of the investigation of 1975 to be differing standards as applied to ordinary offenders on the one hand and offenders of consequence on the other, in that

The Questions in Article I

prosecutorial discretion might be exerted in favour of the latter, but the policy applicable to police investigations did not authorize and would have condemned their interruption by higher authority, and any attempt to falsify their results. The answer to this question must be "yes".

(c) Whether any person or persons impeded or obstructed any police officer in the investigation of these matters.

There is no direct evidence that any officer or employee of the Department of Justice, from the minister down, gave any instructions to the police at the time material to the investigation in 1975 and 1976, or at any time until January 1977 when the deputy minister, Vincent P. McCarthy, Q.C., advised Chief of Police Browne that there was no need for any further police involvement. Nevertheless Robert Hillier was told, as I find, that there was "dialogue" with the department and that the minister was out of town. I accept his evidence as to this, and I am of the opinion that consultation with either the chief or the assistant chief by McCarthy is probable and may be inferred. In view of the agreement subsequently reached and referred to in paragraph (h) below, and all the evidence surrounding the matter I find that no such consultation took place by anyone with the minister, then Mr. Hickman. From the evidence given on oath by Robert Hillier, Arthur Pike and Chesley Yetman I find that orders emanating from the chief of police and transmitted by the assistant chief of police caused Robert Hillier to cease his investigation before it was completed, to alter his report and to write that of December 18, 1975 and that of March 3, 1976 under direction to exclude all allegations of sexual abuse of children at Mount Cashel. The fact that these orders and directions were not effectively

Chapter V

complied with may well have supplied reason for the retention of the reports in the deputy minister's file until January 1977. These orders and directions were doubtless impediments and obstructions to police officers investigating allegations contained in statements appended to the reports; as to whether they constituted the offence of wilfully attempting to obstruct justice is for the law officers of the Crown to determine. It should be borne in mind that John Lawlor transmitted to Vincent McCarthy reports in which Hillier had left abundant allegations of sexual abuse.

(d) Why and at whose direction the police reports dated December 18, 1975 and March 3, 1976 were prepared.

The reports in question were prepared because of a complaint received from Mrs. Carol Earle in respect of alleged injuries to her son Shane, and reports by Mrs. Alice Walters of Social Services and Dr. Paul Patey of the medical faculty of Memorial University as a result of an examination of Shane Earle at the Charles A. Janeway Child Health Centre, both in St. John's. No citizens complaint form has been found and there is no record of the complaint in the occurrence book kept at the material time in the police station on Water Street. The facts are that the text of Hillier¹'s first report (but not the appended statements of complainants) was destroyed by him when ordered to make alterations deleting from it reference to allegations of sexual abuse. Its successor of December 18 was the result of this order. To the extent that it was an edited version of the one destroyed, it was prepared by direction of the chief of police, otherwise by Detective Hillier under compulsion of his interrupted investigation. The report of March 3, 1976 was prepared by Hillier as a result of the same direction, and since he was

The Questions in Article I

advised that it was for the use of the Minister of Justice it was in due course addressed to him. Other than this evidence, which I accept, there is none. One can speculate that the report of March 3, which was a supplement only to the report of December 18, was required for ongoing discussions with Brother McHugh and his advisers, and for communication to the minister by the deputy minister if considered necessary at any future time, but no definite answer can be given.

(e) Whether either or both police reports contained sufficient information to cause the Royal Newfoundland Constabulary to swear informations alleging breaches of the Criminal Code against any person or persons.

As indicated above the two reports must be read together because that of December 18, 1975 had appended to it all of the statements of the Mount Cashel boys interviewed by Detectives Hillier and Pitcher upon which further comment was made in the report of March 3, 1976, but which itself contained only the statement of Brenda Lundrigan, the report of Dr. Paul Patey and photographs of injuries to Shane Earle. All those members of the Criminal Investigation Division of the Royal Newfoundland Constabulary and of the Royal Canadian Mounted Police to whom questions on this point were put were of the opinion that the police officers who responded to the complaint of December 7, 1975 and were armed with the statements obtained in the course of the following ten days, had reasonable and probable grounds to swear informations in the course of laying charges for breaches of provisions of the *Criminal Code of Canada* against some Christian Brothers named in the reports. Commission co-counsel share this view with me, but it must be borne in mind that under policies established and accepted

Chapter V

by both the "criminal side" of the Department of Justice and the police, this was a case of more than ordinary proportions, and the laying of charges was subject to approval by the prosecutors. A reversal of this policy, as noted earlier in this report, occurred only in early 1989. It is clear that the information contained in each report was such as to ensure that charges would be laid sooner or later as transpired in 1989. The answer must be an unequivocal affirmative.

(f) Whether the police reports were received and acted upon by officials of the Department of Justice and if or (*sic*) whether the files were handled in the normal manner.

Assuming that the word "or" should be "so" I must find on all the evidence that the police reports in question were received and acted upon by only one official of the department, he being the deputy minister. This evidence is to the effect that there was no category of confidential files in the department, that the file in question was created by Mr. McCarthy, and because it never reached the file registry in the department at any time when it was active, cannot be considered to have been handled in the normal manner as described by the witness Brenda Chancey. After the appointment of McCarthy to the District Court the evidence indicates that the file, without the police reports, was in place in some filing cabinet on the fifth floor of the Confederation Building, was available for inspection and was seen by Judge Hyslop. Prior to that time I find that it was kept in the deputy minister's office and was not available, and I rely on the testimony of Madam Justice Noonan in this respect. The action taken by the deputy minister, being the only official of the department who took any at all, is referred to again below; but his handling of the file was not normal.

The Questions in Article I

(g) When, how and by whom this file was concluded and which person or persons in the Department of Justice, the Royal Newfoundland Constabulary or elsewhere were responsible for this action.

The file entitled "Mount Cashel re Child Abuse"⁹⁷ was "concluded" by a letter from Vincent P. McCarthy, deputy minister, dated January 26, 1977, to Chief of Police John R. Browne, marked "personal and confidential", returning the police reports of December 18, 1975 and March 3, 1976, enclosing copies of letters received from Brother G.G. McHugh and the Reverend Dr. Thomas A. Kane and ending, "in view of the action taken by the Christian Brothers further police action is unwarranted in this matter". Any further action taken involved the removal by Browne of McCarthy's original letter from the file containing the reports. The reports were found and produced to Superintendent Power in 1989 by Sergeant Leonard Clowe in charge of records at headquarters, who testified that the file on Mount Cashel came into records in the 1970's, containing the Hillier reports but without any correspondence. It must accordingly be assumed that Browne destroyed the confidential letter written to him by McCarthy, since the commission's investigators were assured by the chief's widow that he had no such paper at home at the time of his death.

(h) Whether any bargain was made by any person acting on behalf of the Crown or the police with any member or members of the Irish Christian Brothers or any other person not to proceed with criminal charges and, if so, the terms of such bargain.

It must be assumed that the word "bargain" is used in its

Chapter V

most comprehensive sense in the terms of reference; the primary current meaning according to the *Oxford English Dictionary* is "an agreement between two parties settling how much each gives and takes or what each performs and receives in a transaction between them; a compact". The evidence given by Brother **G.G. McHugh**, then Provincial Superior, and at the time of testifying on December 14 and 15, 1989 Superior General of the Congregation of Christian Brothers, was to the effect that after flying to Newfoundland and being apprised by Brother Nash of the police investigation he remained passively in Brother Rice Monastery in St. John's waiting for a summons, and in due course having received a telephone call from a woman advising him of an appointment with the Deputy Minister of Justice, he went to an office in the Confederation Building accompanied by Brother Nash, "because he had been involved with this situation from the beginning". Brother McHugh must speak for himself as to what happened at this meeting as he answered the questions put to him by **Mr. Day**:

"Q. Describe what happened during the meeting.

A. We entered and Mr. McCarthy received us graciously. We sat down and after very brief pleasantries about maybe the weather or something of that nature, he proceeded immediately into the purpose of the meeting. He said that you are aware obviously of the investigation that is going on and that a report had been presented to him and the evidence in the report gives indication of sexual abuse, incidents of sexual abuse.

Q. By whom?

The Questions in Article I

A. By the two brothers. Q. Against whom? A.

Against children at Mount Cashel. Q. Was that stated by Mr. McCarthy to you?

A. I cannot say whether he stated that specifically, certainly I would have that knowledge.

Q. That was the impression he left?

A. That is correct. He indicated at that time that no charges would be laid at that time and that the report would be placed in the file. That's the substance. Then he said that, he told me to transfer the two brothers from communities in Newfoundland to elsewhere within the Canadian Province."

The rest of his evidence as to this meeting left the impression that the two Christian Brothers acquiesced in the direction given to them, Brother McHugh saying "when that suggestion or direction was made I accepted it I suppose as probably part of normal procedure in dealing with situations such as this ...". They then left the meeting, McHugh advising the deputy minister of the treatment facilities available to the implicated Brothers and feeling that the decision to lay charges was held in abeyance, although leaving his auditors at the subsequent meeting with officials of the Department of Social Services with the impression that no charges would be laid. Before leaving the transcript of the evidence I should reproduce the questions I asked of the Superior General and the answers which he gave at the end of his testimony:

Chapter V

"The Commissioner:

Brother McHugh, I had some questions I was going to ask you mainly about the rather graphic phrase you used when you said you waited in the monastery for the other shoe to drop. Now the impression I have is that you went to St. John's after being advised by Brother Nash and did not pursue the question which was giving you great anxiety but waited to be advised by someone as to what was going to happen. Is that the case, and were you waiting to be advised by Mr. McCarthy for instance?

A. I was waiting for a development, and I could not tell what the next step would have been. I certainly felt that since the situation was in the hands of the police there was nothing I could do.

Q. The impression that must arise from that is that someone other than you was busily canvassing the situation perhaps on behalf of the Congregation. Have you any knowledge of that?

A. I have no knowledge whatsoever."

As previously remarked the head of the Constabulary, by then J.R. Browne, was not advised about charges until January 1977, and after Mr, McCarthy had perused the letters from the treatment centres to which the two suspects first removed from Mount Cashel had been sent, and upon receipt of which he wrote "in view of the action taken by the Christian Brothers further police action is unwarranted". The

The Questions in Article I

transaction from McCarthy's point of view was, I infer, to have Brother English and Ralph moved from the province. There could be little doubt of the sufficiency of the evidence and prosecutorial discretion exercised in their favour, openly and at the time, would have been a clear travesty of justice. It was in the power of the Provincial Superior to assign them to other duties in the religious province outside Newfoundland, and to do it naturally and at once. Therefore there was agreement as to the terms of the transaction: their removal on the one hand, and the suspension of charges on the other, with the likelihood of them ever being imposed remote once the two had left the jurisdiction. No doubt Brother McHugh assured McCarthy that they would be compelled to submit to treatment as his letter of January 26, 1976 indicates, but it is unlikely that these assurances were required. In the sense that an agreement as to the terms of the transaction was reached there was a bargain made between the Deputy Minister of Justice and Deputy Attorney General of Newfoundland and the Superior of the Canadian Province of the Congregation of Christian Brothers and such were its terms.

(i) Whether any report of child abuse was made to a Social Worker, the Director of Child Welfare or any other official of the Department of Social Services by any person in accordance with the requirements of the *Child Welfare Act*, and if not, why not; if so, was it acted upon?

The first report of child abuse in connection with the investigation of December 1975 was made by Chesley Riche directly and in person to Director of Child Welfare, F.J. Simms, and, on investigation by the district office of the department at his direction, by Mrs. Carol Earle to Mrs. Alice Walters and Robert Bradbury employed as social

Chapter V

workers in that office at Harvey Road. There was an exchange of information between Mrs. Walters and Detective Hillier at least, but the contents of the two police reports in question were not made available to the director when Mrs. Mary Noonan was denied access to them by the deputy minister, an action inconsistent with the normal practice. Additional action taken by the director was to discuss his knowledge of the matter with Brother Nash; no social worker was instructed to make inquiries at the orphanage. In his evidence before the commission Mr. Simms somewhat hesitantly expressed the view that his division was deprived of the power to investigate the condition of his wards at Mount Cashel by the opening of a police investigation. The investigation ended soon enough in all conscience, and the last word heard by the heads of the department [again not the minister] was from the lips of Brother McHugh when he announced the satisfactory termination of the Mount Cashel affair and a new direction and purpose for the institution.

It will be recalled that section 49 of the *Child Welfare Act, 1972* as it stood in 1975 was discussed in chapter II at page 56 and was there set out. Mr. Riche and Mrs. Earle did not fail in the duty to report a complaint of child abuse to the director, but it is clearly arguable that no report was made to him by officers of the Constabulary from those concerned with the investigation up to the chief of police himself, and Mr. Vincent McCarthy, perhaps unwittingly but nevertheless decisively, defied the provisions of section 49 by refusing to give Mrs. Noonan any information at all except that he had dealt with the complaint. Equality before the law applies to duties as well as rights and no one was exempt from the duty

The Questions in Article I

to report a complaint of child abuse to the Director of Child Welfare as required by section 49.⁹⁸

A Way of Life

Mount Cashel under the stewardship of the Christian Brothers is no more. Its demise must to a large extent be attributed to the events described, but it is proper to reflect upon the work there undertaken over ninety-two years and its effect on the life of the community. As an educational institution its reputation was high as befitted the function of an order highly regarded in that field; as a refuge for homeless boys of the Roman Catholic faith it stood alone and in that capacity it must alone be judged from the point of view of social welfare. Many witnesses testified about the debt they owed to it in both characters, and as described above on every commemorative occasion the order was warmly supported by the Government of Newfoundland and Labrador and the people of St. John's. But there was a dark side to the ministrations of the Christian Brothers not peculiar to Mount Cashel. They had a reputation as harsh disciplinarians as well as gifted teachers, and it seems to have been taken for granted in any community in which they served that this was so. I do not mean to suggest that what they did in this province by way of discipline and correction was in any way as extreme as what is reported as having been inflicted by them in Western Australia in the years subsequent

Section 49 of the *Child Welfare Act, 1972* is further discussed in its amended form in chapter VIII at pp. 377 - 381.

Chapter V

to the last World War." The commission was told by Mr. H.V. Hollett, deputy minister in the Department of Social Services from December 1972 to August 1980, who testified on February 26 and 27, 1990, that "physical abuse was part of the way of life of the Christian Brothers". In the course of evidence given on December 8, 1989, Mr. Raymond Joseph Fahey, formerly a Crown prosecutor and in 1969 and 1970, a teacher at Brother Rice and St. Patrick's High Schools, said that he had reason to lodge a complaint about a strapping by the principal of the latter who was a Christian Brother. The offender was a smallish grade nine boy, the offence was trivial and the principal delivered the punishment with great force - his feet leaving the floor - and red-faced with anger. Mr. Fahey told him that he would report the matter to the Roman Catholic School Board and he did with the result that this member of the order did not return the following year, having acquired his position as principal simply because the Christian Brothers would not serve under a layman in that office. This evidence was given in the course of the witness being asked whether he knew of any Mount Cashel investigation, and he said that because of his experience with the Christian Brothers at that time any such report would have made an indelible impression upon him. Mr. Fahey was quick to say that he knew members of the order whom he admired

"Lost Children of (he Empire": Bean, Philip & Melville, Joy. Unwin Hyman Limited, London, 1989.

This is an account of the export of orphans and other children under the auspices of various enterprises of which Dr. Barnardo's Homes was typical. In the case of the Christian Brothers such of their foundations as Clontarf are alleged to have been built by the unrequited labour of the immigrant children in their care. Serious cases of physical and sexual abuse are cited.

The Questions in Article I

and liked but there was an element, of which the teacher in question was an example, which repelled him.

John Joseph Penney testified on June 13, 1990 about his experience as a victim of savage sodomizing by a lay employee at Mount Cashel, a state of affairs drawn to the attention of Archbishop Skinner's secretary in 1954¹⁰⁰ as a result of the misgivings of an R.C.M. Police constable about a complaint of indecent assault on a boy at the orphanage. The boy was evidently Penney who on two occasions gave depositions to Mr. Day and Mr. Home combined into one very moving document¹⁰¹ of his life as a resident of the orphanage from 1951 to 1959. I quote the following brief extract:

"Q. You spoke earlier about 200 or more boys being at Mount Cashel at that time. Of that number of boys, from your general overview of what was going on, how many would be in this circle of homosexual activity?

A. Maybe 5, 6, 7, or 8 maybe. It's hard to tell. I certainly didn't go around and count heads and I, thanks be to God that nobody to my mind, to my knowledge, went so far as to go down to the younger classes. It was strictly amongst peers. For the 200 or so boys there are eleven people in there who had charge of us. They were hard men in that organization. I could accept a Brother's firmness. Most of them weren't over-cruel. Firmness, you know, when your dealing with 200 boys or plus, I forget exactly how

¹⁰⁰ Exhibit C-0535.

¹⁰¹ Exhibit C-0536.

Chapter V

many, you had to be a little firm. You were outnumbered 20 to 1 or something on that scale. There is no doubt about it. There had to be discipline and firmness. I accept that. But the cruelty from a couple of Brothers, you know, it still stays with me, and like I say, some of it happened to me and some of it happened to other people, and that's the only reason why I came forward to make sure, if at all possible, to make sure it doesn't happen again."

Again former Christian Brother and Mount Cashel superintendent John Francis Barron told the commission that before he took charge, and while living there under the superintendency of Brother Murray between 1965 and 1968 he one day discovered, crying in a corner, a boy who complained of a Brother "touching" him. Barron took him to Murray and the offending Brother was on an aircraft that night for treatment in Ontario. Not surprisingly, no charges were laid, and there is no record of any report to the child welfare authorities, but Barron said that Murray showed exceptional sympathy with the victim and comforted him.

I am aware of the distinctions that have been drawn throughout the commission's inquiry between physical and sexual abuse of children, and there is no doubt that there is also a link and that sadism is historically a sexual aberration. The allegations by men who were formerly children under the control of the Christian Brothers in Mount Cashel, if true, indicate conduct not only not confined to isolated instances of child abuse but the existence of a morbid condition of many years standing.

Chapter VI: Child Welfare

Mandate and Method

Article II of the terms of reference required the commission to "inquire into the then prevailing policy or practices of the Department of Justice and the Department of Social Services with respect to allegations of physical or sexual abuse of children" and then to make findings under three heads:

- "(a) whether there was a policy or practice of suppression of such allegations where the alleged assailants agreed to leave the Province of Newfoundland, and, if so, whether such related solely to the incidents at Mount Cashel and, if not, for how long that policy continued and to what extent was it applied;**
- (b) if such a policy or practice existed, whether it was applicable to areas of the Administration of Justice other than incidents of physical or sexual abuse of children;**
- (c) whether such a policy or practice was justified or appropriate."**

As to the language used I am of the view, with some lexicographical justification, that "policy" means a general plan or course of action to be adopted in this case by the departments named, either acting independently or in compliance with a government plan or course of action, and "practice" in the sense of habitual action means very much the same thing. A refined distinction may be drawn between the

Chapter VI

theoretical element of policy as exemplified by its stated aim and its practical application. As to paragraph (b) it is recognized that the administration of justice is not only confined to the activities of the department most closely associated with it, but in its concern with the enforcement of the enacted law is a function of government as a whole. In approaching the task of complying with the requirements of paragraph (c) care must be, and I think has been taken not to trench upon the jurisdiction of the courts to the extent of inviting consideration of what is found to be unjustified or inappropriate as a criminal offence or tort.

In construing the commission's mandate it was decided that the provisions of article I, paragraph (i) as to the obligation to report incidents of child abuse to the department of social services under the provisions of the *Child Welfare Act, 1972* were relevant to any inquiry into the policy and practice of that department. Furthermore anything calculated to measure the response of the administration of justice to complaints was judged to be material. An inquiry into "then prevailing" policy or practices necessarily involved an examination of their application subsequent to the period of the 1975 Mount Cashel investigation in order to judge how long they prevailed and to what extent they were modified at a later time.

A searching examination of the files of the department of social services at headquarters, regional and district offices in St. John's and in other parts of the province where considered necessary by commission counsel and investigators was combined with the testimony unstintingly given to the commission of ministers, deputy ministers, and assistant deputy ministers with particular emphasis on the work of the child welfare division from the director down to front line social workers, to whom the problem of child abuse had

Child Welfare

caused concern over the fifteen-year period because of its gradual assumption of menacing proportions. Similar inquiries providing a similar response were addressed to former heads, deputy heads and officers of the department of justice. In line with the stated principle that all the evidence given to and gathered by the commission would apply to any part of its mandate, all of what was furnished for the purposes of article I of the terms of reference is applicable where relevant to what is now to be addressed in response to the provisions of articles II and III.

David C. Day, Q.C. and Clay M. Powell, Q.C. co-counsel to the commission, have, in line with their opening addresses classified the narrative evidence called as falling within two phases, phase one comprising complaints of child abuse alleged to have occurred at Mount Cashel Boys' Home and Training School, particularly at the time of the December 1975 police investigation and subsequent thereto for a reasonable period, and complaints of child abuse in Newfoundland and Labrador other than those alleged to have occurred at Mount Cashel as phase two. The presentation of the latter, the burden of which fell mainly on Mr. Day, assisted by Mr. Powell and Miss Sandra Burke, assistant counsel to the commission, commenced on April 5, 1990 at which time he pointed out that phase two evidence would not only provide the basis for answering the questions posed in article II of the terms of reference but provide as well the means whereby the commission could answer the important question posed in article III which reads as follows:

"Whether existing Police and Government Departmental policies are sufficient and proper to prevent avoidance of the due process of law in

Chapter VI

instances of allegations of physical or sexual abuse of children."

In the course of his statement Mr. Day succinctly described the documentary sources examined and where they were normally located:¹⁰²

"3. Potential Exhibits Examined

(a) Sources Examined: Generally

The matters to be examined in Phase 2 evidence originated with files of Department of Justice and Department of Social Services, Government of Newfoundland and Labrador.

Commission Investigators and Co-Counsel examined both concluded and current files generated by each of the Departments.

Department of Justice records examined were files and Departmental index references to files opened in response to allegations of child abuse.

A like examination was made of Department of Social Services files and file indexes.

Included in the examination were all files and file index references, both concluded and current, relating to allegations of child abuse that were opened in the Department of Justice or in the Department of Social Services, at St. John's, from 01 January 1970 to 31 January 1990.

Exhibit C-0406A.

Child Welfare

The examination of these files and file index references was undertaken by Weldon H. Orser and G. Fred Home, Commission Investigators; Herbert A. Vivian, Executive Secretary; Sandra M. Burke, Legal Assistant; Patricia Devereaux, Margaret Linehan, Virginia Connors, Secretaries, and Commission Co-Counsel.

The locations of the Departmental files and file index references that were examined are as follows:

(b) Locations Examined: Department of Justice.

Concluded files - consisting of criminal, judicial (i.e., judicial matters other than criminal) and civil (i.e., other than criminal and judicial) - are in archives (that is, permanent storage) at S. Burnham Gill Records Management Centre, the Newfoundland and Labrador Government's records storage centre, St. John's, or they are in temporary storage at Mount Scio House, St. John's (also the St. John's Crown Attorneys Office), awaiting transfer to archives.

Current files are at the registry, Department of Justice, Confederation Building, St. John's and at Regional Offices of the Department at Harbour Grace, Clarenville, Gander, and Corner Brook.

(c) Locations Examined: Department of Social Services.

Concluded files relating to child welfare are in archives at the Department of Social Services,

Chapter VI

Confederation Building, St. John's and at St. John's Centre District Office, Harvey Road. Concluded District Office files are stored in the respective District Offices. Current Departmental files are at the registry of the Department at Confederation Building and current District files are at the registry, filing room or filing area in each of the District Offices.

(d) Locations Examined: Other

The examination of these files rendered necessary scrutiny, by Commission investigators and Commission Co-Counsel, of:

- (a) files of Royal Newfoundland Constabulary at St. John's and Labrador City,
 - (b) files of Royal Canadian Mounted Police,
 - (c) medical records (particularly, though not exclusively, records of Dr. Charles A. Janeway Child Health Centre),
 - (d) school counsellor files,
- and
- (e) files of the Supreme Court and of the Provincial Court of Newfoundland."

The result of these investigations which proceeded day and night during the course of phase one evidence, and for weeks before the beginning of presentation on April 5, was the compilation of thirty-seven "child welfare profiles" and could

Child Welfare

have resulted in twice that many had time and human resources permitted. Each of these profiles consisted of documentary material to illustrate the investigating of allegations of child abuse. Of these Mr. Day had this to say:¹⁰⁸

"Most documentary evidence in Phase 2 will be presented in bound volumes entitled "Profiles". There are three types of Profiles.

The first type is a Child Welfare Profile, four of which were received in Phase 1 evidence: Exhibits: C-0281, C-0288, C-0294, C-0358.

The second type is a Criminal Investigation Profile; three of which were received in Phase 1 evidence: Exhibits C-0335, C-0336, C-0337.

The third type is a Child Welfare/Criminal Investigation Profile; the first of which involves the family mentioned above.

The title of a Profile depends of whether the state response to a complaint alleging child abuse consisted of: a child welfare investigation (with or without a "wardship" application); a criminal investigation (with or without the "laying" and prosecution of criminal charges); or both,"

A list of these profiles as categorized under "Child Welfare", "Criminal Investigation" and "Child Welfare and Criminal Investigation" is as follows:¹⁰⁴ the initials in brackets identify

* Exhibit C-0460A.

¹⁰⁴ Exhibit C-0531.

Chapter VI

counsel presenting the profiles and leading the *viva voce* evidence which accompanied and explained it and the commission's exhibit number; each profile was accompanied by a prefatory note offering a general explanation of the documents within.

"CHILD WELFARE:

- No.01: The Shane Earle Wardship Proceeding, St. John's, 1976 [Exhibits C-0281, 281A, 281B] (DCD)**
- No.02: The Francis Strickland Baird Proceeding, St. John's. 1976 [Exhibits C-0288, 288A, 288B] (DCD)**
- No.03: Complaints from Mount Cashel Residents, St. John's, 1982 [Exhibits C-0294, 294B, 294C, 294D] (DCD)**
- No.04: Alonzo Corcoran, Marystown-Whitbourne [Exhibits C-0358, 358A] (CMP)**
- No.05: Temporary-Permanent Wardship Proceedings Gander, St. John's, 1972 to 1978 [Exhibit C-0422] (DCD)**
- No.06: Foster Home Care, Mount Pearl, 1965 to 1975 [Exhibit C-0447] (DCD)**
- No.07: Guardianship Proceedings: Punctuality, 1980 to 1982 [Exhibit C-0471] (DCD)**
- No.08: 1980 - 1981 [Exhibit C-0457] (8MB)**
- No.09: 1972 - 1989 [Exhibits C-0458, 458A, 458B] (SMB)**

Child Welfare

- No.10: 1976 - 1989 [Exhibit C-0459] (SMB)
- No.11: Guardianship Proceedings, Reciting the Facts
1979 [Exhibit C-0469] (DCD)
- No.12: Guardianship and Adoption Proceedings,
1979 - 1985 [Exhibit C-0470] (DCD)
- No.13: Institutional Foster Care - Waterford
Hospital - Girls Home and Training School
[Exhibit C-0499] (DCD)
- No.14: Group Home Complaint Regarding Two
School Teachers; 1989 to 1990 [Exhibit C-
0532] (DCD)
- No.15: Foster Home Care For Handicapped
Children, 1971 - 1988 [Exhibit C-0628]
(DCD)

CRIMINAL INVESTIGATION:

- No.01: Royal Newfoundland Constabulary,
St. John's, 1989 [Exhibit C-0335] (DCD)
- No.02: Royal Newfoundland Constabulary,
St. John's, 1990 [Exhibit C-0336] (DCD)
- No.03: Regina versus Ronald Hubert Kelly, Corner
Brook, 1979 [Exhibit C-0337] (DCD)
- No.04: 1985 to 1986 [Exhibit C-0524] (CMP)

CHILD WELFARE and CRIMINAL
INVESTIGATION:

- No.01: 1985 to 1989 [Exhibit C-0423] (SMB)

Chapter VI

- No.02: Rural Community, 1972 to 1973; Rural Community and St. John's, 1982 to 1984 [Exhibits C-0449, 449A, 449B] (DCD)
- No.03: St. John's, 1976 to 1982 [Exhibit C-0455] (DCD)
- No.04: 1978 - 1983 [Exhibit C-0460] (8MB)
- No.05: 1980 - 1984 [Exhibit C-0461] (8MB)
- No.06: 1974 - 1979 [Exhibit C-0462] (SMB)
- No.07: 1976 - 1977 [Exhibit C-0631] (CMP)
- No.08: 1980 - 1983 [Exhibit C-0632] (CMP)
- No.09: 1980 - 1981 [Exhibit C-0463] (SMB)
- No.10: 1980 - 1982 [Exhibit C-0464] (SMB)
- No.11: 1980 - 1985 [Exhibit C-0465] (SMB)
- No.12: Improper Placement of Child For Parenting, 1981 to 1982 [Exhibit C-0472] (DCD)
- No.13: 1986 to 1990 [Exhibits C-0474, 474A] (CMP)
- No.14: 1973 to 1974 [Exhibit C-0482] (DCD) No.15: 1974 [Exhibit C-0484] (DCD)
- No.16: Adoption and Guardianship Proceedings, 1979 to 1981 [Exhibit C-0485] (DCD)
- No.17: Institutional Foster Care - Exon House, 1971 to 1988 [Exhibits C-0496, 496A] (DCD)

Child Welfare

**No.18: Guardianship and Parenting Proceedings,
1976 to 1978 [Exhibit C-0497] (DCD)**

No.19: 1974 to 1990 [Exhibit C-0502] <DCD>"

Child abuse is now classified under three heads; physical, emotional and sexual. In general these three categories have been observed and understood since early times, but certain aspects have not and much research has been undertaken and information disseminated in comparatively recent years. In particular the "battered child syndrome"¹⁰⁵ in the category of physical abuse has been revealed to the medical profession, and with growing clarity, to the public over the course of only thirty years. Sexual abuse, and all its repellant manifestations, has always been with us and in some societies is simply taken for granted. Emotional abuse is common knowledge but its effects are still only emerging from the shadows, and in any event is not referred to in the commission's terms of reference.

In two of the child welfare profiles prepared by the commission the battered child syndrome was discussed by Dr. Teodoro Resales, consultant paediatrician and clinical geneticist at the James Paton Memorial Hospital, Gander, in connection with Child Welfare Profile No. 5, and by Dr. Charles Hutton, chief forensic pathologist for the province and a member of the medical faculty of Memorial University with Child Welfare and Criminal Investigation Profile No. 2. It is briefly described in the opening paragraph of the seminal article by Dr. C. Henry Kempe and his associates in the *Journal*

"Syndrome" in this case means "a combination of symptoms."

Chapter VI

*of the American Medical Association of **July 7, 1962:*** ¹⁰⁶

"The Battered Child Syndrome is a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent. The condition has also been described as "unrecognized trauma" by radiologists, orthopedists, pediatricans, and social service workers. It is a significant cause of childhood disability and death. Unfortunately, it is frequently not recognized or, if diagnosed, is inadequately handled by the physician because of hesitation to bring the case to the attention of the proper authorities."

Professional and public awareness slowly made their way in the course of the next decade but, as will be seen, a sufferer would be fortunate to have had in the year 1972 as perceptive a diagnostician as Dr. Rosales. By saying this I do not mean to disparage Dr. Hutton whose services as a pathologist would have been provided *post mortem*. By 1973 the Director of Child Welfare and Corrections was able to issue as circular no. 29 of that year¹⁰⁷ an apparently authoritative paper setting out typical symptoms of child abuse and recognizable reactions on the part of the abusers. After noting the substantial increase in the number of cases reported he said, "it is not believed that this is indicative of an increase in the incidents (*sic*) of child abuse but rather an increased emphasis on detecting and reporting such cases by doctors, nurses, teachers, welfare officers, and other interested citizens." There is no word about sexual abuse, and the

¹⁰⁶ Exhibit C-0417.

¹⁰⁷ Exhibit C-0043.

circular no doubt reflects revelations in two cases of physical abuse which are the subject of profiles referred to above. As to sexual abuse enlightenment was to be offered in 1975, but to averted eyes.

Administration

I have already referred to the legislative framework provided for the department of social services and the peculiar position, which never seems to have been asserted, of the director of child welfare provided, and not for the first time by the *Child Welfare Act, 1972*. I shall now examine some of the administrative tools which were used during the past two decades. The first and most important was the department's policy manual, chapter two of which was devoted to child welfare and was available to all members of the division and particularly recommended by the director to "field staff".¹⁰⁸ When H.V. Hollett, deputy minister from December 1972 to August 1980 testified to the commission he said that his department had the best policy manual in the government. The section dealing with child welfare must be accorded special importance since regulations under the *Child Welfare Act, 1972* were almost entirely devoted to licensing of foster-homes, and the scale of expenditures permitted for the care of foster-children. Chapter two of the manual was devoted to child welfare and was extensively revised in June 1974. As it then stood with the revisions to the end of 1975 it was entered in evidence¹⁰⁹ in September 1989, and in April 1990, a new "Child Welfare Policy Manual" dated October 5, 1989

¹⁰⁸ Exhibit C-0047.

¹⁰⁹ Ibid.

Chapter VI

and published by the director replaced chapter two of the "Manual of Policy and Procedures" and was offered in evidence to the commission on April 5, 1990, after substantial editing by Mr. Day and the commission staff which was adopted by the division.¹¹⁰ The circulation of information on child abuse in 1973 by the director referred to above is contained in the 1974 revision, as section 227, and the battered child syndrome is explained. It is clear from this section that child abuse at the time meant the physical abuse of children but, as will be seen, in another aspect of the administration the categories of sexual and emotional abuse were well understood. Instructions were apt to be copious but not always effectively drafted. By a revision of November 1977¹¹¹ section 227.7 is introduced as follows:

"The Division of Child Welfare is legally obligated to report all cases of serious child abuse to the Department of Justice; however, in most cases there is considerable consultation between the two departments before any action is taken regarding criminal prosecution, etc. To facilitate the handling of cases involving serious child abuse the Social Worker is now required to report all such cases directly to the Police in writing immediately with copies to the Director and the Regional Director, This procedure should be less time consuming and should allow for a more coordinated approach by the two agencies. A similar policy statement has been provided to the police by the Dept. of Justice. Included in this policy is an instruction to the police to report all referrals of

^D Exhibit C-0414.

¹ Exhibit C-0446, p.7.

Child Welfare

alleged child neglect and abuse to the Social Worker responsible for the area."

In a subsequent revision this section was replaced by the following, where the word "serious" has been underlined:¹¹²

"The Division of Child Welfare is legally obligated to report cases of serious child abuse to the Department of Justice; however, in most cases there is considerable consultation between the two departments before any action is taken regarding criminal prosecution, etc. To facilitate the handling of cases involving serious child abuse the Social Worker is now required to report such cases directly to the Police in writing immediately with copies to the Director and the Regional Director. This procedure should be less time consuming and should allow for a more co-ordinated approach by the two agencies. In serious cases of abuse where the Police are to be advised, Social Workers are required to advise the parents of the child of such action. Where the child is a patient at the Janeway Child Health Centre or is likely to be a patient there, the Social Worker is also required to inform the Child Protection Team of that hospital regarding the involvement of the Police. A similar policy statement has been provided to the Police by the Department of Justice. Included in this policy is an instruction to the police to report all referrals of alleged child neglect and abuse to the Social Worker responsible for the area."

One observes that this revision of February 1979 inserts the words "in serious cases of abuse" so that in the same paragraph the social worker is confronted with "cases of

ⁱ: Ibid, p. 16.

Chapter VI

serious child abuse" and "serious cases of abuse", thus adding to the difficulty of deciding what is serious and what is not, particularly before a medical opinion can be obtained. Words like "serious" and "reasonable" are to be avoided in drafting instructions unless one is prepared to accept confusion arising from individual interpretation of imprecise language. *A fortiori* the same must be said of the meaningless "etc". Certainly the department of social services was getting no help from that of justice in drafting these instructions; what the police received from that department is not in evidence, but one hopes that it was not left to the individual officer to decide without further guidance what was to be considered serious, and therefore requiring a report, and what was not. As to precision or style of drafting in the policy manual of 1989 little comfort can be derived from the opening statement in section 220 - child in need of protection - under number 221 which reads as follows:¹¹³

"221 Purposes

The Department of Social Services has the legal mandate to intervene in situations where children may be in need of protection as defined in Section 2(a.1) of the Child Welfare Act. The paramount consideration in a determination under this Act is the best interests of the child as per (Section 2.1(1))."

It is not the department of social services but the director of child welfare who has the "legal mandate" under part II of the act, properly cited as the *Child Welfare Act, 1972*; "as per

Exhibit C-0414. p. 17.

(Section 2.1(1))" would make any draftsman shudder, missing bracket and all.

Recommendation 1:

Policy manuals and directives should be drafted in precise language, avoiding the use of terms which do not give clear direction to field staff in departments doing work such as is undertaken by that of Social Services avoiding the use of expressions such as "etc", "serious", and "reasonable".

Proof of the child welfare division's awareness of the significance of sexual and emotional abuse of children may be found in the case of the "child abuse registry" widely referred to as such, although for the sake of accuracy the word "register" should be used. The documents prepared by the staff of the commission refer to it as "the Central Recording System of Child Abuse" a name which presumably has no official currency. In any event it was a record started informally by Sheila Devine and Neil Hamilton in 1973 originally on cards, then in a series of books and again on cards becoming more sophisticated as to classification as the years passed. It was recognized as the responsibility of the assistant director of child welfare and the provincial coordinator of child protection services to preserve it and keep it confidential, but was only used for statistical purposes and its ultimate purpose is still under consideration. The *Report of the Committee on Sexual Offences Against Children and Youths* appointed by the Minister of Justice and the Minister of National Health and Welfare of Canada - known

Chapter VI

for convenience and in recognition of its chairman as the Badgley report - has this observation at page 567."⁴

"Child Abuse Registers

The central child abuse registers are files containing vital information concerning child abuse cases occurring within a given province. Registers, or analogous record-keeping systems, are authorized by the child welfare legislation of eight provinces: Newfoundland, (sic) Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. Rather than legislating the establishment of a single, central register, Prince Edward Island's Family and Child Services Act, S.P.E.I. 1981, c.12 s.45(2)-(3) requires individual care-providing facilities to maintain registers containing the case histories of children receiving services, recorded in a manner specified by regulation. Child welfare legislation in New Brunswick, the Yukon and the Northwest Territories contains no provisions for establishing registers."

Unfortunately Newfoundland has no authorization in its child welfare legislation for such a register and consequently the division has no funds for the employment of a computer as a more convenient way of storing the information received in increasing volume from year to year. Mrs. Catherine Whitten, the present co-ordinator, testified to the commission on May 24, 1990 and said that the functions listed on page 568 of the Badgley report reproduced in the commission's

Exhibit C-0446, p.51.

Child Welfare

document as providing information for research, monitoring the management of cases, assessing the potential risk of child abuse, and "checking" that new cases have no outstanding court orders against them, were not applicable to the register in her custody and it is regrettable that this important record is not deployed for these purposes.¹¹⁶

Two forms in constant use by the child welfare division in recording movements of children in care and how they were getting on in their foster-homes were and are the "child placement report" and the "child progress report". The former, somewhat misleadingly, was completed and filed not only for placement in a foster-home but for every movement back and forth, and in the case of admissions to a hospital and discharge therefrom, and of course transfers from one foster-home to another. In the latter case the foster-parents were required to report on the progress of their foster-children every six months to a social worker who completed the form. A significant exception to this rule was made in the case of Mount Cashel where progress reports were not required - perhaps "expected" is the right word - to be completed until the child in care was about to leave, although in 1978 Neil Hamilton and Brother Bucher reached agreement on a form specially designed for the Mount Cashel ward. The policy manual required "social histories" to be completed for every child taken into care. This was a document which the Christian Brothers insisted on being supplied with before a placement was made at Mount Cashel. All documentation for

⁵ Ibid, p.52.

" I am advised by counsel (David C. Day, Q.C.) that the child welfare division of the department of social services is at present seeking legislative sanction for the register.

Chapter VI

wards of the director placed at Mount Cashel went direct to him in the period under review.¹¹⁷

Under section 630 of the policy manual headed "Office Records and Procedure", as notified in revision no. 208 of February 1975, the following appears:¹¹⁸

"635 Retention and Disposal of Records .1

Retention Period

The retention periods for records in field offices are given in Appendix C. Records should be destroyed as soon as possible after the expiry of the retention period. It is suggested that a schedule for the "weeding" of case files and the destruction of other records be set up in each welfare office with the object of doing the job on a continuing basis rather than as a special project. A record should be kept of what is destroyed each month. This should include the file number when the complete file is destroyed and the starting and ending numbers when a group of files are "weeded".

.2 Method of Destruction

The Social Worker will be responsible for ensuring that records are burnt, shredded or otherwise destroyed to prevent their falling into the hands of unauthorized persons."

George Pope said in his evidence that this direction from the

¹¹⁷ Exhibit C-0445.

¹¹⁸ Exhibit C-0306.

Child Welfare

field services section of the policy manual was still in force unamended when he retired in 1988. The retention periods for records in field offices, as set out in its appendix C, indicate that in most cases the maximum period of retention is the life of the file plus three years. An exception is made in the case of index cards which are to be kept "indefinitely", although the appendix does not indicate their use. The forms appearing under the subheading " Child Welfare" are "affiliation agreement", "application for admission to care" and "application for child". All of these have a life of file plus three year deadline for destruction. Of the two vital forms - child progress report and social history - referred to above there is no mention except as to the child placement report which in note five to appendix C attracts the following observation: "Keep the latest report. Others may be destroyed."

To be sure these are instructions for field offices, may not apply to district and regional offices and almost certainly do not apply to departmental headquarters. Nevertheless I had the impression that much was left in these areas to the discretion of the individual executive. If the instruction as to child placement reports is one of general application there is some danger of losing vital documents which in a given case may serve to reconstruct the administrative process when it is most needed for historical or investigative purposes. For instance H.V. Hollett expressed the opinion that social histories of children taken into care were fundamental, and should not be destroyed.

It is therefore recommended:

Chapter VI

Recommendation 2:

That existing policy dealing with the destruction of files in the Department of Social Services be reviewed to ensure that the social history of children taken into care, child progress reports and child placement reports, be preserved indefinitely for investigative and historical purposes on a confidential basis in the custody of the Director of Child Welfare subject to such confidentiality and exemption from the application of the *Freedom of Information Act* as the minister may deem proper acting on the director's advice.

Mount Pearl: A Decade of Foster Care

In the summer of 1964 Dereck O'Brien briefly became the head of a family consisting of himself and two younger brothers. At this time he was still four years old and did not become five until October. His parents simply walked out of their lodgings in St. John's leaving the three little boys with a comatose grandfather who spent his time in a back room surrounded by bottles. Dereck discharged his first responsibility by begging food from neighbours and was soon mercifully apprehended by agents of the director of child welfare together with his brother Ronald, one year younger, and his brother Roy, then only seventeen months old. They were taken to a foster-home on the south side of St. John's where they stayed for almost a year during which time the St. John's Family Court made an order of temporary custody in

Child Welfare

favour of the director of child welfare which was renewed until finally culminating in orders of permanent wardship. The boys were then transferred to a foster-home on Norma's Avenue in Mount Pearl on June 23, 1965 as a result of an application by a husband and wife who owned a bungalow there for status as foster-parents so that they could provide companionship for their adopted son and the prospective foster-mother could comply with a doctor's opinion that she needed to have children to look after. The adopted son was in fact their grandson whose mother, their daughter, also lived in the house and was employed. I have already referred to the evidence of Dereck O'Brien in connection with his visit to Harvey Road with Brenda Lundrigan and Johnny Williams in 1974. He gave separate evidence on September 26, 27 and 28, 1989 as to his experience as a foster-child and ward of the director and particularly in the house at Mount Pearl where the O'Brien boys spent four and a half years in the case of Dereck and Ronnie and longer in the case of Roy. Their father had seen Dereck once on the railway tracks when the boys were on Southside Road on what must have been Dereck's fifth birthday. After that he did not see his father until 1976. Referring to Norma's Avenue in Mount Pearl, Mr. Day asked:

"Q. In general terms, would you describe what life was like in that foster home? In general terms first.

A. It wasn't good at all. I have got no good memories at all."

There then ensued evidence which it is safe to say electrified Newfoundland and profoundly disturbed those who observed

Chapter VI

it in other parts of Canada. Those who listened in the almost palpable stillness of the hearing saw a young man describe treatment so cold and inhuman as to call into question the sanity of the foster-mother who administered it and of the foster-father who abetted her when he was home from work. In the course of telling the commission how he and his brother Ronnie and two other children lived in the basement in all weathers, were allowed upstairs in the house to eat meals of scraps standing up at a table or if there was any infraction of discipline from a plate without utensils on the basement stairs, called by the names of dogs - Fido and Bowser and so forth - and insensately beaten for little reason and sometimes no reason at all, the witness speaking in a low and muffled voice frequently broke down altogether. The effect of Mr. Day's examination, gentle but insistent, was to heighten the tension of the audience physically present, as well as those surveying the scene from the remotest parts of the country. I quote a sample of this terrible testimony.

"Mr. Day:

Did you ever receive any explanation from your foster-mother about why you were treated as you are describing to us this afternoon? Did you ever get any sense of anything she said as to how she felt about you?

The Witness:

She didn't care. She told us that we were kids that nobody cared about, and the government was paying -- I don't know if she used the word government, but that somebody was paying her to care for a couple of kids that nobody wanted.

Child Welfare

- Q. That nobody wanted? A. That's right.
- Q. Do you recall a specific occasion involving a problem which your brother Ronnie had with his skates one winter day while you were in this foster-home?
- A. Yes, I do.
- Q. Tell the Commissioner about it.
- A. She used to let us go skating on the street. There wasn't many cars. Maybe she was hoping there would be, but there was no cars used on the street, but it wasn't busy, so we would put on our skates and skate up and down the road, and I remember we were finished skating and we were cold and we wanted to come in. So I went up to the door and knocked on the door and asked if myself and Ronnie could come in and she said "No, stay outdoors," and I told her, I said, "Ronnie is complaining of cold feet and his skates are starting to hurt his feet and he wanted to come in a take them off." And she said, "No, go outdoors until I call you in," Well eventually she called us in and we went downstairs to take off our skates.
- Q. Downstairs where?
- A. In the basement. And I had to put my brother's laces in my mouth so I could get the ice off them so I could get them untied, and when I did his little feet were blue.
- Q. How blue?

Chapter VI

- A. Very blue, and I put them under — I put his feet under my shirt to try to warm them.
- Q. Did your foster-mother find out about the condition of your brother Ronnie's feet at this time?
- A. No, I don't think she cared. She never made any attempt to come down and see how we were,
- Q. Was there a bathroom in the house, this house that you lived in as foster-kids for four years in Mount Pearl?
- A. Yes, there was a bathroom upstairs.
- Q. Were you allowed to use it, Mr. O'Brien, while you stayed in that house?
- A. Sometimes.
- Q. And when you weren't, what did you do then?
- A. She would give me some paper in my hand.
- Q. She would put what in your hand?
- A. Some toilet paper in my hand.
- Q. And?
- A. Point me to the front door.
- Q. And?

Child Welfare

A. And say, "There's the dump up there. If you want to use the washroom, go up there."

Q. What time of the year -- what season of the year would this type of event happen to you?

A. It didn't really matter. I remember going both winter and in weather like outside today.

Q. Do you remember where the dump was in Mount Pearl at that time, Mr. O'Brien?

A. Yes, I do.

Q. Where was it?

A. I would go up Norma's Avenue, and there was another street right across it. I don't remember the name of it. I would walk, I would turn left onto that street, and then I would turn right and walk in towards wherever was the reservoir.

Q. You say you were living in the foster-home on Norma's Avenue in Mount Pearl?

A. Yes.

Q. Would you tell the Commissioner about the distance you would walk with the toilet paper given you by the foster-mother in order to get to a private place to use the washroom?

A, I wouldn't be able to give you a time. But for a small kid it seemed like forever. Sometimes it was dark.

Chapter VI

Q. Would this request to use the washroom — or I suppose more accurately, relieve yourself in the dump, be made other than during the night time?

A. No, because I would use the washroom at school, and in the summer time I played baseball, Little League Baseball, and there was a change room and a bathroom and that at the park, and I would use the washroom there.

Q. Where would you go in the dump area to relieve yourself?

A. I would just walk in the road until I thought nobody could see me.

Q. Might the washroom in the house where you were staying have been out of order on occasions when this happened?

A. No, she just wouldn't let me use the washroom. I never knew why.

Q. What about your brother Ronnie? Did he ever have to visit the dump?

A. Not that I can remember.

Q. Did you ever soil your clothes when you were a young person, either for some medical reason or because you never quite made it to the dump?

A. Yes, I did.

Q. How did the foster-mother treat you when that happened? Or, more to the point, when she found out that that had happened?

Child Welfare

A. She'd let me stay there in my soiled clothes for a while until she figured I'd learned a lesson.

Q. Where? Where would you be?

A. In the basement, and she would take us to the washroom, or take me to the washroom, sorry, take my clothes off, and put me into a bath of ice cold water, and she would keep me there.

Q. Take your breath away?

A. Yes.

Q. How long would you be kept in the bath of cold water?

A. Until I was really cold and she came back and decided, "Okay, you can get out."

Q. Do you know whether she ever observed you from a distance after she had put you in a bath drawn of cold water?

A. I think she used to go out of the bathroom and just go around the corner and look in to make sure that I wouldn't get out.

Q. Were you allowed to drink sanitary water in this house?

A. No.

Q. What did you drink in place of sanitary water, Mr. O'Brien?

A. I'd drink water from the basement floor.

Chapter VI

Q. What about Christmas time in each of the years that you were in this foster-home? Treated a little better perhaps?

A. That was no different than any other day.

Q. Where would you spend Christmas Day?

A. In the basement."

Little Roy O'Brien was housed upstairs and did not apparently occupy, at that time, any of the bunk-beds in the basement constructed for the other foster-children. But he did not escape chastisement since he, like them, was constantly hungry and constantly trying to steal food. In his deposition he was naturally less able to recall the events of the four-and-a-half years before Dereck and Ronnie were transferred to another foster-home in O'Donnells and finally to one at Admiral's Beach where they stayed until going to Mount Cashel in 1974. After a prolonged search and much reluctance to testify to the commission Roy O'Brien gave a deposition to Mr. Day on April 20, 1990 in St. John's.¹¹⁹ On the subject of the Mount Pearl foster-home he was asked and answered thus:

"Q. In a general way describe what it was like living at the foster home in Mount Pearl?

A. Well now I know things, I raise animals, my animals live better than I did or anybody else in that place did actually. We had no toys, no

Exhibit C-0437.

Christmas, never ate at the supper table, never eaten chicken like what [name deleted] and their family had; what was thrown in the garbage used to sneak upstairs in the night time and steal stuff out of the cupboards to eat and it was very abusive.

Q. In what way?

A. I got a lot of beatings."

Although his infantile memories of this period were naturally less vivid Roy O'Brien, generally speaking, corroborated what Dereck and Ronnie testified to. That part of his deposition recalling the visits of social workers is instructive:

"Q. You told me a moment ago that social workers came from time to time and for that purpose you were dressed up and you got a bath and you ate at the table on the night before the worker came.

A. And in the morning before she got there.

Q. Do you remember how long before the day of the social workers visit you knew the worker would be coming? Obviously it was at least the day before because you would get your bath and you would eat your supper that night with the family. How long before would it be the night or two days before or a week before or longer than that that you knew, Roy O'Brien knew, that the social worker was coming? She just didn't arrive by surprise?

A. No.

Chapter VI

Q. And your foster-mother knew that she was coming?

A. I would guess yes.

Q. How long before as you remember?

A. Maybe a week before I guess.

Q. Do you know how she found out?

A. No sir I don't.

Q. Now when the social worker came to the house did you ever talk with the social worker on your own?

A. I can't say I have no.

Q. Did she ever speak to you and say Roy how are you making out? How is school? How are you being treated here? Were you ever asked questions like that?

A. Not that I recall no,

Q. But you may have been?

A. It's a possibility.

Q. Do you remember ever having said to a social worker who was there I'm not being treated very well at this place? Did you ever tell a social worker that you weren't being treated very well?

A. Not to my recollection no.

Q. And why did you not complain? A.

Probably scared."

Carl Edward Mallard, now a carpenter living in Alberta, listened one night to a Canadian Broadcasting Corporation programme televising part of Dereck O'Brien's evidence while switching to indignant denials by the foster-mother, and decided he had to come forward. He testified to the commission on May 2, 1990 and confirmed in moderate language, all the more impressive for that, what the O'Brien brothers had said, both expressly and by supplying details of his own experience. Denial to the children of the use of the lavatory seems to have been capricious but enforced as often as not, and Carl Mallard described one of his own frustrated attempts to secure its use with the result that he was kicked downstairs by his foster-father and involuntarily defecated as a result. The Mallard children had been taken into care because of family circumstances and had not been subjected to the neglect of the O'Brien boys; indeed their father would come every week to visit them. When asked if he had ever complained to his father or anybody else of the treatment in the foster-home he gave Mr. Day the following answers:

"Q. Did you complain to either of them about the events you are now describing this afternoon?

A. No I didn't.

Q. Why did you choose not to do so?

A. I'm not quite sure to be totally honest.

Q. Did you tell anybody?

Chapter VI

A. No.

Q. Is there a particular reason why you did not?

A. Well like I say, it wasn't until this past few years I actually realized that I was abused. It was just that I thought we were just bad kids and that we deserved to be punished like that."

Carl Mallard had the same difficulty that Dereck O'Brien had in giving his evidence; in the midst of unperturbed recollection of the events at Norma's Avenue he would break down, recalling for instance being kicked downstairs and hearing the screams of children being punished. When he left Mount Pearl and went to a new foster-home at St. Vincent's in St. Mary's Bay he said on February 17, 1970 - a date he would never forget - it was like going to heaven and the children there, and there were many of them, were well treated and with love and understanding. Dereck and Ronald O'Brien had been removed to a foster-home at O'Donnells in St. Mary's Bay on July 31, 1969 and evidently spent an agreeable year there until the illness of the foster-mother compelled another move to foster-parents at Admiral's Beach. Here they were happy until they were placed in Mount Cashel at the beginning of 1974.

Even more dramatic than the appearance of Mallard as a corroborating witness was that of the Mount Pearl foster-parents adopted son who had been much disliked by the foster-children because of the favours he received and the brutalities he was encouraged by his parents-cum-grandparents to inflict. He gave solid support to the stories told by the O'Brien's and by Carl Mallard. He felt his own birth out of wedlock had precipitated the whole foster-home performance;

Child Welfare

although glad to have the companionship of his foster-brothers, he felt that this experience instead of enriching his life had stultified it. At the height of the foster-home activity he thought "about eleven" children were in the three-bedroom bungalow house at one time, and records of social services indicate at least ten. The visits of welfare officers, as they were called when the home was first licensed, were well advertised ahead of time; they were brought by Bugden's blue taxis - as he recalled - which would wait in the driveway for their conclusion. According to this witness the idea of additional quarters in the basement was suggested by one of them. Dereck O'Brien had been his contemporary and a potential friend, but his grandmother would not permit any friendship to exist, and had indeed described Dereck simply as "passing through". She herself he believed had been a victim of child abuse and would not allow the children to be happy; it was wrong to be that. Dereck he said was a little boy, not saucy and no trouble.

Although Roy O'Brien, being the youngest, did not at first share the indignities and discomforts of the basement, it can be maintained that he was the principal sufferer among the O'Brien boys from the treatment he and others received. Whereas Dereck and Ronald were able to recover their emotional stability in the humane atmosphere of their St. Mary's Bay foster-homes, Roy was left behind in Mount Pearl until 1972 when he was ten years old and then placed in two foster-homes in succession of which no placement records apparently exist. In 1973 he was taken back to Mount Pearl from where he had only briefly escaped. By this time he had become a problem; withdrawn and generally hostile, he showed all the symptoms of a deprived childhood. Again he went on his travels, first to the United Church Receiving

Chapter VI

Home on Hamilton Avenue and finally in March 1974 to Mount Cashel Boys' Home and Training School. Here he remained until 1978 when an unsuccessful effort was made to place him with his father in Toronto, an experiment lasting only three months; he returned to Mount Cashel of his own volition. From there he was expelled at the age of sixteen and placed on behalf of the director in a juvenile detention centre at St. John's from which he was discharged a year later. Roy O'Brien said quite candidly in his deposition that he had been pushed through various grades at school and had never really progressed beyond grade six. He now lives and works hard in British Columbia as a logger.

Not the least astonishing part of this story is how and why the department of government concerned, and particularly the director of child welfare and his staff, allowed it to happen. In the first place the foster-home at Mount Pearl was constantly overpopulated, not only in fact but in relation to its licensed capacity. It is easy enough to blame the overpopulation on the greed of the foster-parents, but the grandson's opinion - not to be treated lightly - is that social workers were only too prone to overload it. If this is so it may explain to some extent fulsome praise lavished on the foster-parents, and particularly the foster-mother, by a succession of reporting social workers. I can do no better in approaching this subject than to quote the note prepared by Mr. Day and commission investigator W.H. Orser which effectively summarizes what the documents included in the child welfare profile say at length. It will be appreciated that because of the appearance of practically everyone concerned at hearings of the commission, and the wide publicity given to

Child Welfare

the story, there is some ambivalence in the editing and few of the usual deletions appear in the text:¹²⁰

"The index cards opened and maintained on this foster home from 1965 to 1975, in addition to listing the 46 children in the Director's care and custody who were placed there on his behalf during that ten year period, containing entries summarizing assessments of this foster home by Department of Public Welfare (from 1970: Department of Social Services and Rehabilitation; from 1972: Department of Social Services) as follows:

12-6-67: There are presently 4 children in this home. A report on sleeping arrangement has been requested.

12-7-67: Sleeping arrangement satisfactory. Home relicensed for 4.

4-7-68: One of the very best homes.

20-10-69: Excellent home.

27-10-69: Re-licensed to care for 6 children.

14-5-70: Continuing to provide excellent care & service for all their children.

6-4-71: W.O. feels this is an Excellent F.H. Children receiving lots of love & care.

8-5-72: Exceptionally good foster home, according to Welfare Officer,

¹²⁰ Exhibit C-0447, pp. v - viii.

Chapter VI

20-7-73: W.O. maintains this is an excellent home & all children placed here improve greatly.

2/10/74: W.O. will keep close supervision on this home with the hope to reach the high standard it has previously been noted for.

4-4-75: Due to problems experienced between foster parents & foster children in this home W.O. recommends that the home of Mr. & Mrs.be closed.

Besides the index card entries there were, up to and including 20 July 1973, reports by several Welfare Officers which expressed the opinion the home provided excellent foster care.

One of these reports, dated 14 May 1970, stated in part:

There are seven children in the ... Foster Home. Although the home is licensed for six children, the seventh was placed there on an emergency basis.

I am pleased that Mr. & Mrs. ... are continuing to provide excellent care and service for all their foster children.

On 13 April 1973, however, Bernadette Walsh, a Welfare Officer doing child welfare work at a community District Office, prepared for the Director a "Narrative Progress Report" on Son 1 and Son 2, who then resided in a foster home at a rural Newfoundland community. Information from Son 1 and Son 2, summarized in her Report, was critical of the quality of foster care they had received in the urban foster home. The Report stated, however, that in the opinion of Son 1 and Son 2, their brother Son 3 (then residing

Child Welfare

for a second period at the Mount Pearl foster home) was "quite happy living there." On the basis of every reasonable inquiry and search by Commission Investigators, there is no evidence there was any response by the state to this Report.

On 09 August 1975, Welfare Officer P. [Patricia] Roberts from St. John's District Office visited the urban foster home. That visit, and her resulting report dated 27 August 1974, initiated a series of events which ultimately resulted in all foster children being removed from the home by 26 February 1975, and the foster home licence for the home being revoked on 12 May 1975.

Commencing in or about 1976, efforts by the foster parents, including contact with staff in the office of the Premier of Newfoundland, to have their residence re-licensed as a regular foster home were unsuccessful.

On 12 April 1976, the Minister of Social Services R. Charles Brett wrote:

12/4/76:

This is a good report [referring to a report dated 02 April 1976 to the Director from Sharron Callahan, the Child Welfare and Corrections Supervisor at St. John's District Office] & Mrs. Callahan should be complimented.

I have never doubted the wisdom of our staff in recommending that Mrs. ...'s licence be suspended.

No further action is required."

Notable and perhaps unusual in the story of this foster-

Chapter VI

home during the decade 1965 to 1975 is its apparent immunity for most of that period from anything but the most perfunctory inspection. This was clearly contrary to the policy of the department of social services, but the practice may well have been lax particularly at a time when professionalism had not reached the level of self-consciousness prevailing in later years. It is true that the report of Bernadette Walsh (now Myers) in April 1973 stated that Dereck and Ronald recalled the four years they spent at Norma's Avenue as "the unhappiest in their lives". Walsh continued as follows:¹²¹

"Apparently, Mrs. Dinn often mistreated the boys and they felt she was a very cruel, heartless person. She often beat them with sticks and belts, often made them stand to eat, forced them to go outdoors to use the bathroom rather than let them use the indoor bathroom, etc.. The boys recently visited the home to see their brother, Roy, and they now feel she must have changed over the years because Roy is quite happy living there. However, they still find it very difficult to forget all of the unhappy incidents which occurred while they were living in this home and, while there, they stated for the first time in their lives they experienced the powerful emotion of real hatred."

At first glance one might conclude that Roy O'Brien's apparent contentment had caused an analyst of this report to discount the sincerity of his brothers' complaints, but as Mr. Day and Mr. Orser pointed out in their prefatory note to the profile there is no evidence that any recipient of Bernadette

Exhibit C-0447, p.31.

Child Welfare

Walsh's narrative progress report took any action. The only indication that this warning from St. Mary's was perused at all is a misleading alteration of the date of Ronald O'Brien's birth to make him a twin of Dereck's, and it is unlikely that this emendation in pen and ink was made by the author. It was not until August of 1974, when there were only five foster-children in the foster-home that the discerning eye of Mrs. Patricia Roberts, a welfare officer working from St. John's district office, detected flaws in the foster-mother's methods of raising young children, and her report to Jerome Quinlan, regional administrator at Harvey Road, countersigned by Catherine Cahill her supervisor, provoked a cautious note from Mr. Simrns, the director, saying'

.122.

"I believe that some way must be found to point out to Mrs. Dinn where she is going wrong without stirring up a scene. There appears to be very little doubt that she provided a satisfactory service in years past and we need that kind of service now."

But the tenacity of Mrs. Roberts, supported by her supervisors, was rewarded a year later. All the children at Norma's Avenue were withdrawn and the licence revoked.

Ibid, p.44.

Chapter VI

Child Welfare Profile No. 5: A Battered Child in Central Newfoundland.

The documents in this case¹²³ were introduced to the commission by Mr. Day offering them in evidence, and calling to testify Dr. Teodoro Resales whom I have already referred to. A graduate of the University of the Philippines College of Medicine in 1963, Dr. Resales was awarded his fellowship in paediatrics by the Royal College of Physicians and Surgeons of Canada in 1972, having in the meantime interned at the South Buffalo Mercy Hospital in Buffalo, New York and performed his residency in paediatrics at the Children's Hospital in the same city. A post-doctorate fellowship at the same hospital led to his appointment as senior paediatric resident at the Izaak Walton Killam Hospital for Children in Halifax, and then to the chief residency in paediatrics at the Dr. Charles A. Janeway Child Health Centre in St. John's. Thereafter, as has been observed, he transferred his practice to Grand Falls and Gander, with the exception of two years spent as a fellow in paediatric genetics at McMaster Medical Centre in Hamilton, Ontario, beginning in 1980.

Dr. Resales testified on April 5 and 6, 1990. He said that the child in question had been referred to him in 1972 when he was working with Dr. John C. Crosbie in a travelling clinic. When first seen he was an eleven-month old baby undernourished and with a short left leg. He was admitted to the Central Newfoundland Hospital in Grand Falls. Dr. Resales, who had had some experience of the syndrome while

Exhibit C-0422.

Child Welfare

in Buffalo, at once suspected he had a battered child on his hands and had him transferred to the Janeway Child Health Centre where the diagnosis was confirmed and the director of child welfare informed. Extensive x-rays revealed nineteen "old" and recent fractures including a serious one of the head and of the left femur which caused the shortening of the leg and was more than thirty days old, whereas a fracture of the right parietal bone in the skull was recent. In his opinion, and in that of the experts at the Janeway, these were caused by the jerking down and twisting of joints in the arms and legs and the damaged vertebrae from dropping. While the child was in St. John's, Dr. Rosales reported by telephone his case as a suspected battered child to the Gander district office of the department of social services. This was on December 19 and on December 21 a social worker visited the mother, recently married and arrived in Newfoundland from Nova Scotia; she had been carrying the child when she was married and biologically he was not the son of her husband. The wife was very nervous, talkative and defensive and was again pregnant. She was reluctant to talk about her husband who did not appear, and seemed more concerned with the possibility of being blamed for her child's injuries than with the injuries themselves. This led to a report on January 4, 1973 saying that "things are not right in the ... household" and a second home visit was projected "when it will be arranged that both [husband and wife] are at home".

A somewhat different comment was made two days later by a public health nurse to a social worker at the Central Newfoundland Hospital, describing a visit when she found the stepfather at home. She reported him to be "a very carefree sort, at times on social assistance and at present drawing unemployment insurance". A less favourable impression was

Chapter VI

produced on the child welfare worker who originally interviewed the mother, but she concluded her report of January 10, 1973 as follows:

"worker has not found sufficient evidence in her home visits to the [mother and stepfather] to either confirm or negate the suspected battering of [the child]. For this reason, Worker recommends that [the child] be returned to his parents, under close supervision by this department and by the medical profession."

124

The district supervisor was a co-signatory of this document.

On January 10 the child welfare worker in question sent a copy of her second report to Dr. Rosales which must have crossed in the mail a lengthy and specific letter to her from the doctor, reiterating his belief as to the cause of the child's injuries, strongly recommending placement of him in a foster-home and suggesting in the last resort "very close supervision by your department" if the child had to be returned to his family. Copies of this letter were sent as a matter of course to the referring doctors and to "Mr. Simms, Dept. of Child Welfare". On January 30 a departmental officer swore an information and complaint before Magistrate C.C. Stone in Gander, the child having been taken into care by the director on January 23 while in hospital. The application was under the *Child Welfare Act, 1972*, section 10 (1) to have him declared neglected. It was heard by Magistrate Stone in the court of summary jurisdiction at Gander on February 8 and on March 12 an order was made denying it and ordering the child returned to his mother. No reasons were given.

I have read what purports to be a record of the evidence,

Exhibit C-0422, p.13.

Child Welfare

only a crude summary of the proceedings but sufficient to establish the fact that Dr. Resales gave full and detailed testimony about the child's condition including his opinion that *inter alia* his legs had been deliberately twisted to cause fractures, which was rejected in the face of the evidence of the mother herself and her mother-in-law. No doubt there was a magisterial policy that a family should be kept together but such a decision pondered for over a month and rendered in the teeth of expert evidence, so conceded by the respondent, is mystifying. Both the minute of judgement¹²⁵ and the summary of evidence signed by the magistrate and dated May 24, 1973 are department of justice documents and there is no indication that section 12 (7) of the statute reading, "An order made under Section 15 shall recite the facts so far as ascertained in an investigation under this section and the Judge shall deliver a certified copy of the order to the Director" was complied with.¹²⁶ The Crown was represented not by counsel but by the child welfare worker who had sworn the information. One must assume that the practice which prevailed later of briefing Crown counsel where an application of this nature was brought and contested was not in place in 1973.

The matter might well have ended there but, as Dr. Resales pointed out, his partner in the treatment of diseases of infants and children in Grand Falls, Dr. John C. Crosbie, had friends in high place. On March 13 the day after Magistrate

Ibid, p.24.

Section 2 of the *Child Welfare Act, 1972* under which the application in this case was expressed to be brought defines in paragraph (1) thereof "Judge" as meaning a judge of a Family Court of a Juvenile Court or a Magistrate.

Chapter VI

Stone's decision, the two doctors wrote a joint letter to the Honourable AJ. Murphy minister of welfare, in terms of studied moderation as follows:¹²⁷

"We have been informed on March 12, 1973 of Magistrate Stone's decision on the [...] case to return the child to the care of the parents. We don't know the details of the basis of the decision, and although we do not disagree in principle to this decision, our own feeling is that the case did not get the proper attention and expertise by those individuals and departments concerned.

A case such as this, in our understanding and experience requires a very thorough evaluation of all its home, social and psycho-emotional facets under the supervision of the Department of Welfare which unfortunately (*sic*) had not really been done here. The two reports of the social worker (who subsequently resigned from the department right in the middle of this case) who worked on this case initially are really the only so called home, social and psycho-emotional evaluation done by the Department of Welfare on its own and how the social worker arrived at her recommendation in her second letter (January 10, 1972) is beyond us.

We thought that a magisterial inquiry might bring in more substantial information and also more concern on the part of the Department of Welfare to bring forth more information, but from what we can gather, the social worker and/or the local welfare office in Gander had not done much more to get other information which had bearing on the case such as medical and psychiatric evaluation of the parents.

Exhibit C-0422, p.25.

Child Welfare

One of us (T.O. Resales) when called forth to give the medical testimony at the local magisterial hearing felt that the seriousness and implications of the medical evidence presented did not seem to have registered fully to those concerned.

The very absurdity of some of the questions asked concerning the medical evidence seemed to indicate that the medical evidence presented was not really comprehended.

It also seems that even after the magistrate's decision was made a specific formulation of the follow-up of the case has not been made.

In conclusion, we reiterate that we do not disagree in principle with the decision made on the case, as the primary aim in cases like this is to rehabilitate the home and safeguard the welfare of the child, but we feel the efforts made by the individuals and departments concerned in this case to evaluate all the factors amounted to really just an exercise in ignorance and conclusive evidence of our antiquated approach to child abuse."

Copies of this letter, signed by both physicians, were sent to the Honourable Dr. G. Rowe, Minister of Health; to the Honourable T.A. Hickman, Minister of Justice; Dr. John Darte at the Janeway Centre and its administrator Mr. Kelland, as well as the Gander welfare department, thus saturating the target, but producing only one ministerial reply given by Mr. Hickman on March 20 addressed to Dr. Crosbie expressing his concern that the welfare of the child might be in jeopardy and advising him of further action to be taken. In this connection he wrote to Mr. Murphy on March 20 advising him that Mrs. Mary Noonan had been assigned the

Chapter VI

case, and on March 23 a notice of appeal was filed by her in the Supreme Court of the province.

In the meantime the house to which the child had been returned was closely supervised by child welfare workers instructed by Sheila Devine and Neil Hamilton for the director, but the first favourable reports became by June 21 more sombre, and a new child welfare worker warned against ruling out the danger to the child because of the refusal of the step-father to be present at any visit, and finally and in consequence the refusal of the mother to allow him entry. This report, co-signed by the district supervisor recommends removal of the child and concluded: "even though there is no concrete evidence worker feels that the possibility of child battering does exist". At length in June the appeal was heard and Puddester and Higgins, J.J. gave judgement committing the child to the care and custody of the director of child welfare for a period of six months, Puddester J. saying, "in the result, then, we feel that in the circumstances of the case and on the evidence the Magistrate should have declared the child to be a neglected child within the Statute".

Mr. Day's prefatory note of what transpired thereafter may be considered sufficient, and reads:

"As a result of the Supreme Court's judgement and subsequent Orders made by Magistrate Stone under The Child Welfare Act, 1972, the child remained in the Director's care and custody: temporarily, until 11 October 1974, and permanently, from that date; and resided in a succession of foster homes in Newfoundland.

On 29 March 1978, following two attempts in Alberta to do so, the child was successfully placed for adoption in Newfoundland.

Commission Investigator W.H. Orser has been unable to locate any person who can say or any document which states that the police were ever requested to conduct a criminal investigation into the circumstances that resulted in the child being initially committed to the Director's care and custody on 22 June 1973."

On April 28, 1990 the mother, now remarried and living in Nova Scotia, at the request of commission investigator G. Frederick Home made a deposition before a notary public of that province saying:¹²⁸

"At no time while I was a resident of Newfoundland and at no time since my relocation from Newfoundland back to the Province of Nova Scotia was I ever contacted by a member of the Royal Canadian Mounted Police or any other police department and asked whether my son had been physically abused by me or my husband or by anybody else* In fact, no policeman has ever contacted me at any time or in any place about the injuries which Dr. Rosales told me that my son had."

There is no evidence that police were ever informed by the director of child welfare and rehabilitation or any of his agents of the plight of this child and the inescapable conclusions flowing from it. At the end of Dr. Rosales evidence before the commission I suggested to him that this was a case of torture, and he agreed.

Exhibit C-0444.

Chapter VI

A Battered Child on Conception Bay

Contemporaneous with the story of Dr. Rosales' patient was that of a little girl who was not so fortunate and who never reached her fourth birthday. She was born in July 1968 as the first child of the marriage of her nineteen-year old mother and twenty-year old father living in the area of Conception Bay, both unemployed and supported by state social assistance. She was her mother's second daughter, the first having been born out of wedlock and I shall refer to them as did counsel as daughter 1 and daughter 2. A son was born in October 1971 - son 1 - and in August 1974 the family unit was completed by the birth of son 2. Almost from the beginning of her short life daughter 2 ceased to thrive and was bedridden. When taken by her mother to a local hospital she was at once transferred to the Janeway Child Health Centre in St. John's with the observation that her difficulties might be due to scurvy. The Janeway Centre's records contain the following descriptive note:¹²⁹

"She was a 3V6 year old child lying quietly with her legs and arms flexed and would wimper and cry when only slightly touched. Her head had numerous small bruises and lumps and her face was covered with scratch marks and a few bruises resembling impetigo. There were some glands in the neck. The chest was clear. The cardiovascular system nomral. (*sic*) Eyes, ears, nose and throat normal. Abdomen revealed softness, liver and spleen were not felt and there was a fullness in the left flank in the left renal area. Examination of the limbs showed that all four limbs had small bruises and deformities and there was small

Exhibit C-0449, p.4.

fluctuant swellings over the right elbow and a deformity of hard callous formation in the left leg."¹³⁰

The conclusion of this report, styled "discharge report" signed by Dr. R.G. Dominic, who testified to the commission, concluded: "... it was our impression that this child had severe malnutrition, septicemia with septic arthritis and fractures. She did not respond to treatment and died on April 3, 1973. Death was due to septicemia with multiple abscesses of the scalp, pharynx, lungs and kidneys."

Dr. Hutton performed the autopsy pursuant to an order by a stipendiary magistrate obtained by two R.C.M. Police officers one of whom was the then Constable W.H. Orser. The doctor gave extensive evidence to the commission of his findings on May 3 and 4, 1990 illustrating on a medical model some nineteen fractures sustained at different times, and giving his opinion that the child had probably never walked and had spent most of her life in severe pain. These fractures were characteristic of injuries due to blows, twisting of the limbs and, as to a fracture of the femur, indicative of great force. Fractures of the ribs were apparently caused by a sharp object. He gave sworn evidence at the magisterial inquiry conducted in May and its concluding paragraph reads:¹³¹

"In my opinion this child died of a septicemia with staphylococcus aureus. It was quite evident that the bacteremia seeded colonies of staphylococcus to the lungs, kidneys and bones. The fracture sites were excellent areas to promote and acute osteomyelitis

¹³⁰ This entry is quoted exactly as written,

¹ Exhibit C-0449, p.42.

Chapter VI

because of the pre-existing damage and hemorrhage. The site of the original abscess in all likelihood would be either the scalp abscesses or the retropharyngeal collection. It is my opinion that the histological findings at the sites of fractures are consistent with a repair process of not less than two weeks duration. There was a remote fracture of the left femur which I think was of approximately a years duration. I cannot conceive to this child receiving these four recent fractures as the result of one incident. Fractures of this nature would create extreme pain."

The witness said that nowadays he would simply say "homicide".

All the proceedings in this case show that from the note of the referring physician at the local hospital to the last word given by Dr. Hutton in his evidence at the inquiry, local reports of spankings, radiologists notes of "repeated insults", and observations of consultants illustrated the nascent awareness of the battered child syndrome falling short of the full appreciation of its significance which now prevails. Indeed there is one document among the medical records, a blood bank and cross-matching chart¹³² on which the words "battered child syndrome" are clearly visible. Dr. Dominic testified that his suspicions at the time were confirmed, but they only appear to have been noted in an "impression" on March 31.¹³³ The effect of professional caution at the time was principally felt by the police. In their testimony given at the magisterial inquiry the R.C.M. Police officers involved in investigating the family did not say that there was any

¹³² Exhibit C-0449B, p.21.

¹³³ Ibid, p. 14.

Child Welfare

evidence of violence, or indeed of other than normal chastisement, nor could the child welfare worker who taxed the father with "rumours that he used to beat the child", do other than accept his denial. He was not entirely convinced, however, but felt obliged to conclude his sworn evidence as follows:¹³⁴

"Although [the parents] said they did not beat [daughter 2], it seems unusual that they did not notice her slow development but according to them she had problems since birth and the doctors did not do anything about it. From my visit I saw no indication of neglect and home conditions appeared to be quite normal."

Nurses at the local hospital testified that they were not impressed by the attitude of the mother who seemed "not overly concerned" about the child. But when the admitting physician from the Janeway Centre told the inquiry "I could not say that these injuries could be the result of child abuse. It is possible for these fractures to have been caused by falling off a chair", it is not surprising that the magistrate - evidently the third who had presided - concluded "circumstances are suspicious but that is all".

In the reports of the R. C .M. Police during the investigation conducted immediately following the death of daughter 2 the following appears under an entry for April 25 when two officers reviewed the autopsy report with Dr. Dominic: "he was quite satisfied with the final diagnosis "septicemia" which resulted from "Osteomyelitis" thus leading to the bone fractures. Again on April 26 the investigating

Chapter VI

officer reported that Dr. Dominic at the Janeway Centre had stated "that in his opinion it was not a matter of ill-treatment nor neglect on the part of the ... family." Although Dr. Dominic testified to the commission that he had been misunderstood by the police, this communication from the Criminal Investigation Branch of "B" division in St. John's, when the complete file of the investigation was forwarded to the deputy minister does not seem unreasonable: "When first reported this incident seemed to have all the earmarks of child abuse and/or neglect. However the subsequent medical opinion supported by the autopsy report revealed that death was due to disease. Our investigation has not uncovered any evidence of foul play or negligence and further police action is not deemed necessary." In his evidence Dr. Hutton indicated that if at the time the police had asked the "manner of death" as well as the "cause of death" they might have received a different answer. But they had been told that child abuse was a possibility, and they had seen the ghastly catalogue of injuries in the autopsy report.

During the period of the police investigation the division of child welfare had launched an investigation of its own after receiving a report from the social service department of the Janeway Centre. On April 10 Neil Hamilton, for the director, asked the local welfare officer for a written report and on April 14 received one to the effect that "generally the home situation is very good" and that no evidence of neglect could be uncovered. The husband had admitted that there were rumours that he beat daughter 2 but described them as false. The worker reporting said that the "circumstances surrounding [daughter 2]'s death is a matter for the police and/or for the medical people." The author of this report was the same representative of the child welfare division as

Child Welfare

testified at the magisterial inquiry. No further child welfare documentation appears until 1979. Then it was the turn of daughter 1.

Beginning in August 1979, and as a result of rumours of violent treatment of his family by the husband and manifestations of concern about the safety of daughter 1, instructions proceeded from the office of the director of child welfare and rehabilitation to investigate and report the domestic situation. Still dependent upon social assistance, the husband resented any inquiries and displayed no interest in the education of his children. He was thought among the neighbours to be beating both wife and daughter, but as to the latter both husband and wife demurred. An examination for daughter 1 at the Janeway Centre was recommended by a local physician. A great deal of daughter 1's trouble was attributed to discord between her mother and father. Although no physical evidence of abuse was found, social workers took an unfavourable view of their attitude and of the standard of housekeeping so that informal supervision was maintained.

Then on November 29, 1982 the girl's "homeroom" school teacher noticed marks on her body, and, after talking things over with the child, received an allegation of physical assault. The guidance counsellor at the school reported the complaint to a social worker at the district office and daughter 1 was apprehended on behalf of the director at the school and placed at Presentation House in St. John's. From there she was moved to a licensed foster-home in a rural community and wardship proceedings were commenced on December 7. The husband was arrested and charged by the R.C.M. Police with assault causing bodily harm to daughter 1 and after remand

Chapter VI

was admitted to bail.¹³⁵ In the meantime the R.C.M. Police constable who had observed the autopsy performed by Dr. Hutton on daughter 2 in 1973, being now sergeant in charge of the detachment with jurisdiction, had been called by a child welfare worker involved in the case of daughter 1. Sergeant Orser - for it was he - and a member of his detachment started their investigation of the allegation of child abuse on December 1, 1982, and examined the child welfare and social assistance files at the department's district headquarters. No medical history for daughter 1 was disclosed, but there was a great deal generated by the death of daughter 2 almost ten years before, including the discharge report from the Janeway Centre communicated to the local hospital and sent to the department of social services. The police file had been destroyed, but the department of justice supplied what papers were needed to enable Sergeant Orser to consult the chief forensic pathologist Dr. Eric Pike, who was of the opinion that daughter 2's death was due to child abuse. In search of a second opinion Orser was advised by Drs. Hutton and Cooper of the Janeway Centre to consult Dr. John P. Anderson of the Izaak Walton Killam Hospital for Children in Halifax.

After a conference of senior department of justice and R.C.M. Police officers, Sergeant Orser was authorized to proceed to Halifax and present the case to Dr. Anderson. By this time the two police officers had taken statements which were indeed more positive than anything that had been said in 1972, Dr. Hutton informing Orser by letter that "it is my considered opinion that in reviewing the history and the autopsy report that this is a 'battered child syndrome'¹". Dr.

¹³⁵ In spite of the official attempt to substitute the cumbersome term "judicial interim release" the public cling to the simple and historic term "bail".

Child Welfare

Dominic wrote: "After examining the child on admission and noting the multiple bruises and fractures it was my impression that this child was suffering from a case of 'battered child syndrome'. I have reviewed the chart again and the various reports and I still maintain that the findings are compatible with battered child syndrome." He had also taken statements from the mother's two sisters, a sister-in-law and grandmother. On December 20, 1982 the mother and father of daughter 2, dead since April 3, 1972, were charged with criminal negligence causing death under section 203 of the Criminal Code, and on January 4, 1983, Dr. Anderson, having been visited by Sergeant Orser and supplied with the admission records of the two hospitals and a copy of the autopsy report by Dr. Hutton, transcripts of the magisterial inquiry conducted in 1972 and January 1973 copies of x-ray photographs of daughter 2 and original photographs of daughter 2, with Dr. Hutton's letter to Orser, delivered his report on January 4, 1983. His findings should be quoted in fairness to those who played their parts ten years before:¹³⁶

"I have spent several hours reviewing all these documents and have come to the following conclusions:

- 1. The actual cause of death was cardiac arrest following acute septicemia, multiple foci of osteomyelitis, and multiple abscesses of lungs, kidneys, the retropharyngeal area, and the scalp.**
- 2. There was no biochemical or x-ray evidence of underlying rickets, scurvy, or any metabolic bone disease.**

Exhibit C-0449, pp.115 - 116.

Chapter VI

3. The child was, in my opinion, physically abused on multiple occasions. This opinion is based on Dr. Heneghan's report and my review of the x-rays with a staff radiologist at the Izaak Walton Killam Hospital for Children. This evidence leads me to conclude that there were remote (greater than one year), recent, and very recent (less than 2 weeks) fractures, some of which are typical of those seen in the battered child syndrome (due to traction and/or shearing forces causing metaphyseal fractures: reference enclosed).
4. This child was also grossly malnourished as judged by the description by attending physicians, the photographs taken at the autopsy, and the growth chart.
5. It is my opinion that this child must have been in severe pain on several occasions extending over a year with untreated fractures, such as the fractured left femur. She probably never walked because of the fractures and associated pain.
6. The attending physician at the Janeway, Dr. Dominic, wrote on March 31, 1972:

"Impression - Multiple bruises and deformities of limbs most likely as a result of battered child." I have seen no reason to doubt his opinion on first seeing this child.¹³⁷

⁷ Exhibit C-0449B, p. 14.

7. On transfer to I.C.U., a physician with the initials "A.N.", perhaps for "A. Nethercott", has stated: "Summary: Probable battered baby syndrome."¹³⁸

In my opinion, this child was physically abused on multiple occasions by a person or persons unknown to me and she was grossly malnourished at the tune of death.

I feel that this was a case of "battered child syndrome" which only came to light because of the severe septicemia from multiple sites of bacterial abscess and osteomyelitis requiring emergency hospitalization."

It will be noted that finding number one as to the cause of death is indistinguishable from the findings expressed at the Janeway Centre in 1972, although Dr. Anderson's opinion as to what produced this result is uncompromising.

While the two boys continued to live with their parents the Unified Family Court of the Supreme Court of Newfoundland made an order committing daughter 1 until June 30, 1983 to the care and custody of the director of child welfare as a neglected child, and a further order to investigate the circumstances surrounding her for report not later than May 2. Then on June 13 an order for temporary wardship was made in the same court in respect of sons 1 and 2, but provided that the two boys continue to reside with their parents under the supervision of the director, and further ordered that they be included in the assessment order respecting daughter 1.

Ibid, p.25. There is an additional unattributed impression at p. 12: "probably battered baby".

Chapter VI

Finally, on August 30, 1983, some six months after the mother and father had appeared to answer the charge of criminal negligence causing death, the preliminary hearing on that charge opened in the Provincial Court in St. John's to which the proceedings on consent of counsel had been removed. On the subject of the difficult decisions which had to be made as they unfolded, the Crown Attorney who prosecuted was good enough to testify to the commission.

Seamus Bernard O'Regan - now the Honourable Mr. Justice O'Regan of the Trial Division of the Supreme Court of Newfoundland - testified to the commission on May 7, 1990 and gave valuable evidence as to the conduct of the case in which he appeared for the Crown. This was provoked by a remark which I let fall on a previous day when my eye fell upon a letter written to the officer in charge of the Criminal Investigation Branch, at "B" Division, R.C.M. Police dated October 10, 1983, principally to convey Mr. O'Regan's gratitude for the good work of Sergeant Orser. At the beginning of this letter the following paragraph¹³⁹ appeared:

"As you are probably aware, the charge against Mr. was dismissed and his wife, , pleaded guilty to the included offence of assault causing bodily harm. We accepted the plea on the lesser charge, due mainly to the fact that our subsequent investigation revealed that the child was at the hospital some three days before treatment was commenced and that was certainly a contributing factor to the death of the child. Although in law the party causing the injuries would still be responsible for the ultimate death, we felt that under the circumstances that if the matter

Exhibit C-0449A, p.269.

proceeded to a jury trial, that the jury would return with the lesser and included offence."

A brief description of what transpired at the beginning of the preliminary hearing and during subsequent developments will serve to introduce Mr. Justice O'Regan's explanatory analysis.

The prosecutor had under his hand the expert evidence of Dr. John P. Anderson and the highly incriminating statement of the sister of the accused wife. After leading the evidence of Dr. Anderson before Provincial Court Judge Seabright he called the wife's sister who stubbornly maintained that the statement she had given to the police was "all lies". Mr. O'Regan put it to her almost sentence by sentence and, although at one point she broke down, she continued to maintain this position even when counsel forcefully pressed her as to violation of her oath. There was then an adjournment and on the following day this accused who, with her husband, had elected to be tried by judge and jury, with consent of Crown counsel re-elected to be tried by a magistrate sitting alone and the hearing preliminary to trial on the charge of criminal negligence causing death was converted, also on consent, to a substantive trial before Judge Seabright, to whom she pleaded guilty of the lesser and included charge of assault causing bodily harm to daughter 2. After ordering a pre-sentence report Judge Seabright remanded her for sentence to October 7, 1983 and in due course sentenced her to two years imprisonment in Her Majesty's Penitentiary. No evidence was offered against the husband at the preliminary hearing, and he was discharged. Subsequently the charge of assault causing bodily harm to daughter 1 against him was disposed of in the same manner.

Mr. O'Regan, as senior Crown attorney, had been

Chapter VI

associated with Sergeant Orser from the beginning of the investigation; as he pointed out the charge was laid at the earliest opportunity so that the investigation could continue and he had drafted it himself, the practice at that time being for the police to consult the Crown attorneys on charges of major crimes. He had two accused to be tried together, always a source of difficulty. He was faced with his only witness considered able to bring home the charge to the accused being hostile, and was particularly concerned to obtain a conviction to assist the department of social services in dealing with the surviving children. If the judge presiding at the preliminary hearing were to find that there was insufficient evidence before him upon which a properly instructed jury could convict and dismissed the charges, he was not satisfied that the minister in his capacity as Attorney General of the province would prefer an indictment. Then if there were to be a jury trial the witness said he was doubtful that the jury would convict because of a defence which would inevitably be raised on the grounds that hospital treatment or the lack of it had been responsible for the child's death, however bad in law that defence might be. When the conviction had been obtained and the sentence of two years imposed he had felt a great sense of relief. He had not acted on the appeal, having been appointed to the bench, in the meantime, and he did not, as one might expect, make any comment on its result. It must be noted that on January 26, 1984 the Court of Appeal allowed the mother's appeal of sentence, varying it to six months imprisonment and three years probation during which she was bound to submit to psychiatric assessment and treatment. The sentence of the court was delivered by Mifflin, C.J.N. who emphasized the

importance of rehabilitation and had this to say in the course of delivering oral judgement:

"On October 7, 1983 the learned Provincial Court judge stating that "as a result of beatings or as a result of injuries, a child who was born to you has died" sentenced [the convicted mother] to two years in jail. The evidence, however, does not disclose that the child died as a result of injuries inflicted by [the accused mother], nor did she plead guilty to that offence. She pleaded guilty to assault causing bodily harm, and she must be sentenced for that offence."

The maximum sentence for conviction for the offence of assault causing bodily harm provided at the time in the Criminal Code was five years imprisonment.

The resolute action of the director of child welfare and rehabilitation in the case of the surviving children has already been described and the division has to this day been closely associated with their welfare both as wards and in the field of extended care. They have suffered much, and their plight, as a result of a devastated childhood of physical violence meted out by a near-retarded father to his wife and them, is well described, as might be expected from her record of compiling lucid and authoritative assessment reports, by Marilyn McCormack, senior court counsellor of the Unified Family Court, in her report ordered by the Honourable Madam Justice Cameron and submitted on March 14, 1983,¹⁴⁰ a social document of a high order.

In the course of his evidence Dr. Hutton, who performed the autopsy on the little girl whose sufferings are here briefly

Exhibit C-0449A, pp.353 - 367.

Chapter VI

recorded, said that had she survived she would have been a helpless cripple.

Cases of Sexual Abuse

The reporting of sexual abuse cases tends to involve a selection of the sensational over the routine; it is the sensational case which tests policy and practice to the utmost, and generates revisions of policy manuals, circulars and other forms of instructions and guidance to departmental workers in the field. For insight into day to day routine of a department the most important witnesses are those who have had the longest continuous experience of its work. Three former ministers, two former deputy ministers, two former assistant deputy ministers and a former director of child welfare and his successor all assisted the commission with information and recollection but because of their long association at the helm of the child welfare division the testimony of Frank J. Simms, director of child welfare from 1971 - 1989 [with the exception of a year in 1984 - 1985], of Sheila Devine as assistant director of child welfare from 1971 to 1983 and again from 1985 - 1987 becoming assistant deputy minister in that year and holding office until January 1990, and of Neil M. Hamilton who was at divisional headquarters from 1966 - 1979 as welfare officer, child care and protection officer - now social services programme coordinator - and for two separate periods acting assistant director of child welfare, were of exceptional importance. In the last case the fact that Mr. Hamilton became in October 1975 supervisor of child welfare in the St. John's district office, and later in 1983

Child Welfare

district manager of the new St. John's East office, had not diminished his grasp of essential problems and current policies of the division.

At another level former deputy minister H.V. Hollett said that former assistant deputy minister George Pope was *the* authority on child welfare in Newfoundland. Furthermore all along the line from the Confederation Building to Harvey Road and to the rest of the fifty-two districts in Newfoundland and Labrador the story, in many cases heroic, of the record of this embattled division, and the documents which have escaped the "weeding" process of destruction have been sought and assembled by the commission's investigators, analyzed by counsel and presented systematically to the commission in public hearings for the greater part of their continuance. When the hazards of investigation by men and women engaged in child welfare work, apprehending children in need of protection and supervising households whose heads often live on social assistance, and devote a large part of that to the consumption of intoxicants of one kind and another, are considered, it is remarkable that no trace can be found of any policy or practice of suppression of the mounting numbers of complaints of child abuse. Apparent exceptions to such a conclusion are those cases where the administration of justice was responsible for a decision that prosecution should not proceed on the basis of evidence given by reluctant children, sexually abused by a parent with the predictable result that the fragile family bond would be irretrievably broken, or by child welfare workers who foresaw all their hard work devoted to keeping a family together to go for nought if primary emphasis were put upon an isolated case of abuse in an otherwise stable and affectionate environment.

Chapter VI

An example of the former is child welfare and criminal investigation profile no. 5¹⁴¹ where an R.C.M. Police officer recommended against laying charges of indecent assault against a father because the child complainant, who had originally told a story of sexual abuse to her guidance counsellor at school, recoiled from the idea of testifying in court against him as one she believed to be "sick" and in need of help and treatment. Several examples of this, in so far as the child welfare division did not choose to involve the police, were brought to the commission's attention and one - child welfare profile no. 6¹⁴² - has been described at length. In one case, in a northern community, child welfare and criminal investigation profile no. 1, the child welfare supervisor was so concerned with the problem of keeping the family together through mediation of marital difficulties of the parents that, over the protests of a subordinate worker whose efforts had uncovered a serious case of physical abuse of the children by the mother, for a perilous period she refused to apprehend them and the Constabulary were finally called in by that worker to assist.¹⁴³ But although motives in these cases may be questioned, no instances of suppression of allegations of physical and sexual abuse of children of the type contemplated in article II of my terms of reference, namely as consideration for an offender leaving the province, have been encountered. Indeed in examining these episodes one is often moved to sympathize with the moderation and compassion of many a hard-worked, over-burdened child welfare worker in trying to

¹⁴¹ Exhibit C-0461.

¹⁴² Exhibit C-0447.

¹⁴³ Exhibit C-0422.

Child Welfare

keep together a family threatened by drinking and violence, an objective which has provoked advocacy and approval in the highest quarters.

Another example of the sort of problem which is at once appealing and frustrating to a sensitive administrator was presented by Miss Burke to the commission, investigated by Mr. G. Frederick Home, as child welfare and criminal investigation profile no. 10. It also illustrates aspects of law enforcement of significance outside the range of child welfare. The complainant was a married woman and the mother of four children, the eldest of which, child 1, a girl, was born out of wedlock, not her husband's child but subsequently adopted. When child 1 was sixteen, she told her mother who had left her husband because of his drinking and had taken her children with her, that she, child 1, had for four years been sexually fondled by her father at night when he was drinking. In November 1980 the mother reported this to a social worker at the local district headquarters of the department of social services. After hearing the story and interviewing child 1 at school the social worker recommended that "this Department should not take legal action or have a police investigation into this as it could result in further emotional problems for child 1". It was hoped that the family would be reunited and continued "monitoring" was recommended. Nevertheless the director's office referred the matter to the department of justice, pointing out that there had been no sexual intercourse or abuse of the other three children, two boys and a girl. An associate deputy attorney general sought the opinion of senior Crown counsel who considered that the "allegations made by the child constitute gross sexual misconduct on the part of the parent". He further expressed the view that if the family were to reunite

Chapter VI

the possibility of child 1 returning to it was highly dangerous, and recommended that the matter be referred to the R.C.M. Police for investigation. This was done and the father was interviewed, giving the investigating officer an inculpatory statement in which he freely confessed his involvement and his regret. The officer's report noted the reluctance of mother, daughter, sister-in-law and clergyman to have proceedings taken against the offender, and referred the matter to the senior Crown counsel in his district "for instructions as to whether or not a charge of indecent assault should be laid". In due course this lawyer wrote a long letter to the senior R.C.M. Police officer involved in the form of a homily on the theme, "Crown counsel's duty is to see that justice is done rather than to convict the accused". Taking into account the improved conditions in the family, now reunited but without child 1 who was living with her uncle and aunt, and the fact that the father had stopped drinking, he concluded by giving his opinion that charges should not be laid against him unless there was a resumption of misconduct. The final paragraph of this letter is instructive:

.144

"As indicated, the decision not to prosecute is based on the assessment of the information in the file and the constructive atmosphere that is apparent in the family at this point in time and more particularly, and most importantly, in the life of [child 1] which has somewhat constructively been rebuilt in the immediate past, and any danger of destroying this certainly is the significant factor to consider in the prosecution."

The police officer's comments were invited and he concurred.

Exhibit C-0464, p.31.

Child Welfare

But child welfare headquarters continued to express concern and its local representative was instructed to maintain contact with the family. As an example of the predominant emotion of female victims of sexual abuse by fathers child 1's statement to the police is quoted in part:¹⁴⁵

"Now that I am living with my aunt and uncle I don't want to go back to live with Mom & Dad, Dad especially, all I want to do is set these incidents aside and forget about it. I don't want to go to court on this because I really don't think it would do any good. It would just make matters worse. No doubt it would ruin any relationship Mom & Dad have now, or ever have a chance of having. If Dad ever had to go to prison Mom would resent me and my brothers and sisters would hold it against me with the fact that I deprived them of their father. I really think that now that Dad knows that Mom and some others know about this, it has taught him a lesson and I don't think it would happen again. For sure I don't want to go to court unless he ever did something like this to someone else."

There is no indication among the documents that the associate deputy attorney general did anything other than confirm the decision of "the man on the spot".

Ibid, p. 13.

Chapter VI

Criminal investigation profile no. 4¹⁴⁶ and child welfare and criminal investigation profile no. 13,¹⁴⁷ the first occurring in the period 1985 - 1986 and the second 1986 - 1990, tell a complicated story illustrating the response of the child welfare division and the R.C.M. Police in relatively recent times to the complaints of two young women born in 1967, one of whom, Cynthia Durdle, was taken into care at the age of four under a non-ward agreement subsequently to become a permanent ward, and Kimberley Somerton also the subject of a non-ward agreement when seven years old, and believed to be a victim of physical abuse in her own family by the social worker concerned who noted that she was a terrified child. Both of them told their story to the commission under oath and before the television cameras and to the extent that their allegations have been made public and the subject of proceedings in court, the evidence can be referred to with modified editing in the interests of those upon whom anonymity should be conferred. The thread of Cynthia Durdle's story was first traced by commission counsel and investigators in child welfare profile no. 15¹⁴⁸ in which Mr. Day examined the situation of a foster-home in a rural community devoted to the care of specially handicapped children with, as the saying was, "special needs". This was a dependency of Exon House, itself a child welfare project specializing in this difficult and demanding work. The connection between Exon House, formerly an orphanage operated by the Anglican Church of Canada, with the division

¹⁴⁶ Exhibit C-0524.

¹⁴⁷ Exhibit C-0474.

¹⁴⁸ Exhibit C-0628.

and the licensing of the foster-home in question, occurred in 1971 and in that year Cynthia, a four-year old sufferer from cystic fibrosis, became its first foster-child. The foster-mother had been a nurse's assistant at four hospitals, and because of the pressures of shift work had resigned at her husband's request. Both foster-parents were highly regarded by social workers within whose purview they fell for a number of years, and from an original licensing for one child the capacity of the foster-home was increased to nine. Although Cynthia was in need of care, she was not incapacitated and not a candidate for special needs. Nevertheless she made periodic visits to the Janeway Child Health Centre in St. John's and entered a cystic fibrosis camp in the country. At these places outside the foster-home she began to make complaints, to be kept in confidence as she maintained, about physical abuse by her foster-mother who, she said, was accustomed to strike her with a stick when there was any conflict between them, mostly because of what the girl felt was a heavy burden of domestic work doing dishes, cleaning floors, making beds, supervising children when the foster-parents were absent to the detriment of her homework and recreation. This culminated in 1982 when she was fifteen and when the social workers felt bound to investigate the matter. These workers, who had for many years been admirers of the foster-parents and their advocates in obtaining additional funds, were not sympathetic to Cynthia's complaints; one was definitely hostile and wrote ably and voluminously to headquarters on the subject of Cynthia's mischief-making which included maintaining a diary illustrating her complaints, and believed to be kept at the suggestions of confidantes at the Janeway Centre. The upshot of the unhappy tension developed in the foster-home was the

Chapter VI

removal of Cynthia to another location in the same area of Conception Bay where she developed an affectionate relationship with her foster-mother. I will at this point defer to the analysis of criminal investigation profile no. 4 and child welfare and criminal investigation profile no. 13 prepared by Mr. Powell, who presented the evidence, as an episode of his written argument and reproduced exactly as written.

"The investigation of alleged sexual assaults against children in foster homes created unique and difficult problems for one R.C.M. Police detachment. Two cases were examined in detail by the commission. Both relate to matters investigated by members of the eight person R.C.M. Police detachment in Holyrood, a town located at the head of Conception Bay about 48 kilometres southwest of St. John's. Each case involved young girls living in neighbouring foster homes located minutes from the R.C.M. Police office and both foster homes were within the jurisdiction of the social services district office at Kelligrews.

First examined was a case relating to an investigation which took place in 1988. It was brought to the attention of the commission by a telephone call to commission investigator G. Frederick Home from the uncle of teenage sisters, Trudi and Marlene Butt. Files obtained from the R.C.M. Police, the departments of justice and social services and sworn testimony of witnesses revealed the following events.

In March 1983 fifteen year old Cynthia Durdle was placed in a foster home near Holyrood where she lived until the summer of 1986 when she confided to a

Child Welfare

nurse from the Janeway Hospital that she had been sexually abused by her foster-father during her stay in that home. She was eighteen at the time of this disclosure and did not return to the home that fall. The confidence was not broken by the nurse.

Two years later, in July 1988, Cynthia Lois Wheeler, a social worker at the Janeway Hospital, heard of the earlier report and on July 19 called the Kelligrews social services office. The foster-home was identified and it was immediately known that the Butt sisters, both foster-children, were then living in that same foster-home. On July 28 Ms. Durdle, then twenty-one, described to social workers the sexual abuse she had suffered but insisted she would not speak to the police.

Karen Alexander at the social services regional office in St. John's was advised and she consulted with a department of justice lawyer who advised 'we had to be concerned with the protection of the children currently in the home'.⁴⁹

On July 29 Kelligrews social worker Marilyn Campbell contacted the R.C.M. Police in Holyrood but did not disclose Ms. Durdle's name. An R.C.M. Police officer made a report of the call which included:

'This matter was discussed with Cpl. Fraught. Since a sexual assault has taken place social services will have to divulge the name of the victim. Once the name of the victim is known arrangements should be made through Social Services to interview her at their office.'

Exhibit C-0474.

Chapter VI

On that same day the social workers decided that in light of the 'probable risk' to the Butt girls currently in the foster-home, and because Ms. Durdle was unwilling to give a statement to the R.C.M. Police, the only alternative was to meet the foster-parents and confront them with the allegation.

On August 2 Ms. Campbell and a student social worker met with the foster-parents in their home. Durdle's name was not mentioned. Both foster-parents were upset by the allegation and stated they would consult a lawyer regarding this 'slander'. The social workers also interviewed the Butt sisters, Trudi - fifteen, and Marlene - thirteen, who had been living in this home for approximately two years. Both said they were well treated and did not want to be moved from the home.

The next day Ms. Alexander was again consulted and a decision was made not to remove the sisters from the foster-home.

On August 10, R.C.M. Police Constable Raymond Griffith was given the name of Ms. Durdle by Ms. Campbell but advised that she still did not want the police involved. He was also told the two teenage girls now living in the home 'seemed happy and well adjusted'. On August 16 Sergeant Douglas Hamlyn, officer in charge of the Holyrood detachment, was advised by social worker Ethel Dempsey that Ms. Durdle would now talk to the police and he instructed Constable Griffith to meet with her. On August 17 the Constable interviewed Ms. Durdle for three hours. While she described in detail a series of sexual

Child Welfare

assaults, the officer noted in his report: 'feel we have a very difficult case to prove ... she would never hold up in a court situation. She has said, however, that there was repeated assaults of a sexual nature culminating in sexual intercourse. She has been told about a mischief charge for not telling the truth or blaming an innocent person for something they haven't done. She sticks to her story.' Constable Griffith discussed the interview with Ms. Dempsey who said she would now have to re-evaluate the foster home and would have to go back and see the suspect and his wife. The officer told her he had regular time off and would be unable to proceed with his investigation until late in the next week.

R.C.M. Police policy contained in bulletin number OM-333, dated January 20, 1987¹⁵⁰ required that certain matters be reported to the St. John's subdivision. It stated in part:

'Sexual Offences Against Children (under 18 years) - Reporting of these offences will be limited to following categories:

1. sexual intercourse under 14 years.
2. incest
3. high profile case where professional person commits sexual assault (*sic*) i.e. doctor, clergy, dentist, school teacher, custodian(s) of foster home or day care centre, etc.

Exhibit C-0479.

Chapter VI

NOTE: A report via message format outlined IV.E.1.b.3. will be sufficient unless criminal operations require request follow-up via C-237.¹

Sergeant Hamlyn provided in a telex to headquarters on August 30 a brief outline of the events to date. It stated:

'Complaint received from Marilyn Campbell of the Department of Social Services, Kelligrews, Nfld. On 88-07-29 requesting general information and possible assistance in speaking to an unidentified female who had made an allegation of sexual assault to their office. The unidentified female was at the time of the alleged offence, 16-17 years old and in the care of a foster home. She left the home in 1986 and has since lived with her natural father in Bonavista, Nfld.

The complainant, Cynthia Durdle, was reluctant to see the police about the matter but was convinced by social services to come forward. A statement was provided to this office on 88-08-17 concerning the allegation. Foster parent is [the accused], [...], [...], Nfld. The assaults started as fondling and increased to forcible oral sex and one attempt at intercourse. Matter is presently being investigated and suspect will be interviewed.

Incident reported to division HQ as per requirement of B Div OM bulletin OM333. Possible high profile case involving foster parent. Please advise if further report required.'

No further report was requested by headquarters. The sending of this telex was the only step taken by the R.C.M. Police following the August 17 interview of Ms. Durdle until the afternoon of September 6 when

Child Welfare

Constable Griffith went to the foster-home and interviewed the suspect's wife. He made arrangements to have the suspect and his wife attend the R.C.M. Police Holyrood office at 10:00 A.M. the next day but that appointment was not kept. After Griffith had left the home the foster-mother talked to Trudi Butt who told her she had been sexually involved with the foster-father for a year. When the father returned home he was confronted by his wife, left the house, and did not return that night.

The next day Trudi left the house in the early afternoon and she was seen shortly thereafter with the foster-father in a nearby remote area. The foster-mother drove to the area and saw Trudi with her husband in a vehicle. Enraged, she took a rock and smashed the windows in the vehicle before her husband drove away.

The R.C.M. Police were notified and a search began in the late afternoon. A helicopter was called to assist. By early evening Trudi Butt, age fifteen, was dead.

A judicial inquiry held in February and March, 1989 concluded that her death was caused by drowning 'attributable to suicide'. Evidence indicated she had fallen fifty feet from a cliff into the ocean. The foster-father testified at the inquiry that he and Trudi had been hiding in the woods and that the girl was despondent and talked of suicide. When the helicopter passed overhead she ran from the trees and jumped off the cliff. When he reached the water, he testified, she was dead.

Chapter VI

Later that night he was arrested by Constable Griffith and charged with sexual assault on Ms. Durdle. In February 1990 he was convicted of that offence and sentenced to a term of two years imprisonment.

When he testified before the commission Constable Griffith had been promoted to Corporal and was in charge of the detachment in Roddickton, Newfoundland. He had joined the R.C.M. Police in 1972 and been transferred to the Holyrood detachment from Alberta just days before he was assigned the Durdle investigation. Before the commission he was asked about the delay in his investigation. He said that following his interview of Ms. Durdle on August 17 it would have been preferable to finish his investigation but other matters intervened which took priority. These included investigations of theft, fire at an abandoned cabin, traffic detail and office work relating to on-going files. He said that there is no real list of priority in relation to files or offences and he simply did not have the time to interview the suspect.

Sergeant Douglas Murray Hamlyn had been posted as unit commander at the Holyrood detachment on June 30, 1988. Since 1982 he had been commanding another small detachment at Ferryland, not far from Holyrood. A twenty-five year veteran with the R.C.M. Police, Sergeant Hamlyn was personally involved in some aspects of the investigation. He spoke to Ms. Dempsey on August 23 about the concerns the social worker had for the two girls then living in the home. The Sergeant advised her that the detachment had other cases to work on and if the

Child Welfare

social worker felt she had to return to the suspects' home alone, she should do it. He said the role of the R.C.M. Police was to investigate the complaint from Ms. Durdle and it was the responsibility of social services to check on the welfare of the children then in the foster home. He testified that as the alleged victim, Ms. Durdle, was not in any danger and was away from that environment the case was not treated as an 'ongoing problem' in that urgent action had to be taken. 'The investigation would be done when the time was available to us', Sergeant Hamlyn testified. He said that if the same circumstances arose again he would handle it in the same way.

Superintendent Emerson Havelock Kaiser, officer in charge, Criminal Operations Branch, "B" Division reviewed the file and listened to the testimony of Corporal Griffith and Sergeant Hamlyn. He said he could not agree with the steps that were taken by his officers. 'There is no way I can conclude that our response was as timely and appropriate as it should have been. Prudence would caution me that the other people in that home are at risk and, real or not, the potential was there and those factors would have driven me to act with much greater haste'. He said the timeliness and reasonableness of the response by the investigator did not meet the test of then existing R.C.M. Police policy. As a result of this case new policies have been issued by Superintendent Kaiser.

Karen Alexander told the commission that the death of Trudi Butt also brought about a change of policy within Social Services. Now, if an allegation of past sexual abuse is made against a foster-parent, any

Chapter VI

foster-children presently in that home are immediately removed.

One other fact should be noted in relation to this matter. Following the public testimony of the R.C.M. Police officers, twenty-one year old Tammy Butt, the elder sister of Trudi and Marlene, contacted the commission. On June 12, 1990 she gave disturbing evidence about events which took place shortly after her sister's death. Ms. Butt said social workers Ethel Dempsey and Marilyn Campbell asked to speak with her in the privacy of an office in the funeral home. After asking how Tammy and Marlene were getting along, Ms. Dempsey said that she and Ms. Campbell were in trouble because they had been instructed by their superior to remove the Butt sisters from the foster-home and had failed to do so because they thought there was no danger. Ms. Butt said she was greatly upset by this statement. She spoke to another social worker in Deer Lake and then made a special trip to Kelligrews in September 1989 to attend a pre-arranged meeting with Ethel Dempsey to further discuss the matter. Ms. Dempsey did not come to work that day. Ms. Butt then took her case to the Minister of Justice, Paul Dicks, and the Minister of Social Services, John Efford, who advised her that they could not comment since the case might be examined by the Royal Commission.

It should be noted that Ms. Dempsey was invited to appear before the commission, but declined. As commission policy was not to subpoena unwilling witnesses the matter of her evidence was not pursued.

Ms. Karen Alexander detailed all steps taken by

Child Welfare

social services in the case and produced a full report she had done for the director of child welfare shortly after Trudi Butt's death. In addition, Samuel Cyril Atkins, formerly district manager, Kelligrews district office, until his retirement on 31 March 1989, testified. There is no indication from their evidence or the reports examined by the commission that anyone in authority at social services instructed Ms. Dempsey or Ms. Campbell to remove the Butt girls from the foster-home. Unfortunately Tammy Butt still has no explanation about the statement she so vividly recalls being made to her at the time of her sister's funeral.

This case highlights the necessity for clear guidelines in situations where police and social services responsibilities overlap. Children in foster-homes are under the care of the director of child welfare. When a criminal act is alleged to have taken place in a foster-home against a foster-child the police must investigate and social services must be notified. Each has a mandate to fulfil and every effort made to ensure responses are coordinated. A social worker should never be placed in the position of having to confront alone a suspect with an allegation of crime. A police officer should be present if only to prevent a possible breach of the peace.

While every effort was made to protect the identity of Cynthia Durdle before the commission she decided she wished to testify and did give evidence on June 1, 1990. On that day in suburban St. John's, twenty-three year old Kimberley Somerton watched her television set as Ms. Durdle gave evidence and the next day she phoned the commission office. She had

Chapter VI

her own story to tell about the R.C.M. Police Holyrood detachment.

On August 16, 1985 a social worker at the Kelligrews office had called the Holyrood detachment and reported that the parents of a three-year old girl suspected the child had been sexually abused by an uncle. Sergeant Noel Nurse, then in charge of the Holyrood detachment, contacted social worker Ethel Dempsey who advised him that a year earlier a foster-child named Kim Somerton had been living in the suspect's home and had run away. There had been 'mention of a possible sexual thing' between the girl and the foster-father.

Sergeant Nurse assigned the case to Corporal Bennett with the following instruction:

Tom:

If this offence did take place, the only way (as you know) to prove it would be a confession by [the suspect] because we are dealing with a three (3) year old victim. Maybe we can get G.I.S. to interview Somerton to see if in fact [the suspect] ever made sexual advances towards her before [the suspect] is interviewed. It might be noted Somerton lived there for eleven years.'

Corporal Bennett interviewed the parents of the three year old and contacted the General Investigation Section in St. John's to arrange an interview with Ms. Somerton. On September 3 he interviewed the three-year old with little success. Corporal Bennett's file note suggests that a policewoman should interview the child who was 'reluctant to speak to me'.

Corporal B.A. MacLean of the St. John's General

Child Welfare

Investigation Section interviewed Ms. Somerton on September 18 and sent his report together with her statement to the Holyrood office where it was received on September 30. The Somerton statement alleged that she had been sexually assaulted in the foster-home from the time she was nine years old until she was thirteen or fourteen. She said it ceased when she 'kicked him in the privates'.

In his report, Corporal MacLean stated:

'Somerton is willing to testify, if necessary, and I feel she will probably be a good witness. She was a bit reluctant to discuss the matter at first, but when she started, she discussed the matter openly.'¹

At Holyrood, Corporal Bennett was transferred to another detachment and the file given to Constable Michael Ouelette who, in turn, discussed the case with Constable Paulette Delaney. She offered her assistance to interview the young child.

On November 3, Sergeant Nurse instructed Constable Delaney to contact Social Services 'A.S.A.P. + conduct interview at earliest convenience. If Social Services person not available, continue investigation without her'.

Constable Delaney and Ms. Dempsey interviewed the young girl on November 8 at the child's home in the presence of her parents. They used a doll to assist in the interview but were unable to obtain much information. Constable Delaney interviewed the suspect a week later. He denied any sexual involvement with the two girls and signed a consent to take a polygraph test. The officer continued her investigation but was unsuccessful in

Chapter VI

locating another female foster-child who had once lived in the suspect's home.

On December 9 Sergeant R.D. Russell, together with Constable Delaney, conducted a polygraph test of the suspect. The constable noted in her report the suspect 'was very edgy and kept moving all the time'. The Sergeant provided a written report which concluded '... there were irregularities in the polygram which prevented analysis'.

On December 26 Sergeant Nurse forwarded a report to the St. John's subdivision summarizing the investigation to date. This form of report is standard R.C.M. Police procedure and is reviewed by officers designated as readers at headquarters. If a reader feels further investigation is required or other steps should be taken he brings the matter to the attention of the C.I.B. officer at headquarters. In this case the report was received without comment.

Constable Delaney continued her investigation. On January 17, 1986 she re-interviewed the suspect who once again denied his involvement in any sexual offence. Constable Delaney obtained a further statement from Ms. Somerton on January 30 and reported 'I feel she is being truthful'. Constable Delaney testified before this commission that she was concentrating solely on trying to build a case around the allegation involving the three year old. Sergeant Nurse was likewise concentrating on the infant. In the file he noted to Constable Delaney:

Paulette All we have is Kim Somerton's evidence as you say. If you can get a similar story from the other foster child, we can have a look towards charges.'

Child Welfare

Efforts to locate the other foster-child continued without success and on February 18 a further report was sent to headquarters, again with no response.

On April 10, Corporal MacLean advised that Kim Somerton had contacted him regarding the status of the file. Constable Delaney advised 'We still have the file open, but we are at standstill.'

A report to headquarters on April 14 provided little new information but did indicate the suspect might be moving to Toronto and this would be investigated. On May 6 Constable Delaney contacted Ms. Somerton and told her that the suspect had gone to Toronto and said she would be advised of any more updates.

Constable Delaney's final report to headquarters was dated May 12, 1986. It concluded:

'Due to the lack of evidence and the age of [the three year old] child, it is felt there is nothing further that can be done on this matter. Based on the forgoing, this file will be concluded at this time.'

Sergeant Nurse added his initials under the words 'Concluded Here'. A reader at headquarters initialled this report and it was filed away. The matter was not brought to the attention of the department of justice.

Following Ms. Somerton's call to the commission the police file was obtained and examined by senior R.C.M. Police officers and commission staff. That the case had been mishandled was readily apparent. To their credit, each officer involved in the investigation voluntarily came before the commission

Chapter VI

and publicly acknowledged that mistakes had been made.

Constable Delaney-Smith (as she now is) said she was very junior at the time and today she would handle the case differently. 'I definitely would have opened a separate file and viewed Ms. Somerton's statement as a separate case.' She said she focused solely on the case involving the three year old and never thought of proceeding with a charge against the suspect for sexually abusing Ms. Somerton. She said that while she did have sufficient evidence to lay a charge in the Somerton case, it just never occurred to her.

Staff Sergeant Noel Nurse had been the detachment commander at Holyrood from July 1984 to June 1988. Having joined the R.C.M. Police in 1968 he spent a good deal of his career in Newfoundland investigating narcotic cases. At the time of the incident in question he held the rank of Sergeant.

Before the commission, Staff Sergeant Nurse said that upon review of the file he now realized that the information provided by Ms. Somerton should have been pursued as a separate matter. He could offer no explanation why that was not done. 'It obviously slipped passed me', he testified.

Corporal Terrence Norman was the officer designated as a reader at headquarters who reviewed all but the last report from the Holyrood detachment. He testified he reviewed twenty to twenty-five files per day and if he found something in a file that was lacking he would bring it to the attention of the C.I.B. officer at headquarters. He was away on leave at the

Child Welfare

time the final report was received at headquarters. Another officer who dealt with offences other than those under the Criminal Code in fact, saw the final report. Before the commission Corporal Norman stated that if he had been on duty he did not feel the file would have been concluded without it being brought to the attention of the C.I.B. officer. 'I would like to think I would have done that', he testified.

When this matter came to the attention of the commission the R.C.M. Police re-opened their file and the suspect foster-father was arrested and charged with sexually assaulting Kim Somerton. That matter is still before the court. The man charged is a brother and next-door neighbour of the individual convicted of sexually assaulting Ms. Durdle.

The evidence of Ms. Durdle and Ms. Somerton highlights a more general problem. Ms. Durdle on one occasion travelled for several hours to court only to find out that the case had been adjourned. She was not kept advised about the various steps in the criminal process. Ms. Somerton was left feeling that she had not been believed by the officers. Crown prosecutors and police must ensure that victims of crime are kept fully informed about matters relating to the investigation and the various steps in the court process."

Chapter VI

Superintendent Kaiser's Position

As a footnote to this account by Mr. Powell the evidence given by Superintendent Emerson Kaiser who in 1986 was assistant officer in charge of the Criminal Operations Branch of "B" Division in St. John's and in 1989 was promoted to superintendent as the criminal operations officer for that division, provided much important information as well as an opinion on the conduct of the Durdle investigation. He was first examined on May 15, 1990 by Miss Burke and dealt with R.C.M. Police principle and practice in the laying of charges in respect of an alleged criminal offence and the division of responsibility between the force and the prosecution, maintaining that a policy instituted in the department of justice by Judge Hyslop and Mr. Flynn, referred to in chapter IV as a change of direction in 1989, had always been in place in the operations of the R.C.M. Police. This question as vexed as any which this commission has had to consider may be found explored in chapter IX below. He was recalled on May 23 and gave evidence led by Mr. Powell about the Holyrood detachment's investigation. He said on this occasion that it was his "absolute opinion" that immediate action should have been taken on August 17, 1988 after Cynthia Durdle's statement had been received. He said "I part company with the decisions made", and commented severely on the lack of any approach to the suspect foster-father until the appointment for interview on September 6. Superintendent Kaiser produced for the commission a bulletin issued in 1987 altering provisions in the R.C.M. Police operational manual under the heading of

"reporting requirements".¹⁵¹ After referring to two situations where reporting to division headquarters was not required, the third item dealt with was as already quoted by Mr. Powell:¹⁵²

"3. Sexual Offences Against Children (under 18 years) - Reporting of these offences will be limited to following categories:

- 1, sexual intercourse under 14 years.**
- 2, incest**
- 3, high profile case where professional person commits sexual assault (*sic*) i.e. doctor, clergy, dentist, school teacher, custodian(s) of foster home or day care centre, etc.**

NOTE: A report via message format outlined IV.E.I.b.3. will be sufficient unless criminal operations require/request follow-up via C-237."

In the meantime Sergeant Douglas Hamlyn, at the time material to the Durdle investigation officer in charge of the Holyrood detachment of the R.C.M. Police, had testified at length on May 22 and 23, examined by Mr. Powell also, and was upset by the strictures of his superior officer. He wished to be called again to testify and answer them, being concerned that out of the multiplicity of documents assembled by the commission staff there was one missing which would justify his detachment's handling of the Durdle complaint: an

¹⁵¹ Exhibit C-0479.

¹⁵² p.297 *ante*.

Chapter VI

internal form entitled "transmittal & diary date request" sent by a "reader" at headquarters to Holyrood dated September 2, 1988 and evidently received on September 6. Referring to the Durdle inquiry it read: "no further reporting required here, at this time". On an application to have Sergeant Hamlyn recalled, presented by his counsel Mr. Robert Regular on June 1, 1990, I declined to allow it on grounds set forth in my oral reasons which can be consulted at appendix H. To be brief I was of the opinion that the commission had no jurisdiction to inquire into a question of discipline in the federal force, and that, although at that time it was not so considered, it might well be later if there was a public confrontation between a senior and junior officer.

Whitbourne 1984

It has been observed that evidence dealing with the policies and practices of the department of social services - only the child welfare division has really been examined - does not disclose an affirmative answer to the key question raised in article II of the terms of reference: was there a policy or practice whereby that department in child welfare matters held its hand in effecting prosecutions of child abusers provided they left the province? Yet a form of suppression untrammelled by any *quid pro quo* was practised by some officials. For instance Mr. Hollett, deputy minister from 1972 to 1980 testified that he had not during his term of office been advised of the Mount Cashel investigation of December 1975 by either George Pope or Frank J. Simms. Pope, as assistant deputy minister at the time, considered that the matter had been disposed of from what Simms had told

Child Welfare

him, and that there was nothing in it which required a report to the minister. Since Hollett on his own showing, attended the meeting of January 1976 and recalled the presence of Brothers McHugh and Nash, although he did not recollect Sheila Devine's request for names of the boys involved in the investigation, he must have been sorely puzzled by Brother McHugh's assurance that the little difficulty in the orphanage had been satisfactorily settled. He felt that child abuse was not so unusual as to require reports to the minister or deputy minister and that George Pope had to use his own judgement which was clearly the opinion of Pope himself. He told Mr. Chalker in cross-examination that Mount Cashel was very important to the department and that Pope and Simms had a "proven track record".

Simms indeed made a practice of keeping all the affairs of the Christian Brothers in Mount Cashel strictly to himself and in his own hands, and did not see fit to advise the minister, Mr. Brett, to whom by statute he had direct access, about the critical events of December 1975, events without precedent in departmental history. An example of this appetite for concealment was presented by Mr. Powell, as child welfare profile no. 4." What happened in this case was very much in the public eye at the time and no deletions for protection of identity are appropriate.

I am again indebted to Mr. Powell for the following summary of the case of Alonzo Corcoran at the juvenile corrections institution known as the Whitbourne School for Boys in January 1984. It is again reproduced exactly as furnished. It represents Mr. Powell's reflections on evidence

Exhibit C-0358A.

Chapter VI

he lead on March 23, 26 and 27 before the commission at St. John's earlier in the same year.

"Mrs. Sharron Callahan recalls the night of January 23, 1984 as being "the coldest night of the year". As assistant director of juvenile corrections she was concerned about the welfare of Alonzo Corcoran and Darren Wall, two youths who, that afternoon, had escaped from the Whitbourne School for Boys.

Corcoran had been in the institution for thirteen days and while only four feet, ten inches tall and weighing ninety pounds he was just two weeks short of his seventeenth birthday.

At 1:30 in the afternoon, the boys had been seen running from the institution by a teacher who reported the incident to the juvenile corrections officer in charge. Three staff members commenced an immediate search in the rugged surrounding area. Local R.C.M. Police were notified and officers kept an eye open for the boys while making regular patrols in the area. Whitbourne staff called off the search at about 9:00 p.m..

The following morning Corcoran's body was found beside railway tracks three and one half miles east of Whitbourne. He was dressed in light clothing and death was caused by hypothermia due to exposure.

The Whitbourne institution was well known to Mrs. Callahan. Two months earlier, on November 10, 1983, she had been so concerned about matters at the institution that she had taken it upon herself to write a

Child Welfare

four page memorandum to her superior, Frank J. Simms, the director of child welfare and juvenile corrections. She addressed several areas of concern. Included in these were staff attitudes and overtime costs.

To quote Mrs. Callahan:

'Sufficient to say, I think, is that the Whitbourne School for Boys exists as a community unto itself and that even God himself could not break down the walls of this institution.'

Earlier, on October 7, 1983, Simms himself had addressed the question of overtime costs at Whitbourne in a directive to John Legge, administrator. The directive included:

'The previous stated policy of apprehending runaways is being reaffirmed and that the search period will not exceed three hours unless special circumstances exist and these are first cleared through the administrator.'

Mrs. Callahan told the commission she was speechless when her memorandum was returned to her by Simms a few days later with a brief note written across it indicating that primary attention should be given to Whitbourne detention, overtime and sick leave. She felt all matters raised in her memorandum were important and required attention.

The minister of social services in January 1984, was Thomas V.P. Hickey who had been appointed to that portfolio in March 1979. A member of the House of Assembly since 1966, Hickey held several cabinet portfolios during his career.

Chapter VI

Hickey testified before this commission that he was advised of Corcoran's death on January 24, 1984 by his deputy minister, Gilbert Pike, who indicated there were few details available but that an internal investigation was being carried out and that the minister would be kept advised.

On January 30, 1984, a meeting was held in Rickey's office. Present with the minister were Simms, Pike, Mrs. Callahan, assistant deputy minister George Pope and Larry Power special co-ordinator, juvenile corrections. Mrs. Callahan kept brief notes at the meeting.¹⁵⁴ Items she noted included: a number of media calls, some for the second time; 'overtime cut backs, boy might have been saved'; and the fact that it was not good to take initiative after Corcoran's death.

New federal legislation, the *Young Offenders Act*, was soon to come into effect. The group discussed closing and renovating Whitbourne and reopening it as a young offender closed unit.

The minister told this commission that he was very upset when he heard at this meeting that there had been one hundred and twenty four runaways from Whitbourne the previous year and he wanted the institution closed immediately.

Mrs. Callahan confirmed that the minister was angry and wanted Whitbourne shut down. In her notes she recorded 'guise of YOA'. She said this related to a discussion that had taken place at the meeting whereby Whitbourne could be closed and this could be achieved under the guise of changes required

by the *Young Offenders Act*.

On February 3, 1984 Hickey held a press conference in company with senior staff members including Simms and Mrs. Callahan. He testified he felt he had been given all relevant information by his staff and he assured the public that no responsibility or blame lay within his department for the death of Corcoran. A press release issued at the time referred to the *Young Offenders Act* and the fact that Whitbourne would become a closed custody facility.

That night, Hickey testified, he received an anonymous telephone call from someone whom he believed to be a Whitbourne employee stating that he (Hickey) did not have all the facts at his press conference and that he should look at 'the Callahan report'. Hickey said he knew nothing of this report and following repeated requests of his staff he finally saw it five or six days later. He said he was shocked by its content and felt it had been deliberately withheld from him by his staff.

On March 14, 1984 Ronald J. Richards, associate deputy attorney general and director of public prosecutions directed that an inquiry be held pursuant to Part III of the *Summary Proceedings Act* into the cause and circumstances surrounding the death of Alonzo Corcoran. Provincial Court Judge G.J. Barnable presided at this Judicial Inquiry which was held in the town of Whitbourne on five days throughout the summer of 1984.

Simms was subpoenaed to attend on the afternoon of May 25, 1985 and to bring with him the Alonzo Corcoran file. Following his appearance Simms wrote

Chapter VI

a one page handwritten note to Mrs. Callahan¹" stating that the file he took did not contain much of Corcoran's personal history. He added:

'Would you please recheck the record for these records. If you find them, they are to be copied and forwarded to Judge Barnable. Copies of personal records (Court orders, social histories) in the attached files should also be made and sent to the Judge. Our records on policy relating to O/T should not be forwarded.

I will call you from Bonavista on Monday.'

The issue of providing the inquiry with overtime policy statements relating to searches had previously been discussed between Callahan and Simms. Mrs. Callahan testified she felt it would be of concern to Judge Barnable as some Whitbourne staff members had commented that the overtime policy had contributed to Corcoran's death. She said Simms disagreed and felt the control of overtime expense should be kept separate and not given to the Inquiry.

Mrs. Callahan said she spoke to Simms on the Monday following when he called from Bonavista. They again discussed the overtime policy. She testified his position was that within the guidelines under the existing policy, the staff had the ability to search all night for the boy.

Despite Simms' concern Judge Barnable did receive the department directive on overtime and search procedure when, on June 5, 1984, Whitbourne

Exhibit C-0363.

Child Welfare

program co-ordinator Brian Miller sent them by mail to the Judge. Mrs. Callahan's memorandum never did come to the Judge's attention.

The inquiry concluded on October 5, 1984 and Judge Barnable completed his report which was sent to Ronald J. Richards on January 16, 1985.¹⁵⁶

In his report Judge Barnable stated:

'By 8:15 p.m., the two searchers were physically discomforted by their half hour trek along the tracks. They were overcome by a sense of futility. They knew they had done as much as was expected of them. They knew of the overtime restrictions. Mr. Reid had passed one three hour allotment at 6:00 p.m.. Mr. Gosse completed three hours of overtime at 7:45 p.m.. By straying too far from the guidelines they ran the risk of not being paid for the time spent.

Although the search was inadequate, the two searchers cannot be personally faulted. They, and the police, had done all that was expected of them.

But not enough was expected of them.

I have examined all the papers and policies I referred to in the Inquiry. I have listened and thought about all the testimony. Nowhere can I find evidence that the question of the safety of escapees was ever adequately addressed.'

His Honour went on to state:

'Not to have addressed this problem amounts to negligence on the part of the public authority responsible for the care of these boys.¹

Exhibit C-0366.

Chapter VI

On January 25, 1985 Robert Hyslop, assistant director of public prosecutions sent a confidential letter to Gilbert Pike enclosing the findings and recommendations of Judge Barnable. Hyslop¹⁵⁷ wrote:

In view of the findings of His Honour and the comments contained in those findings, it will probably be necessary for you to consult with your Minister and your officials as soon as possible.

Our Minister has not made a decision to release the report publicly. In all likelihood, since the report deals with an aspect of public safety, I would anticipate that it will be released in due course. (*sic*)

I would like to have any input from you or your officials before I approach the Minister.¹

Hickey testified he was told by Pike in early February 1985 that the report had been received. Pike said he had not read it but George Pope had. Hickey said Pope told him that the report was "not all that bad" but did comment unfavourably on the department's record-keeping and recommended that a social worker should be attached to Whitbourne. Hickey testified he was not told the report made any reference to negligence. He said he was not given a copy of the report at that time.

A provincial election was held on April 2, 1985 and on April 24 the report was released to the public. On that same day there was a Cabinet shuffle and Hickey

¹⁵⁷ Exhibit C-0364, p. 113.

Child Welfare

was replaced as Minister of Social Services by Charles Brett.

Shortly thereafter Hickey made certain public statements which resulted in a lawsuit by Simms. That matter is still before the courts.

While the disturbing evidence relating to these events does not address the issue of response to allegations of physical or sexual abuse of children, it is capable of indicating an attitude of senior civil servants when a government run institution is under scrutiny. The minister testified certain information was withheld from him and, as a result, he gave misleading information to the public. There is evidence to suggest that not all relevant evidence was readily given to Judge Barnable during his conduct of the judicial inquiry into Corcoran's death.

If such are the facts, steps should be taken to ensure that ministers are given all information - positive or negative - regarding matters within their departments. As well, Judges appointed to conduct judicial inquiries are required to make findings of fact and provide the government with recommendations. That mandate can only be fulfilled if public servants provide to the Judge all information relating to the matter in issue. Relevance is a matter to be determined by the Judge, not the civil service."

With every word of this narrative and observations which occur at its end I am in close agreement and wish to add only some brief observations. The circumstances of Alonzo

Chapter VI

Corcoran's life at home with his parents, brothers and a sister need not be explored other than to say that the children owed their lives to the child welfare division and their welfare officers beginning in January 1971 when they were removed from a house without heat and taken into care. The division kept in the closest touch with this family. Alonzo spent short periods of residence in Mount Cashel as a ward of the director from 1979 - 1980 and again from 1980 - 1982 on both occasions being discharged at his own request; he was unfavourably reported upon by Brother Bucher. He was the subject of two non-ward agreements entered into by his mother and two wardship proceedings instituted by the director and was made a temporary delinquent ward at the tragically early age of ten. In his sixteenth and seventeenth years he turned to breaking, entering and theft which ended in his being made a permanent delinquent ward and confinement to the Whitbourne School for Boys.

It is not necessary to reproduce the unsavoury details of this institution described by Mrs. Callahan in the report alluded to by Mr. Powell. Suffice it to say that if her strictures were justified - and they were not challenged - the staff were generally speaking not of high quality and the classification of "juvenile guidance officers" was singularly inappropriate. Mrs. Callahan said that they spent most of their time complaining about their employment contract with the government. It seems obvious that they exploited the overtime issue by effectively turning it upside down. Mr. Simms may have been on sounder ground than he apparently felt to be the case on this issue since the custodial staff took the position that they would be deprived of overtime pay conducting a search lasting more than three hours, whereas in fact when the administrator authorized a search of longer

Child Welfare

duration there was no such difficulty. There was nothing in the directive on the subject which would have deprived the administrator of the right to order overtime payments retroactively after a search was over on any reasonable application. But Simms felt, rightly as it turned out, that the question of overtime would be misrepresented and he decided to withhold information on the subject from the investigating judge. As it turned out the judge was informed at the inquiry of its significance by the administrator of the school. But the minister of the department was left to find out from an anonymous telephone caller that his statement to the press declaring that his department was free from blame could not be supported by the facts.

Frank J. Simms testified on April 5, 1990 mainly in connection with the events which led to the disappearance of the originals of Robert Bradbury's report of October 23, 1975¹⁵⁸ and Stead Crawford's report of November 8, 1982.¹⁵⁹ But the main thrust of Mr. George Horan's cross-examination for the government was directed to the director's performance as a witness at Judge Barnable's inquiry in 1984. Simms' first explanation as to why he had not disclosed to the judge the details of the overtime directive was that the subpoena issued to him had not required anything other than reports about Corcoran. Eventually he said that he knew that the judge would be advised of the overtime policy by the administrator of the boys' home. On his second attendance at the judicial inquiry he had produced the report of W.T. McGrath, executive director of the Canadian Criminology and Corrections Association dated November 10, 1970 and

¹⁵⁸ Exhibit C-0049.

¹⁵⁹ Exhibit C-0294, pp. 34 - 36.

Chapter VI

entitled "Newfoundland Training Schools Study" which appears to have been submitted only in draft "for discussion purposes only".¹⁶⁰ This was in response to a much more comprehensive inquiry by Judge Barnable seeking all reports extant about Whitbourne. Why had he not also provided Sharron Callahan's report of November 10, 1983?¹⁶¹ On this document, tendered in form by his assistant director of juvenile corrections, he had written slantwise across the top a note dated four days later as described above by Mr. Powell. After considerable fencing Mr. Simms said that the only explanation possible was that he had overlooked producing it. If one were looking at the document alone one might conclude that he had also overlooked minuting it to the assistant deputy minister George Pope. But Mr. Simms here said that he had provided Mr. Pope with a copy although he agreed with my suggestion that the normal procedure was to forward the original to higher authority. Simms may not have wished Pope to read his note to Mrs. Callahan. This is one explanation. The other is that he did not in fact send a copy to Pope and, since the latter had been called to testify to the commission six weeks before, his recollection of the matter was not explored. It is even less likely that Simms would have wanted Judge Barnable to read the note across the top of Mrs. Callahan's timely warning about the state of affairs in the Whitbourne School for Boys.

Grace was bestowed on the last hours of sixteen-year old Alonzo Corcoran's wasted life. His body was found wrapped in the coat of his fellow fugitive who had resisted the fatal urge to sleep.

¹⁶⁰ Exhibit C-0364, p.58.

¹⁶¹ Exhibit C-0361.

Sampling Other Profiles

As one might expect the commission's public hearings tempted one or two young people to tell stories of physical and sexual abuse which on investigation proved to be fictitious. Such was the case in criminal investigation profiles no. 1 and 2, the first occurring in 1989 and the second in 1990, perhaps the result of motivation by the commission's proceedings, and peripherally in the case of child welfare profile no. 14 described as a "Group Home Complaint Regarding Two School Teachers" also relating to the years 1989 and 1990. Mr. Ronald Tizzard testified to the commission on June 4, 1990. Formerly a director of Talbot House, a detoxification centre in St. John's, and at present a counsellor for the Alcohol and Drug Dependency Commission, beginning in 1971 he had enjoyed varied experience in child welfare work. In 1989 he was chairman of the St. Francis Foundation board operating a group home, which was conducted for the benefit of unmanageable boys with a normal capacity of five residents, all of them wards of the director of child welfare. At the time of Tizzard's testimony a staff of six full-time and three part-time workers provided care round the clock. At one time there were ten residents being looked after and from time to time the division would place boys for short periods pending placement in another environment.

One day in May 1989 the boy who was the subject of Mr. Tizzard's complaint came home from school with a bruise on his right upper arm which required and received no medical attention. The story he told was that during lunch hour at school he and his friends had been playing "piggy back tag",

Chapter VI

and that a teacher unknown to him had compelled him to leave the playground by squeezing his arm and shaking him. The teacher's reason was, as the complainant admitted, that younger children were at play in the vicinity. This statement was amplified by the teacher involved who said that the complainant and his companions were playing roughly and had hurt one or two of the smaller children, whereas he had taken the action complained of, using only necessary constraint. His request to the boy and his companions to stop their rough play had been received with abusive language. The social worker concerned with the group home reported the incident to the superintendent of the Roman Catholic School Board - Mr. William Whelan who testified earlier to the commission - who made inquiries of the principal of the school in question, a Christian Brother. The principal reported his colleague's version of the incident and his belief that the latter had "acted in a responsible and reasonable manner". In the meantime the boy had been suspended for three days for refusing to apologize to the teacher he had verbally abused. The summer months went by and, evidently exasperated, Mr. Tizzard wrote the following letter¹⁶² to Social Services, reproduced in the edited form in which it was admitted into evidence:

"I am writing you at this time, on behalf of the Board, to express great concern about the fact that it has now been almost four months since the incident, with no satisfactory conclusion having been reached. As the Board sees it, this is due to the virtual inaction of your Department in this matter.

A worker attended a meeting at the school on May,

Exhibit C-0532.

Child Welfare

31st.. The school did not fully co-operate, from the Department's point of view. A letter was written to the R.C. School Board, dated June 8th, 1989, requesting their intervention in sollicking (*sic*) greater co-operation from the school. To date they have not responded to the June 8th letter. For three months, this matter laid dormant; June, July, August. The Home needs to know how to respond to [name deleted] concerning this matter.

Your Department called the School Board at the end of August, Mr. [name deleted]'s Assistant, as I understand it relayed the message that the Board concurred with the action/inaction taken by the school. Two, almost three weeks later, there is no indication that your Department has any decisive plan of action.

Last week, Mr. [name deleted], the Home Co-ordinator, reported to your Department that he had received information that the teacher in question has been involved previously in similar incident or incidents; that he has a letter on file warning of disciplinary action should there be further occurances (*sic*). A week later, we understand that [name deleted]'s file is on the way to Mr. [name deleted]'s desk. I would have thought that a Worker would be out knocking on Mr. [name deleted]'s door at the School Board, trying to confirm the information received, the day after it was received.

The Board is most perplexed at the latitude given the school and the School Board in this matter; and would like to know what, if anything, the Department intends to do in this matter to bring it to some conclusion, soon,

This incident and information around it is crying out for investigation, and the Department owes [name deleted], the teacher and all concerned some concerted action. The Board would appreciate a response at your earliest convenience."

Chapter VI

A copy of this somewhat hectoring letter was sent to the minister, the Honourable John Efford, who, according to the witness, was upset by the incident and expressed his concern over the telephone. But during the apparent delay over the summer months the decision of the school principal and that of the Roman Catholic School Board had been expressed as final and this blunt conclusion had not apparently been communicated to the chairman of the foundation. In October a full blown case conference was held at the St. John's West office of the department attended by the superintendent of the school board, the principal of the school and four officers of the department, and to which Mr. Tizzard and the co-ordinator of the group home were invited but declined to attend. The social worker who had throughout made representations on behalf of the foundation in reporting this conference said: "it was recommended at this time by the author that a referral to the R.N.C. should be made. This was later decided against, no explanation was given as to why¹¹. None the less the author was instructed to pursue the matter and she interviewed a number of people including children who had been involved in the incident. Whatever decision had been made about the involvement of the Constabulary not being necessary, Constable Zita Dalton did in fact interview the young complainant, not only in relation to the playground incident but about an allegation of sexual abuse by another teacher at his school, like the principal also a Christian Brother, of which he had complained to an educational therapist of the Child Abuse Treatment and Prevention Unit. Finally in February the social worker was advised by Constable Dalton "that this was considered a summary offence, therefore the statute of limitations applied after a six month period". A high level of cooperation was

Child Welfare

evidently reached in allaying this storm in a tea-cup provoked by the playground activities of a teacher doing his best, and an unrelated complaint of sexual abuse by a child against another teacher. The file discloses no further action, perhaps owing to the child having claimed that he would deny making the allegations if he were called upon to repeat them,¹⁶³

It is inevitable that various child welfare profiles prepared for the commission, with or without records of criminal investigation and offences should deal with difficulties encountered by social workers and police investigators, perhaps complicated by errors in procedure, and wards of the director coming from families where parents have been irresponsibly prolific when their material circumstances and emotional difficulties have rendered them likely to endanger the welfare of their children. I have already commented upon the invariable presence of alcoholism and hostility to children of a previous union. As in all aspects of public administration a great majority of procedures are free of trouble and the conduct of the administrators correct. There is therefore danger that a commission of inquiry should convey an unbalanced view of the function under examination. Yet it is in the unfavourable circumstances that seem to predominate that policy and procedures can be most effectively tested. For instance, child welfare profile no. I¹⁶⁴ deals with the wardship proceedings in the case of Shane Michael Earle and leads to the evidence given by the

¹⁶³ Exhibit C-0532.

¹⁶⁴ Exhibit C-0281A.

Chapter VI

Honourable Madam Justice Noonan on February 20, 1990 in which the following exchange took place between her and Mr. Powell:

"Mr. Powell:

... I make reference if I might to Exhibit C0281A, Mr. Secretary, which is the profile, Mr. Commissioner on the Shane Earle wardship proceeding. I have provided you with a copy of this the other day.

Madam Justice Noonan:

Yes, you did.

Q. And you have had a chance to look through it?

A. I have.

Q. I ask, at page 8 - we use the numbers at the bottom of the page for the purpose - this is a letter from Mr. Simms to Miss Cahill on May 26, 1975, re Shane Earle in care of Mount Cashel saying "our file indicates that the temporary order of wardship on Shane Earle expired on May 16, 1974, and to date has not been reviewed. Would you please have the worker for the district arrange to have this case reviewed in court at an early date." That's May of 1975, many months before the December of 1975 police investigation, but was it your experience that temporary orders of wardship were not reviewed within the appropriate time? My understanding first of all it could be for one year, is that correct?

Child Welfare

A. That's correct. A child can be committed to the care of the director of child welfare for a period not exceeding 12 months.

Q. Here is one that is more than a year past that period of time. Was that a usual thing or not?

A. No it wasn't. I found it very frustrating.

Q. How could something like that happen? From your experience how would these things happen?

A. Other than the internal organization in the Department of social services, I mean I did not keep a K.I.V. system on these matters because I didn't know what the situation was going to be. I didn't see that as my duty. I expected the social worker who was dealing with the case to bring forward the file in the appropriate length of time to have the matter reviewed by the court. The social workers were quite aware that the matters had to be reviewed within 12 months. Quite frequently, the cases weren't. You might say that the situation has improved considerably at the moment, and they are being reviewed promptly."

For those unfamiliar with civil service jargon "K.I.V." means "keep in view" and refers to a system of retrieval whereby an officer asks his or her secretary to bring forward the file on a certain date for reviewing the matter in question. The next folio in the file after Mr. Simms' letter is one by a social worker countersigned by Mrs. Sharron Callahan, her supervisor, dated September 1975 to William Earle advising him that temporary wardship of his son Shane is due for renewal, and that several attempts to contact him have been

Chapter VI

unsuccessful. The explanation for this delay appears to have been the fact that Miss Cahill had relinquished her position as supervisor at Harvey Road and been succeeded after a period of some weeks by Mrs. Callahan. Then on October 30 the same social worker advised the director that William Earle was working as a security guard at the Western Memorial Hospital in Corner Brook, concluding "I have been unable to obtain an address for him. Trusting this is satisfactory to you". On November 14 Mr. William Fox writing for Mr. Simms wrote to the district administrator of the department at Corner Brook saying *inter alia* "we have been unsuccessful in locating either of the boy's parents to arrange a review of Wardship, but we have now been advised that Mr. William Earle is employed as a security guard at the Western Memorial Hospital in Corner Brook."

After Shane was apprehended on April 4, 1973 and placed in Mount Cashel orphanage a judicial inquiry under section 11 of the *Child Welfare Act, 1972* took place in the following month before Judge C.L. Roberts. Two orders were signed, the first dated May 10, 1973 which stated that the inquiry occurred on May 8 and ordered that the child be committed "temporary" to the care and custody of the director of child welfare for one year from May 10, 1973. The second order was dated May 16, 1973, or roughly a week later, and stated that the inquiry occurred on an indecipherable date in May 1973 and using the same language, including the word "temporary" in spite of the printed invitation to insert the word "temporarily", directed wardship for one year as from May 9, 1973. Buttressed by two orders applied for by the same welfare officer and proceeding from the same judge, Shane Earle's status was secure to at least May 9, 1974 after which he might be said for somewhat over eighteen months to

Child Welfare

be legally in limbo, although physically at Mount Cashel.

Into this muddle unauthorized action intervened when Shane left the orphanage on December 7, 1975 under the auspices, as will be recalled, of Chesley Riche, going to his mother's flat at 360 Duckworth Street, St. John's where he stayed until April 7, 1976. As a result of an order made by Judge M.R. Reid sitting in St. John's Family Court on March 18 of that year he became a permanent ward of the director and on April 7 a resident of Mount Cashel for the next ten years.

I am indebted to Mr. Day, co-counsel to the commission, for a compendious review of all the child welfare profiles including those which had a concomitant investigation by the police. These may be found combined in appendix J in their totality but in the meantime I reproduce as written his summary of child welfare and criminal investigation profile no. 4¹⁶⁵ upon which a comment will be made.

"During investigation of an allegation received on 16 February 1978 that a father of four children had publicly exposed himself, the Constabulary learned from the father's mother-in-law and three of his four children (girls born in 1961 and in 1972, and a boy born in 1963) that the father was mistreating the three children who, in turn, were concerned the father was mistreating the fourth child (a boy born in 1971). Unable to secure satisfactory evidence identifying the

Exhibit C-0460.

Chapter VI

father as the exhibitionist, the Constabulary's investigative report dated 09 March 1978 did not recommend charging the father but stated that 'something should be done with regards to his children.' The report was received on or shortly after 16 March 1978 by Justice which, on 21 March 1978, copied the Director and promised the Constabulary a reply following what Justice described as separate Social Services' investigation and (perhaps) a case conference between Justice and Social Services 'to determine a plan which we believe to be in the best interests of the children.'

There is no evidence of such an investigation, case conference or a response by Justice to the Constabulary. However, the Director's District representatives apprehended the two younger children while the two older children took up temporary residence with relatives. On 08 August 1978, the youngest child was committed temporarily (to 30 June 1979) and the next-to-youngest child was committed permanently, to the Director.

The child permanently committed, who in May 1979 was hospitalized for treatment of psychiatric problems occasioned by his father's mistreatment of him in the home, eventually visited his parents occasionally but remained committed to the Director's care to age 16 years in 1979 and afterwards remained in the Director's extended care until 16 March 1983.

The temporary committal of his brother, youngest of the four children, was extended on 08 August 1979 for 12 months by the Unified Family Court Justice, subject to what he described as 'condition' expressed

Child Welfare

in a letter from the Director's District representative to the parents, which both parents had signed. On 15 October 1980, notwithstanding some reservations by a District social worker professionally involved with the family, the Director successfully applied to the Unified Family Court Justice to replace temporary committal of the child with Director's supervision of the child in the child's home.

By now, the oldest child was planning nuptials (that occurred on 28 November 1980) and the second oldest child, living away from home, was visiting from time to time."

The order referred to as proceeding from the Unified Family Court Justice must be considered and it was indeed made by a judge of the Trial Division of the Supreme Court of Newfoundland as was reported by Mrs. Noonan to the director of child welfare in October 1980. The order on the familiar form, now re-issued to reflect the currency of the *Child Welfare Act, 1972*, as form 8-608, awards the youngest child to the "temporary care and custody of the parents subject to supervision by the Director of Child Welfare under section 15(1)(b) of the child welfare act". This part of the order preceded by a finding which is derived from the printed portion of the order as follows: "I DO FIND the said child to be a neglected child within the meaning of The Child Welfare Act, 1972, the Act No. 37 of 1972". The material portions of section 15 as they then stood are set out for convenience thus:

"15.(1) Where it appears to a Judge that the public interest and the interests of a child declared by him to be a neglected child or of any

Chapter VI

child against whom an offence has been committed may be best served thereby, the Judge may, subject to subsection (7) of Section 12, make an order

- (a) that the child be returned to his parents or guardians or other person in whose care he may be, subject to supervision by the Director;**
- (b) that the child be committed temporarily or permanently to the care and custody of some suitable person, subject to supervision by the Director; or**
- (c) that, subject to subsection (3), the child be committed temporarily or permanently to the care and custody of the Director, who in his discretion may order that the child be placed in a foster home, training school or other institution which has been approved by the Minister for the care of delinquent or neglected children."**

Paragraph (b), which is operative in the order of the learned judge, refers to "some suitable person" as the temporary custodian and one may speculate that the paragraph intended to be cited was (a) which does provide for a return of the child in question to his parents. But if this is mere inadvertence one must be concerned about any result which would classify parents responsible for the neglect of a child as "suitable" persons to exert care and custody, then perhaps question the desirability of making an order under (a) without some proviso that the designated custodian under the supervision of the director would at least be someone not

Child Welfare

responsible for the neglect, or, as it became a year later, the need for protection.

Mr. Day's subsequent summary of child welfare and criminal investigation profile no. 18¹⁶⁶ is similarly reproduced.

"Upon divorcing a father and mother in 1977 a Trial Division Justice granted the father custody of the three children of the family. Two of the children were boys born 12 November 1965 and 23 September 1969. the older boy, born to the mother by another man prior to the marriage (in 1967), had been adopted into the marriage of the father and mother.

Older Boy. As a result of the adoptive father's efforts to discipline the older boy by striking him with a belt the boy left home on 30 March 1978 and went to the residence of his grandmother who brought him on the same day to the Janeway where and when he was admitted, treated and apprehended on behalf of the Director who commenced in St. John's Family Court, but inexplicably did not proceed with, an application for a judicial investigation to have the boy committed to him or made subject to his supervision. Moreover the St. John's Family Court Judge did not press the Director to do so. Instead, the Director placed the boy at Mount Cashel upon his discharge from the Janeway on 07 April 1978 (perhaps on the basis or an Order the St. John's Family Court Judge

¹⁶ Exhibit O0497 and Appendix J.

Chapter VI

made on or about 24 May 1978 authorizing the Director to detain the boy until the judicial investigation [that never occurred] was completed).

The result of a district social worker's contact with the Constabulary on 04 May 1976 was a criminal investigation by the Constabulary which produced a report dated 23 May 1978 that concluded there were grounds to lay a criminal charge. On 25 May 1978 the Director of Public Prosecutions noted on the report: 'No criminal charges warranted' and on 30 May 1978 a Justice solicitor accordingly notified the Constabulary.

The mother, by now living in Ontario where she remarried on 04 February 1978, learned of the older boy's departure from home and applied to vary the custody Order (made in the 1977 divorce proceeding) to obtain custody of the older boy. In a Judgement granting her application, filed 06 September 1978, a Trial Division Justice described the father's treatment of the boy, albeit recognized as being isolated, as 'a savage attack'¹. On 23 September 1978 the mother removed the older boy from Mount Cashel and brought him to Ontario to live with her and her second husband.

Younger Boy. On 24 May 1985 the younger boy was brought to the attention of a social worker at the St. John's West District as a result of a telephone call from the boy's school counsellor suggesting that the father was unreasonable in his attempts to discipline the younger boy.

Consequent District inquiries and interviews resulted, on 05 June 1985, in the boy being

Child Welfare

apprehended by a District social worker and placed in a home licensed under subsection 45(2) of The *Child Welfare Act, 1972*, and being committed by Order of the Unified Family Court Justice on 15 August 1985 to the Director until 23 September 1985 when the younger boy would cease to be a 'child' as defined by subparagraph 2(a) of the Act. Commencing 23 September 1985, the boy lived in the Director's extended care until 01 July 1989. Meantime, the boy had no contact with his father or his father's cohabitant."

The words used by the learned judge of the Trial Division in the custody application - the Honourable Mr. Justice Goodridge, now Chief Justice of Newfoundland - must be quoted, being of general application:¹⁶⁷

"While I am prepared to accept that the beating which the respondent administered to his son was out of character it was clearly of a savage nature. Despite his assurance, I could never be certain that it would not be repeated.

A person may have no intention of doing such an act. Such acts are performed by people who for the moment have lost their temper and their reason. The best of intentions may readily yield to an impulse born in a moment of anger."

No better description of the danger of administering discipline before anger cools can be easily conjured up.

Exhibit C-0497, p.56.

Chapter VI

As a final sample of the work of Mr. Day and Mr. Orser investigating and reporting upon the files of the department of social services and the department of justice, and as an example of the elaborate notes with which they prefaced many of the profiles in all three categories - as did Mr. Powell, Miss Burke, and Mr. Home to a lesser extent - the introduction to child welfare and criminal investigation profile no. 17¹⁶⁸ is reproduced exactly as offered in evidence. It will be observed that no attempt has been made to edit the text of the documents quoted. Numbers appearing in square brackets, e.g. [055], refer to subsequent pages in the profile volume containing the documents on which the prefatory note is based.

"The issues in this proposed Exhibit are the responses of

1. Health Care professionals ("Health Care"),
 2. The Newfoundland Constabulary ("N.C."),
 3. Department of Justice, Government of Newfoundland and Labrador ("Justice"),
- and
4. Department of Social Services ("Social Services"),

to a complaint that a ten-year-old girl, placed from her parents to Exon House by the Director of Child Welfare ("Director"), was injured there.

Basic Facts

A mentally-challenged girl, born in 1968 ("Child"), was put in care of the Director by her Mother pursuant to Non-Ward Agreement she made with the Director on 06 October 1971.

Exhibit C-0496.

Child Welfare

The next day, the Child was placed on the Director's behalf in Exon House, St. John's, Newfoundland. On 26 March 1979, while continuing to reside at Exon House, she was admitted to Dr. Charles A. Janeway Child Health Centre ("Janeway") presenting with several unexplained injuries. The injuries were treated at the Janeway and the Child returned on 10 April 1979 to Exon House where she continued to reside until 01 February 1988. An investigation by N.C. did not result in any criminal charges. Commission Investigators did not locate any evidence of an internal inquiry at Exon House.

The Child

The child, born 05 November 1968 [001.], joined her Mother, born 1937 and Father, eight years younger than the mother, and two male children, in an urban Newfoundland community. [005.]

The family lived in a clean, tidy bungalow consisting of three rooms: a bedroom, a kitchen and a porch. The bungalow was not connected to either urban water or sewage services. [002;024.]

The Child's Father, who frequently abused alcohol, was infrequently employed. [002;012.]

The Mother had experienced a seizure in the fourth month of her pregnancy for the Child. [007.]

Within thirty months following birth of the Child, the Mother was unable to cope with her; partly because of the Mother's increasingly-precarious marriage, and partly due to the Child's strenuous behaviour. [012 to 013.]

A medical doctor ("Doctor 1"), practising in the community where the Child resided recorded in November 1969 [010.] that the Child was referred by him to the Janeway for investigation

Chapter VI

of seizures that had begun shortly after the Child suffered a bout of whooping cough.

Physical examination at that time was essentially negative and her physical and mental development was regarded as appropriate for her age. She was discharged home on Phonobarb 10 mg. twice a day.

By June 1971, the Mother contacted Social Services {then: Social Services and Rehabilitation) to place the Child in institutional care. The Social Services' welfare officer who discussed this prospect with the Mother included the following in her report dated 27 July 1971 to the Social Services Director of Institutions [003,]:

... [The Child], two and a half years makes it difficult for ... [the Mother] to give the other children in her home the type of care and attention they need. This little girl has to be closely supervised at all times as she could quite easily do harm to herself if left alone.

... [The Child] has very little fear of anything; she climbs on the stove and takes the covers off boiling pots - she has no fear of steam or fire, although she has on occasion been badly burned. She eats whatever she gets hold of - buttons, glass, and bugs. She likes fur and woolly things and will try to eat them. ... [The Mother] is unable to take her anywhere because of her behaviour.

... she mostly eats colored vegetables.

... [The Child] is very dirty over herself; she is not toilet trained and cannot stand for her pants to be dry. If she has been changed, she will usually find some water and wet herself. She will use the bathroom wherever she happens to be.

Child Welfare

... [The Child] is unable to talk; she usually grunts and makes strange noises.

On 06 October 1971, the Child's Mother made a Non-Ward Agreement with the Director regarding the Child. [009.]

As a result of the Agreement - pursuant to which the Child remained in the Director's care to age 16 years - the Child was taken, on the same date, by a welfare officer on the Director's behalf, to Doctor 1. Doctor 1's resulting report [010.] included the conclusions that

From ... [November 1969] until now ... [the Child] has returned on more than two occasions [to me] for re-assessment and was later discovered to be mentally-retarded and athology of which was not and still is not clearly understood. Presently the position is still the same, there is no clear cut motive deficit, that I can detect. If anything the child tends to be hyperactive. She has a recent burn on the left buttock which is clean and dry and healing.

On 07 October 1971, the Child was placed on the Director's behalf at Exon House, [Oil.]

A report dated 08 October 1971 to the Director from a welfare officer in the District Office responsible for the urban community where the Child's parents continued to reside ("District Office") [012 to 013.], suggested that the Child's hyperactivity had lately intensified:

... [The Child] is a hyperactive three year old - there is no end to her energy, and she has to be heavily sedated in the night in order to sleep. She has very little fear, and she can be seen climbing over chairs, on top of the stove, and places where even an older child might not be able to get. She climbs fences and has to be watched when near the road.

Chapter VI

She is unable to talk, but merely grunts and makes strange noises. ... [The Child] seldom notices anybody speaking to her, but usually goes right ahead with what she is doing.

... the home situation, along with her behaviour has necessitated her admittance to Exon House.

Exon House

Exon House, situate at 30 Strawberry Marsh Road, St. John's, operated from 11 March 1971 until 30 June 1989, as an institution administered by Social Services for severely mentally and physically challenged children (capacity of Exon House: about 100 children).

Exon House was employed for that purpose to relieve overcrowding at Children's Home. The Children's Home had been established in 1964 on Water Street West, St. John's, in a building known as the Merchant Navy Hospital.

Exon House was the Child's home from 07 October 1971, approximately a month short of her third birthday, until 01 February 1988 when she was nineteen years old. [011;169.]

From shortly after her arrival at Exon House up until at least 1980, the Child lived in the wing of Exon House known as "1 South"; whose residents were for should have been) under constant supervision. [022.]

At Exon House, the Child's care and security were the responsibility of several classes of persons: the Exon House administratrix, child therapists, nurses, doctors, teachers and security persons.

Child Welfare

Parents

Following the Child's placement at Exon House, the Mother visited the Child as often as "weather & distance will permit"; at least until January 1973. [019.] In October 1973, the Mother was visiting the Child "occasionally & keeps in touch." [022.] By 19 February 1975 a Social Services social worker following the Child described the parents' relationship with the Child as follows [023.]:

No recent contact known. Seems to be loosing interest. On

11 September 1975, a social worker's report stated [025.]:

No known contact [by parents of the Child] since last report [on 19 February 1975].

All subsequent reports disclosed no contact by parents with the Child for the duration of her stay (to 01 February 1988) at Exon House. A social worker who visited the parents in 1976 reported on 31 May 1976 that the parents were not interested in having the Child returned to them. However, as of January 1979 [030.], a volunteer was sometimes taking the Child out of Exon House for daytime periods.

For their part, the Child's parents continued to increase their family size. When the Child was placed from the family to Exon House in October 1971, she left behind two brothers. By 31 May 1976, two more children had been born and a sixth child was imminent. [024; 026.]

Child Development

The gradual acquisition by the Child of basic living skills while at Exon House is described in Child Progress Reports prepared by Social Services' social workers. Immediately below are excerpts from all of the Reports, made from 1971 - the year the

Chapter VI

Child was placed in Exon House - to and including 10 January 1979:

1. Child Progress Report dated 17 January 1973 [019.]:

... [The Child] is said to be autistic. She is however a pleasant child preferring to play alone in a very orderly fashion.

It is possible that ... [the Child] could eventually become toilet trained, however, constant individual attention is needed before her full potential is known and realized.

2. Child Progress Report dated 04 October 1973 [022.]:

... [The Child] continues in good general health. She is eating & sleeping well. She is still not toilet trained.

... [The Child] is now associating with others a little better. She has been transferred to 1 South, so that she will have more contact with other children.

3. Child Progress Report dated 19 February 1975 [023.]:

... [The Child] is very active & runs & climbs quite a lot. Her general health is good. She is able to feed herself but is not toilet-trained & cannot dress herself. She has no speech development.

... [The Child] is generally a loner & doesn't want to mix with the other children. She is not very responsive.

4. Child Progress Report dated 11 September 1975 [025.]:

... [The Child] continues in good general health. She can feed herself with her hands & is partially toilet trained.

Child Welfare

... [The Child] is still quite active. She refuses to associate with other children & loves attention on an individual basis.

5. Child Progress Report dated 16 March 1976 [027.]:

... [The Child] has continued in good health. She now feeds herself with a spoon and can indicate her need to use the bathroom. She is a very clean child.

... [The Child] always exhibits a great deal of energy. She loves physical activity where she can run, climb and jump. She has difficulty relating to the other children.

6. Child Progress Report dated 11 April 1977 [028.]:

... [The Child] has been in good health since last report. She can feed herself and is now placed on a toilet-training program but is not doing very well. She is also learning to dress herself.

... [The Child] does not relate well to the other children but she loves physical activities. She spends much time running around the playroom.

7. Child Progress Report dated 30 March 1977 [1978] [029.]:

... [The Child] recently had a grand mal seizure but she is doing well since then. She can feed herself and partially dress herself but she is not doing anything with her toilet training. ...[The Child] still does not relate very well to the other children but likes to be alone. She still strips off her clothes, although not as often and she like staff's attention.

... [The Child] is attending Preschool here at Exon House and is adjusting fairly well.

Chapter VI

8. Child Progress Report dated 10 January 1979 [030.]:

... [The Child] had a grand mal seizure about a month ago but has been fine since. She can feed and dress herself but is otherwise dependent.

She still takes off her clothes and will run away if given a chance.

She is on no special program at the present time.

Janeway

From the date of the Child's placement at Exon House on 07 October 1971 until and including April 1979, the Child was admitted to the Janeway on three occasions: on 18 February 1972 [015.], 03 April 1972 [017.] and on 26 March 1979. [094.]

The reason for the Child's admission on 18 February 1972 is summarized in the Janeway's Discharge Report regarding the Child dated 21 February 1972 [015.]:

Two days prior to admission patient fell of the chair and bumped the front left part of the head. Patient slept about four hours afterwards, no neurological signs. On the day of admission patient was sleeping more than usual and the nurse at the Exon House decided to send patient in because the bump had been soft. ...

The Child was again admitted to the Janeway on 03 April 1972 because of a [017.]

two week history of sore throat. Two days prior to admission, she developed a slight cough and fever.

The Child's third admission to the Janeway was at 8 p.m. on 26 March 1979 when she presented in the visible condition

Child Welfare

recorded in six photographs contained in Volume 2 of this proposed Exhibit ("the photographs").

Issue 1: Health Care (a)

Exon House

The events which resulted in the Child's admission to the Janeway on 26 March 1979 most likely occurred at Exon House where the Child had been continuously residing since 07 October 1971.

The Health Care Progress Notes kept by Exon House regarding the Child include one entry for 25 March 1979. The entry states [031.]:

Discovered lg. lump behind Lt ear & multiple scratches around external ear, cause unknown. Have Dr, check on next visit.

Both the Child's Progress Notes [033.] and records of Doctor's Orders [032.] kept by Exon House state that on 26 March 1979, a medication - Bactrim - was prescribed for the Child.

The same entry in the Child's Progress Notes [033.] - the first of four entries on 26 March 1979 - stated

Banging over weekend. Noth. to find.

The remaining three entries in the Progress Notes regarding the Child for 26 March 1979 are as follows [033.]

(L) eye bruised - multiple small bruises and scratches - crying at intervals thru out day. Given atazol 1 tsp. @ 1430 hrs. more relaxed.

5 p.m. 26-03-79 Requested by ... to have some

Chapter VI

medications Dr. ... ordered ... has telephoned to commence [medication] at 6.p.

7 pm called to examine condition of ... [The Child] ... large bruises on scalp ear (L) eye completely closed, numerous cuts and bruises, high pitched screaming Face swollen beyond recognition Skin rough. Washed looking. Taken to Janeway seen by Dr. ... admitted.

(b) Janeway

The first report from the Janeway regarding the Child's admission on 26 March 1979 was a letter dated 29 March 1979 from a Janeway staff pediatrician (who was also Chairperson of the Janeway Child Protection Team) ("Doctor 2") to the Director [038.]:

This ten year old girl was admitted ... for observation and treatment of bruises. She is a retarded girl She was reported to be a head banger and hyperactive child.

I saw her on March 27, 1979, at which time she had swelling and bruising of the scalp, forehead, face, behind the ears, neck and both eyes. Skull x-ray was normal. There was no evidence of any other significant injury.

While such injury could be self-inflicted, I feel that the circumstances whereby the above-mentioned injuries were obtained should be investigated.

The patient has also been seen by ... [another pediatrician, Doctor 3].

On the same date - 29 March 1979 - Doctor 2 telephone the Criminal Investigation Division, N.C. [051.], and reported that the Child had been admitted to the Janeway on 26 March 1979 at 8 p.m.

Child Welfare

suffering from bruising and swelling of the scalp and face.

As a result of Doctor 3 seeing the Child (as mentioned in Doctor 2's letter to the Director), he wrote a report on the Child, dated 09 April 1979, which he sent to Detective Kelvin E. Barnes, a member of the Criminal Investigation Division, N.C., and which he copied to the Director. [040 to 041.] Doctor 3, who saw the Child shortly before Doctor 2, wrote in his report to Detective Barnes that upon the Child's admission to the Janeway

There was very little history available from the institution and there was no explanation for these injuries.

I saw the child around 1330 on March 27th she was ... restrained and ... had massive bruises over her face and scalp. She had marked ecchymoses of both eyes and there was marked bruising all over her forehead and massive bruising and "bogginess" over the lateral part of her scalp. The bruise over her left cheek was massive and comprised all of her left cheek and went well back over her ear and back into her scalp. She also had scattered bruises on the rest of her body but these were faint and different than the other areas. The massive bruising on her face and scalp seemed recent and certainly seemed no more than 36 hours old.

Laboratory investigation ... showed no evidence of fracturethis girl bled a massive amount into the injured area

During her hospital stay the child has been mute and obviously has marked developmental retardation. However, she is able to get around reasonably well but must be supervised by our personnel in the hospital. She has not exhibited any significant head banging during her stay at this hospital.

Chapter VI

It is my opinion that this child was injured by a person or person who used violent force to inflict these injuries upon her. I do not think that these injuries are accidental and if they were accidental it would have to be explained by some unusual circumstances such as a high impact force delivered in a motor vehicle accident. Because these injuries are multiple it is not likely that these were caused by an injury such as falling over stairs, particularly because the injuries were only seen on her head.

I would suspect an assault on this child for several reasons, the main one being the extent of the injuries sustained by this child, but also it is the opinion of several experienced individuals that have been at the Janeway since its opening and who deal primarily with trauma - a neurosurgeon [Doctor 4], a general surgeon [Doctor 5], and an nursing supervisor [Nurse 1] - that they have no recollection of a child ever having been admitted to the Janeway with any extensive injuries sustained by self-inflicted head-banging. Also it is a fact that if this is an accident, and because she is in a custodial institution there must be other people who have witnessed it, however to this date I am unaware of any accident report about this child.

In summary, this is an eleven-year old girl who has sustained very significant injuries about her face and head and, in my opinion, these can only be explained by some brute force inflicted by some other individual. I do not think that these could have resulted from head-banging, nor could they have occurred as the result of an accident that would normally occur around an institution.

Doctor 2, having previously written to the Director on 29 March 1979, also sent a letter to Detective Barnes dated 09 April 1979 [041A.], in which he expressed the opinion that:

Child Welfare

The extent of the injuries noted on this girl is very suspicious of non-accidental trauma. While self-inflicted injuries are perhaps possible, the circumstances surrounding the child's injuries should be investigated.

On 10 April 1979, the Child was discharged from the Janeway and resumed living at Exon House. [043.]

A medical doctor [Doctor 6] in private practice at St. John's who followed the Child, reported by letter to Detective Barnes, dated 07 May 1979 [042.], the Child's history during the previous six months, including:

- 1) Mental Retardation with Behaviour Problems -- ... [the Child] has been mentally retarded since birth. During the past six months she has had outbursts of aggressive destructive behaviour (ie) episodes of head banging at times. However on several occasions these were probably secondary to illnesses (ie) ear infections etc. and at other times there were no apparent causes. She did not at any time cause severe damage to herself. Actually over the past six months her behaviour has improved and her medication (ie) mellaril which was used to modify her behaviour had been gradually reduced and discontinued on November 10, 1978.
- 2) Epilepsy - ... [the Child] has had history of grand mal seizures but these were controlled on phenbarb 90mgs. daily.

Issues 2 and 3: Newfoundland Constabulary and Justice

By 10 April 1979, when the Child returned to Exon House from the Janeway, the N.C. was in possession of

- (a) the complaint on 29 March 1979 at 3 p.m. from Janeway staff pediatrician, Doctor 2, who had first examined the Child on 27 March 1979, the day

Chapter VI

following her admission to the Janeway, [051.]

- (b) a written report dated 09 April 1979 from Doctor 2, [041A.] and
- (c) a written report dated 09 April 1979 from Doctor 3, another Janeway staff pediatrician, who had also first examined the Child on 27 March 1979. [040 to 041.]

The resulting N.C. investigation regarding Doctor 2's complaint produced two reports, both prepared by Detective Kelvin E. Barnes.

His first report, accompanied by witness statements and the photographs, was dated 23 August 1979. [051 to 078.]

On 16 November 1979, the solicitor in Justice who, on behalf of the Minister of Justice, ordinarily advised Social Services ("the Social Services solicitor") wrote to the Chief of Police [047.]:

I am wondering if a report has been completed into ... [the Child]'s injuries. The matter was referred to you some time ago.

Her letter was copied to the Director (of Child Welfare).

In response, the report, with covering letter dated 05 December 1979 [049.], was sent by the Assistant Chief of Police to the attention of the Social Services solicitor in Justice. Detective Barnes' summary of his investigation, contained in the report, included the following two points [055.]:

(IX) Reports of Doctors ... [3] and ... [2] indicated that the injuries were not self-inflicted.

(X) I consulted Dr. ... [7, a pathologist] at the Health Science Complex and after viewing the photographs of ...

Child Welfare

[the Child], he expressed the opinion that the injuries, as shown in the photographs, could not be self-inflicted.

On 11 December 1979, Social Services wrote to the Social Services solicitor in Justice [079.], following an earlier telephone conversation:

We would very much appreciate if you would advise whether a report has been completed pertaining to the alleged assault of the ... [the Child] at Exon House.

By 14 December 1979, the Director of Public Prosecutions ("D.P.P.") had examined Detective Barnes' first report and, on that date, wrote to the Chief of Police [080 to 081.] and stated that

... some further investigation may be necessary.

His letter, copied to the Social Services solicitor, continued as follows:

... I note that during the past few months some administrative and operational difficulties have arisen in light of the transfer from the old building to the new headquarters. Now that this is over, it should be possible to carry on the normal duties much more efficiently.

The investigation into this matter indicates that the report was submitted by the Detective concerned on August 23, 1979, but was not received here until December 5, 1979. No doubt this was affected by the move referred to above.

Perusal of the file leaves no doubt in my mind that the injuries sustained by this child were not all self-inflicted. There is clear medical evidence to support this view and sufficient other evidence to raise very serious suspicions.

Chapter VI

No statements were taken from Dr. ... [6] and nurses ... [2] and ... [3]. In fact, there is nothing to indicate that the latter were even interviewed. You will recall that certain activities at Exon House raised serious public concern in the past. Every effort must be made to carry this investigation to a successful conclusion. There are other helpless children there who might be treated to similar abuse if this investigation is not pursued.

The communication to the Chief of Police from the D.P.P. was reported upon by a letter from the Social Services solicitor dated 18 December 1979 to the attention of the Director (of Child Welfare) [082.]:

Enclosed for your confidential information is a copy of a police report in this matter which was received here on December 10, 1979. The associate Deputy Attorney General [and D. P. P.] has asked the police to clarify certain aspects of the case. I will advise you further when we receive the requested clarification.

The following June - specifically, on 06 June 1980 - Detective Barnes' second investigative report, this one responding to the letter dated 14 December 1979 from the D.P.P. to the Chief of Police, was completed [085 to 155.] and, with covering memorandum dated 18 June 1980 [084.], was sent by the Deputy Chief of Police to the D.P.P.

The finding by Sergeant Barnes, in his second report, included the following [086 to 087.]:

It appears that ... [the Child]'s injury was first noticed on the 12 midnight to 8 a.m. shift, March 25-26, 1979, by ... [registered Nurse 4 and registered Nurse 3], both of whom noticed a slight lump behind her ear.

The injury became progressively worse during the next 24

Child Welfare

hours, until ... [the Child] was examined by Dr. ... [3] at approximately 1:30 p.m., March 27, 1979.

I cannot explain how the examination by Dr. ... [6] at approximately 8:45 a.m., March 26th, did not show any injuries, when approximately one half hour later ... [Child Therapist 1] ... noticed that the left side of ... [the Child]'s face was slightly swollen.

I cannot find evidence to suggest who was responsible for the alleged assault on ... [the Child], if indeed she was assaulted.

One of the enclosures to Detective Barnes¹ second report was a medical note from Doctor 6, dated 16 January 1980, regarding his examination of the Child approximately 9 a.m. on 26 March 1979, about eleven hours before her admission to the Janeway [088.]:

Apparently ... [the Child] had been aggressive with head banging over weekend period. At time of examination I did not detect any significant injuries to ... [the Child] ... may have been minimal bruising around forehead but nothing of great concern. ... [The Child] was discharge from office to be observed closely during the day.

Another enclosure to Detective Barnes' second report was a copy of the contents of the Child's medical file maintained at the Janeway [094 to 155.]. In the file were the notes of Doctor 2 that included the following observations he made at 2 p.m. on 27 March 1979 (16 hours after the Child's admission to the Janeway) [110 to 111.]:

... This 10 year old girl was admitted here last night from home because of bruises. The child is known to be hyperactive and apparently self destructive. She is severely retarded.

Chapter VI

She was reported to be banging her head on the day of admission.

EXAMINATION. Difficult child to examine tied in bed with extensive bruising of the face.

... mouth - small cut

There is extensive bruising and swelling of the scalp involving both the frontal and parietal areas. There is severe swelling of the eye lids and both eyes are very purple. There is swelling of the L cheek and bruising and bruising and swelling behind the left ear extending along the neck almost to the midline. There is some swelling and bruising behind the ear in the area under the auricle. There is bruising of the forehead.

Numerous bruises on the shins bilaterally with scattered bruises and scratches over the remainder of the body, none of which are of significance.

Impression (1) multiple trauma - the circumstances is questionable ?self-inflicted ?another child ?another person?

Suggest (1) consult Social Service. ... (3) Photographs ... I have spoken to authorities at Exon House who will look into the situation further at Exon House.

Child Welfare

The results of the consultation on 02 April 1979 to Doctor 8, a child developmental specialist on the Janeway staff, were also contained in the Child's Janeway medical file and include Doctor 8's conclusions, as follows [155.]:

Opinion. The primary area of injury could easily be self-inflicted although banging head against the wall usually produces a more anterior lesion. Eye hitting is common & can produce the injuries she shows, & bitemporal selfhitting is quite usual.

She was known to have been injuring herself over a period of approx. 26 hours. ... - could have been self-inflict, culminating in ... self abuse. The Exon House notes show that she was seen at intervals over this period by nurse and doctor once on the 26th, with description of new bruises.

Opinion. In light of the above history, findings & events I feel that these injuries were self-inflicted, & treatment of the child, apart from dealing with the injuries, should be aimed at decreasing hyper-activity & self-destructive tendencies. I note she has swallowed FBs - This is common with self abusers.

Detective Barnes' second report, with its enclosures, were shown by the D.P.P. to the Social Services solicitor and to a Justice 'criminal side' solicitor. [156.]

The opinion of the Social Services solicitor, written 30 July 1980 [156.], was that

The further questioning on the part of police does not appear to have been particularly helpful.

I found it interesting to read Dr. ... [8]'s notes. She is very knowledgeable in the field of mental retardation and

Chapter VI

perhaps in fact this injury was self-inflicted as she suggests.

On the same date, the Social Services solicitor sent a copy of Detective Barnes' second report to Social Services.

The 'criminal side' Justice solicitor noted, on 05 October 1980 [156.]:

I have read this carefully.

There does not appear to be sufficient to proceed with charges - Inquiry??

Commission Investigators did not locate any document stating or otherwise indicating that a decision was ever made to request further investigation or to direct the laying of charges or to proceed no further.

Issue 4: Social Services

(a) Exon House

Following medical attention at the Janeway, the Child was returned by Exon House staff to that institution on 10 April 1979.

Neither in the Child's next Progress Report from Exon House nor subsequently was there any reference to her Janeway admission on 26 March 1979, her subsequent inpatient treatment there until 10 April 1979; or the reasons for her admission and treatment. Her next Child Progress Report, which was prepared by a social worker on the Exon House staff and sent to the Director, dated 12 October 1979, informed as follows [044.]:

(a) Physical ... [The Child] has had several seizures since our last report. Other than this she remains

Child Welfare

in good health. She will still run away if the opportunity arises.

fb) Behavioral ... [The Child] can dress and feed herself. She is partially toilet trained in that she will cooperate when taken to the bathroom at regular intervals.

(c) Educational Was attending Learning Assistance Centre until the first of September. These 1/2 hour sessions emphasize basic life skills.

3. CHILD'S RELATIONSHIP:

(a) Parents No know contact has been made since the last report [on 10 January 1979].

(b) Others ... [The Child] was involved in our Total Impact Program this past summer.

4. FUTURE PLANS:

(a) Medical Continued use of mellaril 35 mg TID, Phenobarb 60 mg am and 90 mg HS. Colace 1-2 tsps HS.

(b) Education Will be attending Learning Assistance Centre when it is reopened.

(c) Social Place more emphasis on her toilet training.

(b) Social Services Headquarters

First notification of Social Services regarding the Child's injuries on 26 March 1979 had been by letter to the Director from Doctor 2, a Janeway pediatrician, dated 29 March 1979. [038.]

Chapter VI

The Director, in turn, sent a copy of that correspondence to the Administratrix of Exon House with the Director's covering letter dated 04 April 1979. The Director wrote [039.]:

I am attaching for your information a copy of a letter recently received from Dr. ... [2] of the Janeway Child Health Centre concerning the ... child. As agreed during discussions on this case late last week, I look forward to a meeting between you, and ... [the Social Services solicitor] and myself regarding this case as soon as you have had an opportunity to totally assess the situation at Exon House.

If the meeting proposed by the Director took place, no record of such meeting was found by Commission Investigators.

Reports to Detective Barnes by Doctor 2 and Doctor 3, both dated 09 April 1979 [040 to 041A.] were copied to the Director.

On 12 November 1979, a Transmittal Slip from the Assistant Director to the Director stated [045.]

This case was reported as an alleged child abuse - do you know where we stand on the case now.

On 13 November 1979, the Director wrote on the Transmittal Slip [045.], the following:

... [the Social Services solicitor] may have info. Would you like to speak with her?

On 15 November 1979, the Assistant Director wrote a note to the Child Welfare Program Co-ordinator at Social Services Headquarters [046.]:

I have made some notes on Dr. ... [2]'s letter [041A.] - lets record as reported child abuse & KIV for 2 weeks.

Child Welfare

We will then write to Justice - if no police rept has been received by then.

The Social Services' solicitor, with her covering letters dated 18 December 1979 [082.] and 30 July 1980 [157.], sent Social Services a copy of each of the two N.C. investigative reports dated, respectively, 23 August 1979 and 06 June 1980.

The only Social Services file on the Child is its Headquarters file. There is no document in that file indicating that Social Services made any response to this matter other than to gather the documents mentioned in this Summary.

Subsequent Events

From 10 April 1979, the Child continued to reside at Exon House without incident until her discharge from there on 01 February 1988 to a Group Home in an urban Newfoundland community [169.]. The Child is living in that Group Home today."

The foregoing account, although an extreme case, may be considered an episode in the declining fortunes of Exon House which was first used as an "institutionalized" home for handicapped children by social services in 1971 and continued as such until June 1989 when it was closed except for some independent daycare activity conducted during a five-day week. Evidence was given to the commission on June 14, 1990 by Mrs. Violet Ruelokke, from 1966 to 1981 director of nursing at Grace General Hospital in St. John's and director of its school of nursing, and from 1981 to 1989 executive director of the Association of Registered Nurses of Newfoundland. When president of the association she headed

Chapter VI

a delegation which expressed concern in 1977 to the deputy minister of the Department of Rehabilitation and Recreation about the quality of care applied by the administration of Exon House and the Children's Home and particularly in the area of "behavioural modification".

The association was perhaps handicapped by the fact that its complaint was directed against the employment of inadequately qualified child therapists instead of nursing assistants which gave it the appearance of a jurisdictional dispute. But almost from the beginning of government's operation of Exon House allegations of brutality and neglect had from time to time been made public. The fact that the association's specific complaints made in 1976 had not been conveyed to the minister was revealed by its final and effective protest to Premier Moores in person. It is unnecessary to review the press reports and ministerial statements of the day other than to say that the public was aroused over the situation of helpless children, whose misbehaviour through no fault of their own was apt to provoke the uncontrolled anger of those who had charge of them. Public concern was heightened by the death of a nineteen-year old patient at Exon House found in a bath-tub in September 1977 after considerable investigation and reporting had been done. It is remarkable that the case of the child considered in profile no. 17 should have received so little attention after the excitement two years before, but one may suppose that by this time the die was cast and the enterprise at Exon House liquidated; already contemplated ten years before it was complete. The present policy is to place mentally and physically retarded patients in group homes or independent living arrangements and to withdraw support from institutions of which Exon House and Mount Cashel were examples.

Chapter VII: The Questions in Article II

The questions which must be determined in summarizing the commission's examination of policies and practices of the Departments of Justice and Social Services are suggested by the wording of article II as set forth at the beginning of chapter VI. First it will be observed that the commission is enjoined to make a general inquiry into the policy or practices "then prevailing" referring to the Newfoundland Constabulary investigation of December 1975, in compliance with which commission counsel and investigators did not put too fine a point upon the indicated date, but concerned themselves with what happened before, then and thereafter with a view to my answering the questions posed in the particular determinations required by subparagraphs (a), (b) and (c). These inquiries, as already noted, cover a period from a time when child abuse went almost unnoticed, and was little understood, to one when tragic revelations of the often permanent damage inflicted on the emotional stability of the victim, much of it passed on from parent abuser to child victim and in turn inflicted on a third generation, became common knowledge. It is understandable that whatever policy was pursued was not uniform, and whatever practice resorted to not dictated by precedent.

An understaffed "criminal side" of the department of justice wrestled with the many problems of prosecution in the courts with a leaning towards the weighing of evidence rather than the setting of an example to the community of the presence of the rule of law. At the same time the department kept a tight rein on the two police forces which served the province, one indigenous, the Royal Newfoundland Constabulary, and the

Chapter VII

other contractual in the sense that the Royal Canadian Mounted Police, a federal force with a multitude of federal concerns, served Newfoundland as provincial police hired on terms similar to those agreed to by every province in Canada other than Ontario and Quebec. The Constabulary made no bones about deferring to the prosecutors in the matter of laying charges; the R.C.M. Police in spite of asserting a more independent policy, in almost every case examined - that of Father R.H. Kelly being a notable exception - paid equal deference to the Crown lawyers as to whether charges should be laid, or allowed files to be "concluded" by junior officers after no apparent consultation with their superiors.

The department of social services, with many opportunities of early detection of child abuse, appeared to be committed to a policy of "keeping the family together" and was frequently confronted by the irresponsibility of parents and worse. Its front-line workers, however devoted, rarely succeeded in obtaining the cooperation of neighbours in the detection of child abusers or of conveying to the community, urban or rural, the vital provisions of section 49 of the *Child Welfare Act, 1972*, whereby those with knowledge of or reasonable grounds to believe in the presence of child abuse were bound to report it or incur a penalty, much less the provision which protected an informant from actions for libel and slander. Excessive case-loads arising from chronic understaffing, similar to and even more onerous than those which bedevilled the Crown lawyers, weighed heavily on the social workers of the child welfare division.

The same department from time to time, followed what may be a general bureaucratic practice of allowing an "executive" of deputy, associate deputy and assistant deputy ministers to limit the initiative of officers like the Director of

The Questions in Article II

Child Welfare, and to discourage that of ministers by withholding information which they in their wisdom thought it unnecessary to give them, except in rare cases where they might be compelled to make explanations in the House of Assembly. I must not be heard to say that the evidence discloses any intent to deceive or conceal; but in spite of what was testified to by Mr. Hollett and Mr. Pope about the devolution of responsibility encouraged by the management policy of the government of Premier Moores, this attitude was deeply engrained and indeed acquiesced in by the officers concerned and not always contested by the responsible ministers. The prime example of defective communication in this regard was the Mount Cashel investigation of December 1975 and its attendant complaints, as to which both the minister of social services and the minister of justice were denied information which, however unpalatable, would have avoided an accumulation of embarrassment in later years and been of incalculable benefit to victims of the abuse complained of. The case of the Mount Cashel investigation of 1975 does not stand alone as an example; the failure to advise the minister of the full import of the subsequent Mount Cashel investigation of 1982 was its counterpart. Mr. Hickey, it will be recalled, complained that although he had been informed of the case of Brother Burton's activities he was not told about, and had no knowledge of the investigation of homosexual activity consented to and indulged in by juvenile residents. He had a further complaint about his briefing in the affair of Alonzo Corcoran. Contemporaneously the minister of justice was the Honourable Gerald R. Ottenheimer (since 1988 a member of the Senate of Canada), assuming office on July 3, 1979 and retaining it till April 24, 1985. On June 28 and 29, 1990 he gave a sworn deposition to the commission in the

Chapter VII

form of questions put by Mr. Day, responded to by him in his office at the Senate in Ottawa.¹⁶⁹

An extract from this deposition serves to illustrate the situation of a minister of justice who had responsibilities related to those of a minister of social services. Mr. Day put to Senator Ottenheimer the following questions and received the answers indicated:

"Q. The first question is as follows: While you were the Minister of Justice did you in any way encourage or establish or support a practice or policy of lawyers on the criminal and civil side of your department agreeing to therapy, private therapy, for a suspect or an accused as a potential alternative to charging or prosecuting a person in circumstances where there existed reasonable and probable grounds to believe that the person had committed a criminal offence.

A. My policy was that wherever the evidence warranted there should be prosecution. The question then with respect to therapy and medical treatment, counselling, and that entire related field would, I think, be more appropriately a matter to be deliberated and decided by a court such as in the sentencing process.

Q. My second question is prompted by two matters in particular that I bring to your attention. The first relates to inquiries by police and Social Services in 1982 that I summarized for you generally yesterday. Involved were a member of a lay religious Order, one civilian, and 21

Exhibit C-0627.

The Questions in Article II

boys who were either alleged assailants, alleged recipients of mistreatment, or were witnesses to such alleged conduct of a sexual nature amongst boys at Mount Cashel. In that situation, the evidence tends to show that the Assistant Director of Public Prosecutions and the solicitor then advising the Department of Social Services on behalf of the Minister came to an understanding as follows: that provided Social Services took steps to look out for the interest of the affected children, Justice would deal with the alleged assailants outside the criminal justice system by therapy and likesuch. Neither occurred on the basis of every reasonable inquiry and search that our Commission Investigators were able to do. The other situation prompting my second question to you this morning, involves a request made on 25th June 1982, by the Deputy Minister of Social Services, to the Deputy Minister of Justice, for legal advice on a number of matters resulting from the coming into force on April 17th, 1982, of the Charter of Rights and Freedoms. This request for advice to Justice was responded to by the solicitor who, on behalf of the Minister, would normally advise Social Services, on May 16th, 1983, just short of the year later. When the response was made, it was not a substantive one in that it indicated that the solicitor in Justice did not have "time to study the question but I understand that one of the Provincial Court Judges is addressing this question over the Summer. His project includes other Provincial Statutes as well, I will keep you posted." Every reasonable search and inquiry by Commission Investigators has failed to indicate that during the rest of 1983 or in 1984 was there any further communications between

Chapter VII

Justice and Social Services on this matter. Were you ever informed or otherwise aware of either of these two situations that I have a moment ago outlined to you.

A. No I was not informed nor aware of either of those.

Q. Further, how can a Minister deal with matters such as these inappropriate responses to criminal complaints or a lethargic, insubstantive response to a request for legal advice from another department of government, in terms of checks and balances? From your point of view who is responsible for monitoring these sort of things, and avoiding their repetition?

A. Well, with specific reference to the letter from the Deputy Minister of Social Services to the solicitor in Justice, for certain legal advice and the fact that practically a year passed without substantive reply, and the reply that was sent did not address the issue, it would appear to me there that the Deputy Minister of Social Services, I suppose, had a number of courses of action, and I don't know that they were pursued or not. First, it would have been to complain very firmly to the solicitor. If he didn't wish to do that, then to complain to his counterpart, the Deputy Minister of Justice. There was also, of course, an avenue where he would have advised his minister and would have relied on a Minister to Minister reference. I know the latter did not happen and I'm not aware of a Deputy to Deputy conversation on it. But, in general, I think these would be the avenues to rectify the situation available to the person who asked for the information and didn't receive it.

The Questions in Article II

In a more general context, I think that what I would like to do is indicate specifically mechanisms that I established to keep myself informed and then on a more general basis, what I consider the basis of ministerial responsibility in general. During my term as Minister I met, on a quite regular basis, the Deputy Minister and also with the two Associate Deputy Ministers, sometimes all four of us were together and sometimes it was two or three of us. But this was on a fairly regular basis and the purpose of these meetings was to review the work of the Department and to identify what problems there were and to decide upon what actions were to be taken to rectify it. It was my responsibility to be informed of these matters and to the extent policy was involved, not a detailed administration, but policy was involved, to naturally be involved in solutions. To the best of my knowledge the Deputy Minister who served with me and the Associate Deputy Attorney General and Associate Deputy Minister in the civil field had conversations that were always open and frank. I certainly believe they felt that I was quite accessible and that I didn't have to call a meeting or anything to have a matter brought to my attention and indeed on their own initiative they frequently briefed me on a matter or asked my opinion on a matter, or generally discussed things with me.

Q. As were individual solicitors in the department?

A. That is correct. On a number of occasions an individual solicitor would ask to see me to discuss something and on other occasions I would ask to see a specific solicitor on a matter that he or she would be working on which I

Chapter VII

wished to be apprised of in terms of what progress was being made and certainly it is my opinion, and I would be surprised to the contrary, that none of the people involved felt that I was not accessible and I was certainly of the opinion that they felt totally accessible. These people are the Deputies and Associate Deputies and all the solicitors. With all of them I had dealings that were honest, frank and open. Now in terms of the meetings with the Deputies of course they can only inform me of what they knew and I am of the opinion that they always informed me of what they knew within important areas. Probably in a more general context, and I am not necessarily thinking of any specific reference, but in a more general context, the question comes up of ministerial responsibility and a number of treatises have been written on the subject and obviously you made reference to it in a former public inquiry. The way I have always regarded it and I don't think it is at variance as to what you mentioned it is probably just a slightly different formulation: I take as given that a Minister must be honest and must be competent. I think a Minister must be diligent and prudent in the performance of his or her public duties and in this context I take diligence and prudence to be synonymous, and I suppose I use those terms to emphasize that it would be a betrayal of public responsibility to be negligent and nobody can reasonably expect omniscience. In my formulation of ministerial responsibility, the Minister must be diligent and prudent."

The Questions in Article II

Although this definition of ministerial responsibility may strike as novel those who have believed that it means responsibility to the House of Assembly for all the affairs of the minister's department, it is obvious that in this testimony there are echoes of the evidence of Chief Justice Hickman as to his own reputation for accessibility and the general harmony which existed when he was minister of justice in preceding years. Yet both he and his successor were on critical occasions denied information. As to the observation of Mr. Day inserted into the second question that "the evidence tends to show" that two senior officers, one from each department, came to an understanding that if social services looked after the affected children justice would deal with the alleged assailants outside the criminal justice system, there is no question, as he pointed out, that nothing of this nature was done.

In spite of various compromises which could and did temper the wind to the shorn lamb in the matter of prosecution there was no case, other than that of Christian Brothers Ralph and English in December 1975, in which agreement to leave Newfoundland was either offered or accepted as the price of immunity from prosecution. The closest analogy is what occurred in 1979 when Father Ronald Hubert Kelly was represented to the magistrate in Corner Brook as having a room reserved for him in a place called Southdown and a seat on an aircraft which he proposed to occupy upon leaving the courtroom. I can only answer in the negative the question posed in article II (a) as to whether there was a policy or practice of suppression of allegations of physical and sexual abuse where the alleged assailants agreed to leave the province of Newfoundland. I observe that what occurred in December 1975 was neither policy nor practice,

Chapter VII

but a single convulsive response by co-religionists of the alleged offenders to what was perceived as a challenge to the faith and morals of their religious community. This conclusion having been reached, and the answer to the first question being "no", the questions posed in paragraphs (b) and (c) cannot be addressed.

Chapter VIII: Law Avoidance

Due Process of Law

By the provisions of article III of the commission's terms of reference I am asked "whether existing Police and Government Departmental Policies are sufficient and proper to prevent avoidance of the due process of law in instances of allegations of physical or sexual abuse of children". The term "due process of law", frequently shortened to "due process", is little used by lawyers trained in the English tradition. It occurs very often in American case law and jurisprudential writings. In my experience in Canada it was rarely used but since the adoption of the *Charter of Rights and Freedoms* a shy appearance has occurred. In the United States its use is frequent and familiar particularly to constitutional lawyers. I have thought it important to explore authorities not in depth but in sufficient contemplation to make sure that the language of article III of the terms of reference is understood.

The latest English law dictionary consulted, stating the law as at 1977, is the second edition of Lord Jowitt's *Dictionary of English Law*, which has no title for "due process" but defines "process" at considerable length. The opening paragraph of the entry as derived from Britton reads:

"The proceedings in any action or prosecution real or personal, civil or criminal from the beginning to the end; strictly, the summons by which one is cited into a court, because it is the beginning or principal part thereof, by which the rest is directed."

The definition continues to examine the meaning of process in

Chapter VIII

its various applications in former times and, bringing matters up-to-date, declares that for civil actions process consists of the writ of summons or originating notice, execution by which a judgement or decree is carried into effect, and as against persons not parties to an action such as jurors and witnesses. In criminal proceedings process means "proceedings issued to bring in a person to answer an indictment which has been found against him". *Black's Law Dictionary*, a leading American authority, (revised fourth edition) as might be expected lists the complete phrase as "due process of law" and derives the following from the Constitutional Commentaries of the famous American jurist and judge Joseph Story as "law in its regular course of administration through courts of Justice", citing *People v. Skinner*, Cal. 110 P.2d.41,45 for the statement that, "'law of the land', 'due course of law', and 'due process of law' are synonymous".

The last word may be said by the author of *The Oxford Companion To Law*, David M. Walker, who because of his position as Regius Professor of Law in the University of Glasgow can be credited with a dispassionate view of all systems and jurisdictions. The title "Due Process" reads,

"The conduct of legal proceedings according to established principles and rules which safeguard the position of the individual charged. The concept of due process is rooted in English common law and expressed in Magna Carta art. 39 (1213) whereby the king promised that 'no free man shall be taken or imprisoned or disseised or exiled or in any way destroyed ... except by the legal judgement of his peers or by the law of the land'. This was later interpreted to require trial by jury. In later statutes and books the phrase was used with or in lieu of the phrase, 'the law of the land'. The concept was adopted by the U.S.

Law Avoidance

Constitution in the fifth amendment (1791) which was extended to state action by the fourteenth amendment (1867) and has been said by the Supreme Court to mean the same as the law of the land."

Conceivably, one can avoid the law of the land in two ways: first by not using it and second, by not having it used against one.

Avoidance in Practice

I regret the absence of the word "practices" in article III because many of the difficulties conducive to avoidance of due process of law in this regard are created by failure to practise what the policies preach, or to put it in another way by indulging in practices which policies do not countenance. To illustrate this proposition one need only turn to the *Child Welfare Act, 1972* an expression of policy of the highest importance. It is true that the future of this legislation is under consideration in the Department of Social Services at the present time and much of what is said here may well be under contemplation by civil servants and legislators in due course. Section 49 of this statute as it stood in 1975 which has already been quoted (p.56) in chapter II of this report was later to be amended in 1981 by S.N. 1981, c.54 s.6 so that it read:

- "(1) Every person having information of the abandonment, desertion, physical ill-treatment or need for protection of a child shall report the information to the Director or a social worker.**
- (2) Subsection (1) applies notwithstanding that the information is confidential or privileged, and no**

Chapter VIII

action lies against the informant unless the giving of the information is done maliciously or without reasonable and probable cause.

- (3) Any person who fails to comply with or contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment."**

Originally subsection (3) provided that failure to comply with or contravention of the section was an offence and left the penalty to section 55 subsection (2) of which provided that:

"Where no penalty is provided for a breach of any provision of this Act or of any regulation made under this Act, a person committing the breach or failing to observe the provisions thereof is liable on summary conviction to a fine not exceeding two hundred dollars, or in default of payment, to imprisonment for a term not exceeding two months, or to both such fine and such imprisonment."

It will be observed that for obvious reasons in the climate of 1981 the penalty for failing to report abandonment, desertion, physical ill-treatment or need for protection of a child was increased from a fine of two hundred dollars and imprisonment not exceeding two months to a fine of one thousand dollars and imprisonment not exceeding six months or both in each case. Nevertheless I can find no reference in all the evidence submitted to the commission of any charge being laid under this section, and although this may not be conclusive it suggests two things: first, inattention to the provisions of the statute which is by no means isolated, and

Law Avoidance

second, a failure to appreciate the plight of victims of mistreatment. In the latter case the involvement of Father R.H. Kelly with young boys and youths in his west coast parish of 1979 produced no such report from either police or public.

Again subsection (7) of section 12 of the act, as it existed in 1975, provided that "an order made under Section 15 shall recite the facts so far as ascertained in an investigation under this section and the Judge shall deliver a certified copy of the order to the Director". Sweeping amendments made by the *Child Welfare (Amendment) Act, 1972*, S.N. 1988 c.45, s.1 provide for section 11.1(7) that "an order made under section 15 shall recite the facts so far as ascertained in an investigation under this section and the Judge shall deliver a certified copy of the order to the Director". In most cases investigated by the commission the order was made on a printed form number 11-606 entitled "Order Respecting A Neglected Child". For long after the introduction and passage into law of the *Child Welfare Act, 1972* the form referred in print to the *Child Welfare Act, 1964* and no attempt was made to alter this anachronism. The form provides for the name of the alleged neglected child and the names of its parents, but no other "ascertained facts". At its foot, and in brackets beneath the space for the signature of the judge of a family court or stipendiary magistrate, are the following words "(two copies of this Order and Copy of Evidence to be forwarded to the Director of Child Welfare)". Although the bare orders are generally present in the wardship files of the child welfare division, I can think of only one case in which any attempt was made to state the facts ascertained to date or any of the

Chapter VIII

evidence reviewed; that is in child welfare profile no. II.¹⁷⁰

If it is assumed that the *Child Welfare Act, 1972* and regulations made thereunder constitute the visible expression of policy in matters of child welfare, then attention must be given to developments which have official sanction but do not appear to be authorized by the enacted law. Three types of agreements of an extra-curial character affect the care of a child in need of protection. The first is a written agreement made by the parent to yield care and custody to a person other than the director, prohibited by section 45 subsection (1) of the *Child Welfare Act, 1972* which read when first enacted:

"45(1) A person shall not accept a child under the age of twelve years into a home for the purpose of providing that child with board or lodging, or both, unless that person

(a) has received permission under this section from the Director or other person designated by the Minister generally or specially for the purpose, hereinafter in this section referred to as the "designated person";

Exhibit C-0469.

Mr. Day has corrected my impression that Judge Barnable's lengthy and comprehensive reasons were unique in the following note:

"This was one of only three judicial investigations from 1965 to 1990 in which the Commission located a recitation of facts required by *The Child Welfare Act, 1972* and its predecessor *The Child Welfare Act, 1964*,"

Law Avoidance

- (b) is of the same blood as the mother of the child where the child was born out of wedlock; or
- (c) is of the same blood as the father or mother of the child where the child was born in wedlock."

and which by 1988 had become by virtue of the *Charter of Rights Amendment Act* S.N. 1988, c.39 s.2:

"45(1) A person shall not accept a child under the age of twelve years into a home for the purpose of providing that child with board or lodging, or both, unless that person

- (a) has received permission under this section from the Director or other person designated by the Minister generally or specially for the purpose, hereinafter in this section referred to as the "designated person"; and
- (b) is a mother, father, sister, brother, aunt or uncle or a parent."

An example of such an agreement in 1980 provoked the following letter from Mrs. Mary Noonan in the Department of Justice to a lawyer in St. John's:

"I have been consulted by the Director of Child Welfare in this matter with reference to a document which you apparently drafted and which was executed on the 19th day of June, 1980. I am attaching a copy for your easy reference.

The Department of Social Services is deeply concerned over this matter as it is illegal to place

Chapter VIII

children privately in this province to non-relatives. In this connection, I would like to draw your attention to section 45 of The Child Welfare Act, Stats. N. 1972, the Act No. 37.

I am available to discuss this matter further with you if you wish."

The agreement was between a mother from Marystown and the foster-mother of a licensed foster-home in Pouch Cove in which the latter agreed to take care of the former's child for three hundred dollars a month and might be considered a professional production if the space for execution by the parties and by the witness thereto were not on a page entirely separate from the rest of the agreement,¹⁷¹

The second type of arrangement is a written agreement between a parent of a child committed temporarily to the custody of the director of child welfare by order of the court and a social worker representing the director which is apparently supplementary to the judge's order and would not on the face of it be judicially authorized.¹⁷²

The third type of arrangement is, to use the language in Mr. Day's memorandum of evidence, "an understanding between the parents of a child who is subject to an Order committing the child temporarily to the custody and care of the Director of Child Welfare, a social worker representing the Director, and a solicitor who, on behalf of the Minister of Justice, is representing the Director in the proceeding that resulted in the Order; an arrangement possibly made before the ordering Justice, which provides that notwithstanding the

Royal Commission Inventory MSH 059, pp.1 - 30.

Royal Commission Inventory MSH 036, pp.9 - 10.

Law Avoidance

Order, the affected child or children *will* be returned to the parents before the expiry of the term of committal that has been ordered". This situation is exemplified by a letter written by Mrs. Noonan to the director advising him that she appeared before a Supreme Court judge in the Unified Family Court and obtained an order committing four children to his care for a period of six months. She continued, "Your social worker agreed to return the children home before Christmas. Also we have agreed as well that ...", and there follow three conditions which may have received judicial sanction although the writer does not say so. The undertaking that the children will be returned for Christmas may not be consistent with the terms of the order which in this case is not available.¹⁷³ These are examples of variations which do not apparently fit the legislative framework.

In the case of the "non-ward" agreements frequently negotiated for placements in Mount Cashel, subsection (1) of section 46 of the statute appears to confer authority, as does subsection (3) for extended care after the age of sixteen years and until the age of nineteen "or until some earlier date considered advisable by him", or maintenance until twenty-one, subject to the same proviso. But caution must be observed in commenting upon the legality of the "non-ward" agreement quite apart from the infelicity of the expression. Section 46 reads as follows:

"46.(1) If, because of the special circumstances, he considers it in the best interests of the child so to do, the Director may, upon the written request of the parent or guardian of a child, take the child into his care and custody.

Royal Commission Inventory MSH 037, pp.1 and 5 - 7.

Chapter VIII

(2) The Director may, when he has accepted a child under subsection (1), make such arrangements for the support, care and welfare of the child as in the circumstances he deems fit.

(3) If a child referred to in subsection (1) reaches the age of sixteen years while in the care and custody of the Director, the Director may, where he considers it in the best interests of that child so to do,

- (a) continue his care and custody of that child until that child reaches the age of nineteen years or until some earlier date considered advisable by him; and
- (b) continue his maintenance of that child until that child reaches the age of twenty-one years or until some earlier date considered advisable by him.

(4) Where the Director has, under the provisions of subsection (1), taken a child into his care and custody, he may, at any time, and from time to time, apply to a Judge for an order for the payment by the parents or guardians of the child to such person or persons as the Judge may direct of all or any of such sums as may from time to time theretofore have been expended for the maintenance of the child, and the Judge to whom such application is made shall make such order as he may consider reasonable under the circumstances.

(5) Without limitation of the generality of his powers, a Judge making an order under subsection (4) may, in any case where there is a pension or income payable to the parent or guardian concerned and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard,

Law Avoidance

order that such part as the Judge may see fit of the pension or income be attached and be paid to such person or persons as the Judge may direct, and such order is authority to the person by whom the pension or income is payable to make the payment so ordered, and the receipt of the person or persons to whom the payment is ordered to be made shall be a good discharge to the person by whom the pension or other income is payable.

(6) The Director does not by taking a child into his care and custody under subsection (1) become the legal guardian of the child and he may terminate the care and custody at any time he sees fit.

(7) When any other provision of this Act conflicts with this section, this section shall prevail."

It will be noted that the expression "non-ward" does not occur and I am advised by counsel that "the written request of the parent or guardian of a child" referred to in subsection (1) was rarely encountered in the headquarters and district files of social services. Furthermore, the provisions of subsection (6) are inconsistent with those that permit the director to take a child into his care and custody, these words having the effect of making him the legal guardian of the child at least *pro tempore*. The section indeed is full of difficulty and requires amendment, particularly since judges are empowered to authorize payments of money in situations of doubtful legality. That doubt assailed the draftsman, and perhaps the legislature, as to the effectiveness of the section is perhaps indicated by the inclusion of subsection (7).

It is hoped that these examples of apparently inadvertent adoption of procedures not authorized by statute or regulations made thereunder, which are matters of public knowledge even

Chapter VIII

though done in compliance with the provision of a policy manual which is not, do not need further elaboration as instances of avoidance of the law of the land. A more careful adherence to policy determined by government and exposed to and approved by the House of Assembly and a determination not, in effect, to amend it by means of manuals of policy altered from time to time by circulars and directives of which the public cannot be aware, is all that can be expected of a vigilant public service. More difficult problems are presented by avoidance of the process of the criminal law represented by reliance on what is known as "prosecutorial discretion", and such latter-day expedients as "plea bargaining" adopted as a result of inability to cope with the business of the courts.

The question of prosecutorial discretion will be referred to again, but just as an observance of the law is a prime concern of government in civil matters, so enforcement of the criminal law cannot for long be avoided with impunity. Plea bargaining, or the agreement of counsel for the Crown and the accused in the case of a criminal charge to avoid due process of law by the offer and acceptance of a plea of guilty to a lesser charge, has been resorted to as a means of liquidating arrears of work and securing convictions of offenders on terms which may or may not be appropriate. The recent decision of the Supreme Court of Canada in *Askov et al. v. The Queen*¹⁷⁴, by applying section 11 (b) of the *Charter of Rights and Freedoms*, caused the dismissal in Ontario of several thousand charges without trial. The unexpected result in a certain area of that province has been a complaint that local Crown attorneys have declined to take part in plea bargaining, a term which in the present climate of

Law Avoidance

euphemism will no doubt be superseded by "plea negotiation". It may be too late to condemn this type of arrangement, unheard of not so many years ago, but the practice of involving the judge in these negotiations must surely be frowned upon. This generally involves both counsel seeing the judge in chambers before a guilty plea is entered to secure his cooperation in imposing a pre-determined sentence. Such a procedure suggests concealment and it is a remarkable tribute to the high reputation in which our judges are held that it does not suggest corruption. If indeed the judge should by some misadventure become party to such an agreement of counsel, the whole matter should, subject to the observance of justifiable confidences, be explored in open court.

Avoidance in Principle

The question of prosecutorial discretion, which in the negative sense means staying or withdrawing charges laid by the police because in the opinion of Crown counsel a conviction cannot be obtained, must be explored at length and under other heads. Suffice it to say here that there is, in my respectful view, no justification for arrears of criminal business in the courts of Newfoundland other than acquiescence by Court and Crown in delays sought and secured all too easily by counsel for the defence; and I would set the "back-log" excuse on one side, especially as it might be expected that thirty Supreme Court judges and twenty-six Provincial Court judges in a community of half a million people could easily, with the assistance of the provincial bar, address any such problem and settle it with dispatch. What then is left? Plainly it is the reluctance of prosecutors to let difficult cases which might well result in acquittals go to trial

Chapter VIII

before judge and jury or judge alone. Presumably if the police have had reasonable grounds to lay a charge the prosecutor must in the great majority of cases take the same view, and let the court decide in proceedings open to the public whether the evidence is sufficient to bring the case home to the accused. In this connection the often repeated maxim: "the Crown never wins and the Crown never loses" assumes fresh emphasis. The public expects the law to be enforced by the state, and breaches of it not to be prematurely cast into the scale of speculation as to the result.

The commission has been advised of a general feeling that the criminal justice section of the department of justice is understaffed and that its members have unmanageable caseloads. There is a companion complaint that agents of the attorney general, normally in private practice in outlying parts of Newfoundland and Labrador are in some cases not effective as prosecutors, and that they should be replaced by permanent employees of the department. There is no doubt that up to a certain point efficiency would be promoted by an increase in the number of Crown attorneys, but there does not seem to be any justifiable reason for ceasing to rely on private practitioners to conduct prosecutions where it is convenient and economical. Indeed it has long been a tradition in England for the treasury solicitor to brief practising barristers to conduct prosecutions, although in view of the separate activity there of barristers and solicitors a comparison is not always helpful. In earlier days in the common law jurisdictions across Canada the retaining of counsel in general practice to conduct a whole assize or special prosecutions for the Crown was commonplace and the modern tendency to incorporate Crown counsel into the civil service does, in my respectful view, tend to divide the criminal bar into a

Law Avoidance

prosecuting bureaucracy on the one hand, and a self-conscious defence community on the other. To be effective, an advocate should have experience of both roles, if only to appreciate the problems confronted by both prosecutors and defenders, and to render less likely the creation of an intellectual gulf separating the institutional and private bars. To lawyers observing the traditions of independence and influenced by the fraternal traditions of many generations, an unyielding division of function such as now exists, and is being fostered by governments, cannot be appetizing, and perhaps is responsible for the tendency for Crown lawyers to leave the public service to seek fulfilment in private practice. This wastage is not peculiar to any particular province but is widely felt across the country.

The position of the social worker in the department of social services suggests some similarity with that of the lawyers in the department of justice, but in many respects the comparison is superficial. In any event this is not the place to deal with the problems of the social workers, their nascent professionalism and the numerous recommendations I have received from bodies in the field of social work. But the comparison may not be inexact if one considers the question of understaffing. This problem is created not simply by failing to provide sufficient establishment but by failing to use the establishment provided and furnishes another example of government policy being sufficient as expressed and advertised but government practice falling short of the policy proclaimed. An important example may be found in the criminal law establishment in the department of justice where the permanent staff complement for 1989 - 1990 provides for twenty-six solicitors for the whole province, eleven of whom were in practice allotted to the "eastern office" at St. John's

Chapter VIII

commonly known as "headquarters". I am advised that in November 1990 there were only eight - or for practical purposes seven employed at headquarters. Since agents in the normal course only deal with the trial of minor offences this means that in the Supreme Court alone, staffed by thirty judges, all criminal prosecutions devolve upon the shoulders of a mere handful.¹⁷⁵ If the disparity between establishment and numbers employed is created by policy, it cannot be overlooked as an item in the catalogue of those which contribute to avoidance of due process of law. If it is caused by the discontent of the incumbents with pay and professional opportunity it demands equal attention. Who under these circumstances would not be tempted to accept, for instance, a plea of guilty to a charge of assault causing bodily harm, instead of enduring a time consuming trial of murder or manslaughter, or be satisfied with a conviction for simple assault where the circumstances require that it should be aggravated and sexual?

As a general observation in answer to the question put in article III it may be said that government departmental policies in the case of social services and justice are at present sufficient to prevent avoidance of due process of law if applied with reasonable vigour and dispatch, always providing that understaffing, in the sense of leaving established positions in the public service unfilled, is not policy but only an aberrant practice.

¹⁷⁵ Speaking as a member of the Police Response Panel on June 20, 1990, Mr. Colin Flynn, D.P.P. said there were then eight vacancies in the complement of twenty-six solicitors.

Police Response to Avoidance

Two developments of recent date in the field of police policy have served to affect law avoidance. Reference must again be made to steps taken by Judge Hyslop and Mr. Colin Flynn to restate the position of officers of the Royal Newfoundland Constabulary when laying charges and to discourage the practice of consultation with Crown attorneys before doing so except in cases of the utmost complexity. This question has been referred to in chapter IV and is examined at length in chapter IX below. Secondly as both Superintendent Leonard Power of the Constabulary and Superintendent Emerson Kaiser of the R.C.M. Police have testified it is now the general practice to seek the co-operation of social workers in the child welfare division in interviewing suspected victims of child abuse, although this view has only recently been translated into official policy, in some cases arousing considerable dissent.

Official policy for the Constabulary was expressed in the form of directives and memoranda issued from time to time until 1990 when it was replaced by a "Policy and Procedures Manual",¹⁷⁶ the introduction to which instructed all ranks that the manual was in effect a collection of previous directives and memoranda and that "personnel should review all memorandums in their possession to see if they are included in the manual. Memorandums not noted in policy should be retained and those that are should be discarded". This would not appear to be a very helpful instruction, assuming as it does that every member of the force has retained in his or her possession all the memoranda issued, but this is by the way.

Exhibit C-0415.

Chapter VIII

In November 1982 and March 1983 Chief of Police Roche was concerned with the police following up contacts with victims of crime. An operative paragraph is selected out of lengthy operational directive no. 1.87:¹⁷⁷

"In all instances, *especially when serious matters* are reported, the assigned investigator will be required to contact the victim before closing the file and record the gist of the conversation on the last entry placed on the 002 form ... Readers concluding cases are to contact the victim and record the information on the 002 form as noted above."

Then on March 7, 1983 Chief Roche had occasion to issue operational directive 1.96 entitled "Complaint Response":¹⁷⁸

"In recent months I have received several letters very critical of the Force because police failed to respond when complaints were made to us. The incidents were generally not of a serious nature, but nevertheless the criticism was severe. A continuation of our present method of dealing with less serious matters must be changed in order to protect the overall good image of our membership which is held by the community at large.

One must remember that something which is relatively unimportant to us may be the most serious thing happening in the life of the complainant.

I fully realize that this Directive may well overburden you in some respects, but this action must be taken if

¹⁷⁷ Exhibit C-0525, p.21.

¹⁷⁸ Ibid, p.31.

Law Avoidance

we are to reduce the continuous criticism being directed toward us for nonresponse to minor complaints.

The policy, in future, will be as follows:

- (a) All calls received at the Communications Center when a crime is in progress, or has been committed, must be responded to by the area unit where the incident occurred.

The respondent must speak with the complainant and inquire if witnesses, etc., can be identified.

- (b) Files assigned to Investigators for investigation.

In all instances the complainant must be *interviewed in person*, unless the person has left the jurisdiction policed by the Royal Newfoundland Constabulary. In some instances special consideration may have to be considered for the member to travel outside our jurisdiction.

- (c) Complaints for insurance purposes only.

No complaint, for insurance purposes only will be recorded unless the alleged theft is confirmed by the responding unit."

It is not clear how the responding member of the force is to ascertain what complaints are for insurance purposes only, or why such a complaint should be considered separately from a regular complaint of alleged theft.

The first operational directive on child abuse by the Constabulary of which there is evidence before the commission was no. 1.129 of November 13, 1985 proceeding

Chapter VIII

from Chief of Police D. Randell. It is a document of critical importance to the development of police policy in this field and no apology is made for quoting it extensively. The subject is dealt with at first generally and as follows:¹⁷⁹

"The problem of Child abuse, both physical and sexual, is clearly recognized as an area of increasing concern by all levels of Society. The Royal Newfoundland Constabulary shares this concern and recognizes the need to provide better protection for abused children. To achieve this goal we must coordinate our efforts with Child Welfare Officials, the Medical Profession, Legal Profession, and others having a direct responsibility in the area.

The principle of this Policy, will, therefore, be one of unproved operational procedures through cooperation with others towards the protection of children."

There follow instructions as to training which I omit because they were not carried forward into the policy and procedures manual with which some comparison must be made, but item 2 headed "Prevention" reads:¹⁸⁰

"The RNC Crime Prevention Unit will continue to develop and initiate programs for the protection of children. Emphasis will be placed on coordinating programs in cooperation with other concerned groups, e.g. Child Welfare Workers, Medical and Legal Professions.

Exhibit C-0525, p.81.

Ibid, p.82.

Law Avoidance

- (a) The RNC will conduct a prompt detailed and thorough investigation in every case of alleged Child Abuse.
- (b) Child Abuse will be considered as "Major Crime" by the RNC. The Assault and Homicide Section of the C.I.D. will be responsible for all such investigations.
- (c) In accordance with Section 49(1) of The Child Welfare Act all cases will be reported promptly to the Director of Child Welfare. If deemed necessary, the initial report can be by telephone, or personal contact. This will be followed by a written report on Form 060.
- (d) Contact will be made with Crown Counsel as early as possible after the initial complaint. This consultation can be by telephone to advise that such an investigation has been initiated.
- (e) All Justice Reports relating to Child Abuse are to be completed and submitted to the Justice Department as soon as possible. They are to be "RED FLAGGED" for immediate attention.
- (f) During the entire investigative process, and any eventual court process, the Investigating Officer will maintain close contact with the Child Welfare Worker and Legal Counsel assigned to the child abuse case."

Item 3, "Interviewing the Child", illustrates the contemporary reservations about joint interviews.

- "(a) The number of interviews conducted with a child should be kept to a minimum. To this end, non-

Chapter VIII

investigative members responding to initial complaints will endeavour to obtain the necessary information from parent or guardian, unless the situation requires an immediate interview with the child victim.

- (b) An interview with the child should take place at the earliest possible time following receipt of complaint.
- (c) Whenever practical, C.I.D. members responsible for Child Abuse Investigations will respond to the initial complaint and conduct all interviews.
- (d) Whenever possible, interviews with the child will be conducted jointly with a Child Welfare Worker."

The directive continues and concludes:

"ITEM #4: Assistance to Victim and Family

- (a) The responding member in child abuse case will give priority attention to the physical and psychological well-being of the child and non-accused family members. Immediate medical attention should be a prime consideration, even in the absence of physical injury.
- (b) The offender should be removed from the scene by means of arrest, whenever legal grounds exist for such action.
- (c) When arrest, or voluntary removal of the alleged offender is impossible, or impracticable, removal of the child should be considered under the protection of the Child Welfare Act.

Whenever there exists a situation where children, other than the victim, are vulnerable

Law Avoidance

to abuse, the protection of these children will be of prime consideration. Child Welfare Officials will be directly involved in this process.

ITEM #5: During any ongoing investigation the investigating member will maintain close contact with the victim and family regarding:

- (a) steps taken in relation to the case
- (b) what to expect during the investigation and possible court appearances
- (c) appropriate social services, victim services, legal services, and medical or therapeutic agencies
- (d) arrangements for pre-trial interviews between Crown Counsel, victims and other witnesses

INTER-DEPARTMENTAL COOPERATION

A member of the Royal Newfoundland Constabulary will be designated to coordinate Force Policy with the Department of Social Services (Child Welfare Division), Department of Justice, and other professionals involved in Child Protection.

It is understood that Department of Social Services and Department of Justice will be making similar designations in order to facilitate an integrated approach to Child Abuse Cases."

This directive is in substance incorporated in the policy and procedures manual¹⁸¹ with amendments and additions, e.g.

¹⁸¹ Exhibit C-0415: Excerpts.

Chapter VIII

providing for the securing of photographic evidence in the case of battered children and with some administrative instructions about special application to the Corner Brook and Labrador divisions. The cautious direction: "Whenever possible, interviews with a child will be conducted jointly with a Child Welfare Worker" contained in the 1985 directive, is repeated in the manual although it is now generally accepted that there should be no exceptions to joint interviews by police and social services personnel.

Superintendent Kaiser testifying on June 26, 1990 introduced into evidence before the commission a volume entitled "Certain Royal Canadian Mounted Police Policies and Procedures Dealing with Child Abuse".¹⁸² This exhibit consisted of extracts from the various volumes of policy used by the operational side of the force, prepared by him with help from Corporal Lloyd Fry, R.C.M. Police. Under section B, representing policy developed for Newfoundland by "B" Division two directives illustrate a remarkable change of policy between 1986 and 1989. A bulletin dated December 2, 1986 numbered OM-330, presumably with the effect of amending the operational manual, has the following under "Sexual Assault Investigations Involving Children":¹⁸³

"1. General

- a. There has been an increased tendency by investigators to unnecessarily involve Social Workers in the interviews of young persons who are suspects/witnesses in these investigations.**

¹⁸² Exhibit C-0610. ^{1K3}

Ibid, p.54.

Law Avoidance

2. Unit Commander
 - a. Whenever possible, interviews of suspects /witnesses should be conducted by an investigator(s) in private.
 - b. It may be necessary to conduct joint interviews (Police/Social Services) of victims when there might be a requirement for Social Services to provide follow-up services to the victim. This lessens the trauma of requiring the young victim to undergo two interviews.
 - c. Ensure that investigators are aware the investigative process must remain a police responsibility."

This may be compared with a later directive not labelled "bulletin", but explicitly involving the operational manual, dated November 11, 1988:¹⁸⁴

"R. 2. Unit Commander

- R. 2. a. When you become aware of child abuse or any offence against children:
 1. Notify your local social worker as soon as possible. Do not wait until your investigation is completed.
 2. Submit reports on all offences against children to Division Headquarters within 21 days of notification of the offence.

Ibid, p.44.

Chapter VIII

3. Take appropriate court action when evidence justifies a charge.

R. 3. Child Sexual Assault

- R. 3. a. The reporting of sexual assaults on children is increasing each year and is a high profile area of enforcement.

1. Notify Social Services when a report of child sexual assault is received.
2. Arrange for a joint interview of the victim with a representative of Social Services.
3. Submit message to Div. HQ Criminal Operations.
4. Follow-up reports will be requested for the following:
 1. sexual intercourse under 14 years,
 2. incest,
 3. high profile case where professional person involved, i.e. doctor, clergy, dentist, school teacher, custodian of foster home, day care center, etc.
 4. Other cases as may be requested by Criminal Operations,
 5. Take appropriate court action where evidences justifies a charge."

In the second and current directive interviewing of the victim jointly with a representative of social services is taken for granted. A very effective pamphlet published by the force's public relations branch, with acknowledgements of

Law Avoidance

permission to reproduce from the solicitor general of Ontario and the Ontario Provincial Police entitled "Child Sexual Abuse"¹⁸⁵ was distributed to all members of the force in "B" division with a special insert for "the Province of Newfoundland and Labrador", reminding all recipients of the provisions of section 49(1) of the *Child Welfare Act*, requiring that "every person having information of the physical ill-treatment or need for protection of a child shall report the information to the director of child welfare". Strikingly, the provisions of subsection (3) containing information as to the penalty is not included, and surely should be if the members of the force are to educate the public as to their obligations under section 49 and show that its provisions are not merely a pious exhortation.

The documents furnished to the commission by Superintendent Kaiser comprehensively covering R.C.M. Police policies and training¹⁸⁶ dealing with child abuse show a high level of expertise, real and potential. It is not necessary to make further quotations but I cannot refrain from citing one from a series of questions submitted to Superintendent Kaiser by Mr. Powell, replied to in writing,¹⁸⁷ and introduced into evidence on June 26, 1990.

"5. Is the RCMP aware of any case in Newfoundland where an agreement was reached by persons in authority with a person suspected of committing any criminal offence whereby, if the suspect

⁸⁵ Exhibit 00610, pp. 47 - 53.

⁶ Exhibits C-0610 to C-0617.

⁷ Exhibit C-0611.

Chapter VIII

left the province, criminal charges would not be laid?

Response: Of my 30 years as a member of the RCMP I have worked in Newfoundland for 25 years. I have worked at various locations and continuously since 1986 at the Headquarters level. Based on my experience, I am aware of no such arrangement."

Another question and answer should not be overlooked in view of the questions posed in the commission's terms of reference:¹⁸⁸

"7. In the view of the RCMP, are there any measures or policies which should or could be implemented to improve the system of Criminal Justice in Newfoundland?

Response: Not in my opinion. The RCMP have and exercise the right to lay charges where such action is made out on the facts and we recognize the Crowns (*sic*) right to stay or withdraw if, in their opinion, this action should be taken. I would add that very seldom is there any disagreement between the RCMP and Crown, however, we have a system in place where the RCMP Headquarters and the DPP would examine the issues and arrive at a resolution should a disagreement occur."

Ibid.

The Police Response Panel

One of the devices employed by commission counsel towards the end of the public hearings was the constitution of panels of experts to offer suggestions and to give the commission the benefit of their experience in various fields. These discussions produced information of value not given in the usual course by witnesses on oath, particularly since the panellists were able to profit from an exchange of views among themselves and the tendency which such an exchange promotes to find common ground. One of the panels consisted of two senior police officers who had previously testified on oath on several occasions, Superintendent Power of the R.N.C. and Superintendent Kaiser of the R.C.M. Police and Mr. Colin Flynn, Director of Public Prosecutions, who prior to June 20, 1990 when the panel convened had not previously appeared. It will be recalled that Power has been commander of the Criminal Investigation Division of the Constabulary since 1986 and Kaiser, Criminal Operations Officer for "B" division of the R.C.M. Police; both of these senior officers have had extensive experience of police work in Newfoundland, Power for all of his career of twenty-six years and Kaiser for twenty-five out of thirty years of his in Newfoundland and Labrador. Mr. Flynn with a Master of Arts degree from Memorial University, a Bachelor of Laws degree from the University of Saskatchewan and the degree of Master of Science in Legal Studies from the University of Edinburgh, has spent his professional life on the criminal law side of the department of justice and has been the director of public prosecutions since 1988. The focus of the panel was upon police response in investigation and prosecution of

Chapter VIII

complaints, particularly, although not exclusively, complaints of physical and sexual abuse of children. The panellists were questioned by Mr. Day and Mr. Powell for the commission, by Mrs. Eve Roberts, Q.C. on behalf of the Provincial Advisory Council on the Status of Women and by Mr. George Horan for the Government of Newfoundland and Labrador. Mr. Powell also put some questions on behalf of Miss Gwen Mercer, a participant.

Public awareness of the menace of child abuse has increased dramatically particularly since the reopening of the Mount Cashel investigation and as a result of this commission's inquiry. For the Constabulary as observed before, mainly a municipal force policing St. John's, Corner Brook, Labrador City and Wabush, the major crime section has reported:

1988	child sexual abuse	175
	child physical abuse	not available
1989	child sexual abuse	251
	child physical abuse	40
1990	child sexual abuse	246
	child physical abuse	62

The situation of the R.C.M. Police in Newfoundland and Labrador is very different in that there are forty-seven units, many with as few as two or three members widely dispersed in rural and semi-rural communities around the province. A comparable figure from the R.C.M. Police has not been

Law Avoidance

supplied, but Superintendent Kaiser confirmed counsel's suggestion that there were 935 complaints of sexual assault of one kind and another to his force in the course of 1989. The superintendent said further when asked the following question:

"Q.....First of all, Superintendent Kaiser, in your experience the majority of the complaints alleging child mistreatment come from Social Services or come from the public, whether that be the doctor, the teacher, or the next door neighbour?

A. Without looking at the facts from that point of view and just reacting from memory and from my experience over the last couple of years in this particular chair and thirty years as a policeman, I would have to think it is a very good mix. That you would certainly get fifty percent that would come forward from school teachers or from the family itself or from the victim. And probably the other fifty percent and I wouldn't want to be held as absolute on these percentages, the rest would be from Social Services."

^{1sg} Subsequently supplied by Superintendent Kaiser as follows:

	1988	1989	1990
Sexual Assaults	not	995	940
Reported	available		
Actual Offences	494	791	780
Victims Under 18 years	162	360	501

Chapter VIII

The same question was put to Superintendent Power who replied as follows:

"A. Yes, I agree with Superintendent Kaiser. In recent years I think, in our jurisdiction at least we seem to be getting a lot more referrals from the department of Social Services, the Child Protection Unit, I suppose mainly because of the creation of that unit and the expansion of that unit. I would also say that it is my view that teachers and other professionals in positions to beware of child abuse, now seem to be more aware of the requirement to report child abuse to the Director of Child Welfare and I think that may be one of the reasons why we are getting an increase in referrals from Social Services. I think a lot of people now know that if they are aware of child abuse they must report it to the Department of Social Services. So as opposed to coming to the police they go to the Department of Social Services. Now I don't know what the mix is as Superintendent Kaiser said."

Both officers assured the commission that all complaints, even though as Superintendent Power said "of a very tenuous indication" were investigated, and particular attention was paid to referrals from the child protection unit of the department of social services. Although both asserted that there was now a very close liaison with social workers in the matter of complaints of child abuse, Mr. Flynn stated flatly in reply to Mr. Day's question:

"When a police report investigating an allegation of child mistreatment comes to the criminal side, if I can refer to it in that way, is there at present any practice,

Law Avoidance

policy, that permits these reports to go to the Department of Social Services either the director at headquarters, the regional office, or the district office?"

in the following way:

"The policy is that the criminal reports are criminal reports and are not shared with the department of Social Services. And the practice as I am aware of it is that they are not shared."

There are of course many grounds for not compromising the confidentiality of police reports, prevention of avoidance of due process of law through premature disclosure to a suspect being an obvious one. Nonetheless the child welfare division should in my opinion have a regular procedure for being advised on matters pertinent to its mandate when a proper application is made to the department of justice and when there has been no direct communication between it and the police. In other words, the provisions of section 49 of the *Child Welfare Act, 1972* apply to the police as well as the public.

Consolidating the Response

It now appears that a thoroughly beneficial measure of agreement has been reached among the two departments - justice and social services - and the two police forces constituted to enforce the law in Newfoundland, and to take steps to prevent its avoidance, in four important particulars: first, concentration on the problem of child abuse represented

Chapter VIII

by a child abuse unit in the major crime section of the C.I.D. in the Constabulary; secondly a child protection unit in the department of social services; thirdly, the conduct of joint interviews with social workers of alleged victims of child abuse and fourthly a determination, not yet fully developed, to establish a victim and witness assistance programme, the last being unsettled as to where it should be administered and by whom it should be staffed. As to the first I am advised that the special unit in the major crime section has become a "sexual offences" unit and if this is so it runs the risk of having its focus widen at the cost of dispersing its resources. The major crime section at the time of writing is composed of fourteen officers: one lieutenant, one staff sergeant, two sergeants and ten constables. In addition to investigating sexual offences generally the section is called upon to deal with homicides including sudden deaths, suicides, robberies, industrial accidents, suspicious persons, and harassing or obscene telephone calls. Allegations of theft, fraud, breaking and entering and "drug offences" are considered, one assumes, to be matters of routine and might well be joined by industrial accidents, suspicious persons and harassing or obscene telephone calls and entrusted to the patrol division. However that may be resolved in the case of the Constabulary, it would appear that at least until statistics show a marked reduction in allegations of child abuse, a special unit concentrating on that problem to the exclusion of those of other sexual offences should be constituted. There are clearly defined limits imposed by the Supreme Court of Canada on the ability of a provincial commission of inquiry to explore the policy of the R.C.M. Police but a commissioner may be permitted to note the fact that the General Investigation Services of "B" Division, with sections at headquarters and in

Law Avoidance

Gander and Corner Brook, can be deployed, as Superintendent Kaiser testified, when the individual units stationed in Newfoundland and Labrador need assistance. Whatever comparisons may be drawn between the ability of these two forces to concentrate on child abuse cases there is no doubt that the essential ingredient for success at this stage is training. Here there is no question that the R.C.M. Police have greater resources in money, personnel and programmes and that determined efforts must be made to put the Constabulary's specialists in child abuse on a footing equal to that of the federal force.

An outstanding example of this disparity is training in the use of the video camera, not only as an instrument in itself which can be readily mastered, but in the arrangement and recording of interviews and of evidence in court as now sanctioned by the Criminal Code. Training in this respect involving a small unit of specialists need not be expensive, and should, if possible, be undertaken in the company of R.C.M. Police and social worker personnel; if there are jurisdictional problems there should be no hesitation in resorting to foreign attachments. I am aware that all these possibilities are being borne in mind by dedicated officers who are at the same time confronted with understaffing and mounting caseloads, relief from which should be afforded amply and at once. At the same time it is my respectful view that techniques in dealing with sexual offences, other than that of child abuse, are familiar and do not require the thrust that child abuse cases cry aloud for. There is the additional consideration that cases of child sexual abuse and child physical abuse must be considered together and allegations of both offences investigated by the same specialists operating in one unit. It is not clear that current provisions for a sexual

Chapter VIII

offence unit takes this distinction into account.

I have confined myself in this chapter to matters involving avoidance of due process of law as directed in article III of the terms of reference. It would have been possible to prolong it almost indefinitely because of the inter-relation of matters raised in both article III and article IV, and perhaps in the general direction to make recommendations for improvement in the administration of justice. I propose to conclude the chapter by making a number of recommendations which are pertinent to the matters discussed, but first one unusual and perhaps incredible response arising from the discussion with the Flynn-Power-Kaiser panel should be mentioned. During the sittings on June 20, 1990 Mr. Day produced for that panel a document entitled "Interdepartmental Statement on Child Abuse".¹⁹⁰ This was a declaration dated January 5, 1987, and signed in the city of St. John's by five members of the ministry then in office namely the Honourable R.C. Brett, minister of social services; the Honourable W. Matthews, minister of culture, recreation and youth; the Honourable L. Hearn, minister of education; the Honourable H. Twomey, minister of health, and the Honourable L. Verge, minister of justice and attorney general. The text is as follows:

"The children of the Province of Newfoundland and Labrador are of paramount importance and have the right to love, affection and understanding, as well as an environment which encourages their positive development and self worth. The increased reported incidents of child abuse and neglect within the Province of Newfoundland and Labrador highlights the

Exhibit C-0556.

Law Avoidance

need for interdepartmental co-operation and co-ordination, as well as a very strong supportive role which community agencies and the general public can play in the treatment and prevention of child abuse and neglect.

A child in need of protection is broadly defined under nineteen specific sections of the Child Welfare Act and includes such situations as lack of reasonable supervision and protection for a child or failure to provide a child with the basic necessities of life.

Child Abuse is included within the definition of a child in need of protection and includes any situation in which a child is suffering serious physical injury inflicted by other than accidental means and includes physical assault and sexual abuse.

Responsibility to protect children is a shared responsibility between many departments including the Department of Social Services, Department of Culture, Recreation and Youth, Department of Education, Department of Health and the Department of Justice. This responsibility is also shared with the community at large, with other community agencies and with every family in the Province of Newfoundland and Labrador. Because of our mutual well-being of all the children of the province, the following statements of agreement are presented.

- Within the Child Welfare Act, 1972, there is a clear legal responsibility for every person who has reasonable grounds to believe that a child is being abused or is otherwise in need of protection, to report this to the Director of Child Welfare. This reporting requirement gives precedence over any previous commitment to confidentiality and it is an offense for failure to report such incidents. Such reports may be made to the local office of the Department of Social Services

Chapter VIII

The Department of Social Services has a legal duty to protect children from abuse and neglect and work in conjunction with other departments and community agencies to support families and to protect children.

The Department of Justice is responsible for the administration of justice in the Province. Both the Royal Canadian Mounted Police and the Royal Newfoundland Constabulary are accountable to the Minister of Justice and are responsible for the prompt and thorough investigation of alleged mistreatment of children with a view to initiating prosecutions under the Criminal Code of Canada. Crown Attorneys are responsible for the conduct of such prosecutions before the Courts.

Whenever one has reason to believe that an offence has been committed against a child, the situation should be promptly reported to the local police force.

The Department of Education is in a very unique position to observe children and to identify situations of child abuse or neglect at a very early stage. As well, teachers can assist children to cope with problems at home as well as providing information and education regarding child abuse and neglect which will assist children to be better equipped for their role as the parents of tomorrow.

The Department of Health has community health nurses, family physicians, specialized medical and mental health programs that provide direct service to any families and children, and because of concern for the overall health and development of all residents of the province, can be extremely effective in not only the identification and treatment

Law Avoidance

of such situations but in the prevention of child abuse and its antecedents.

The Department of Culture, Recreation and Youth has a broad mandate to respond to the needs of the young people of the province and provides leadership in activities and programs which helps prevent situations where children would be at risk of child abuse and neglect.

It is recognized that the five government departments have separate roles and special responsibilities in specialized areas. There is, however, a shared concern as well as a shared commitment to work together in increasing awareness with regard to this problem, in co-ordinating services and policies, and in endeavoring to increase the effectiveness of programs and services offered to children and families. Such objectives can be achieved by conjoint training endeavors, as well as the preparation of a handbook for usage by all government departments who have responsibility in this area,

It is recognized that to achieve the very worthwhile objectives of treating and preventing child abuse and neglect, input (*sic*) from the community is essential including the early identification of risk situations, as well as co-operation in the co-ordination of community services.

In the treatment of reported cases of child abuse, the necessity for a co-ordinated approach, particularly with regard to the interviewing of victims and their families, is strongly endorsed and wherever feasible, the Department of Social Services and local police forces will co-operate with joint interviews.

Chapter VIII

The focus of the interdepartmental approach to the problem of child abuse and neglect will have as its primary goal the protection of the child with support and services being provided to enhance the family functioning wherever possible.

An effective response to treating reported cases of suspected child abuse and neglect requires an interdisciplinary approach which utilizes the best resources of all professions and from all government departments. It is our hope that this interdisciplinary approach to the problem will help ensure the protection and well-being of the children of the province of Newfoundland and Labrador."

It might be supposed that this was a seminal document from which much may have flowed in connection with the efforts to cope with the problem of child abuse in succeeding years. In particular the paragraph describing the part to be played by the department of justice, one might think could hardly escape the attention of a panel composed of a senior officer of the department and of the two commanders of criminal operations in the police forces of Newfoundland. But they all agreed that they had not seen or heard of this document until it was shown to them by commission counsel on the previous day.

Recommendations arising from matters discussed in this chapter are as follows:

Law Avoidance

Recommendation 3:

Close observance of the provisions of the *Child Welfare Act, 1972* should be consistently maintained by the Child Welfare Division of the Department of Social Services and unauthorized practices and expedients not implemented until authorized by either amendments to the statute or by regulations made thereunder.

Recommendation 4:

The Director of Child Welfare and the police forces of the Province should forthwith begin to lay charges under section 49 of the *Child Welfare Act, 1972* in cases where they have reasonable grounds to believe that reports of child abuse, as required by the said section, have not been made.

Recommendation 5:

The provisions of section **11.1** (7) of the said statute to the effect that an order made under section **15** shall recite the facts so far as ascertained in an investigation under the latter section and that the presiding judge shall deliver a certified copy of the order to the said director should be observed by judges in courts over which the Province of Newfoundland has jurisdiction, and such judges should give their reasons in writing for making or declining to make the orders sought.

Recommendation 6:

If Recommendation 5 is adopted and section **11.1** (7) amended as suggested non-compliance therewith

Chapter VIII

should not be considered acceptable and an order by way of *mandamus* should be sought in the Supreme Court of Newfoundland.

Recommendation 7:

The Director of Child Welfare should act as intended by the House of Assembly in enacting section 3 of the *Child Welfare Act, 1972* providing that he or she shall be appointed by the Lieutenant Governor in Council and empowered to administer and enforce the act "under the control and direction of the Minister" enjoying direct access to the minister and freedom from direction in matters of policy by the deputy minister with whom he or she should be equal in status in all matters over which the said director is given authority by the statute.

Recommendation 8:

The *Child Welfare Act, 1972* should be amended to validate arrangements for care of children between the Director of Child Welfare and parents, guardians or persons providing foster-care not at present expressly authorized therein.

Recommendation 9:

Section 47 of the *Child Welfare Act, 1972* should be amended to provide that in any such arrangement the said director must assume the status and duties of guardianship in respect of a child under his or her care and control.

Law Avoidance

Recommendation 10:

Caseloads of solicitors in the Department of Justice should be reduced by immediate recruitment to established positions not now filled, and the provision, if necessary of a special salary scale not conforming to any generally applicable scheme of public service pay as exemplified by provisions made for advisory counsel in the Department of Justice of Canada.

Recommendation 11:

Crown attorneys and all agents of the Attorney General of Newfoundland should ensure that plea negotiation involves only counsel for the Crown and counsel for the defence, that the facts, course and expected result of such negotiations should be disclosed to the judge presiding at any trial material to such negotiation in open court, and not discussed with him or her at any time in chambers or otherwise.

Recommendation 12:

Where expedition and the reduction of caseloads of Crown attorneys situate either at headquarters of the Department of Justice or anywhere else in the Province of Newfoundland are required the Director of Public Prosecutions should retain the services of members of the bar in private practice to act on behalf of the Attorney General.

Chapter VIII

Recommendation 13:

Members of the Royal Newfoundland Constabulary assigned to the Major Crime Section of the Criminal Investigation Division should receive training in all the procedures and techniques necessary to enable them to detect, investigate and testify in respect of the sexual offences defined in those sections of the *Criminal Code of Canada* introduced by an *Act to amend the Criminal Code* and the *Canada Evidence Act* S.C. 1987, c.24; R.S.C. 1985, c.19 (3rd Supp.) to standards the same as or equivalent to those observed by the Royal Canadian Mounted Police without delay.

Recommendation 14:

The Director of Public Prosecutions should forthwith make arrangements for the contents of police reports in any case of physical or sexual abuse of a child to be made available to the Director of Child Welfare, subject to such reservations that may properly be based upon the requirements of security to ensure effective prosecution of offenders.

Recommendation 15:

As a corollary to and in contemplation of the implementation of Recommendation 14 the Director of Child Welfare should make available to the police the contents of the register of child abuse cases now maintained in the Child Welfare Division for statistical purposes.

Law Avoidance

Recommendation 16:

A child abuse unit under such name as may be considered inoffensive and desirable be maintained in the Major Crime Section of the Criminal Investigation Division of the Royal Newfoundland Constabulary to investigate, report upon and charge in cases involving the sexual and physical abuse of children, being unmarried boys or girls under the age of sixteen years separate and apart from any subdivision of the said section dealing with sexual offences not so specified.

Chapter IX: The Chance of Prevention

Article IV of the terms of reference of this commission reads as follows:

"To determine what measures or policies, if any, should or could be implemented to prevent a recurrence of the events which gave rise to this Inquiry."

The events in question are those described in chapter III of this report under the heading "The Mount Cashel Investigation: December 1975" and in chapter IV under the heading "Reopening the Investigation: March 1989"; but one must assume that the problem of child abuse in institutions and the prosecution of offences related to it cannot be excluded entirely from the discussion even though a high standard of relevance should be observed. The words "relevant" and "irrelevant" which from time to time came to the surface in public hearings of the commission frequently produced looks of bewilderment except among the lawyers engaged. "Relevant" may be defined as bearing on or pertinent to the matter in hand and the matters in hand in this case are set forth in the commission's terms of reference. Relevance is crucial in an inquiry or case in court in which it is the basic test for admissibility in evidence. In appendix K there is set out a condensed list of the recommendations made to the commission by associations and individuals, with and without standing, many of which are irrelevant to the terms of reference and cannot be considered even though they and the reasons behind them were fully aired in the public hearings of the commission.

The Chance of Prevention

Even though most of the institutions housing wards of the Director of Child Welfare are closed or closing and as has been noted, increased reliance is being placed upon group homes and private placements, those who indulge in physical and sexual abuse of children may be expected to operate as opportunity offers particularly when their natural inclinations of kindness and propriety are dulled by the consumption of alcohol. Whether their perversions are curable or even treatable is doubtful, especially in the case of paedophiles. In my respectful view public funds should not be employed in treating or attempting to treat people animated by evil, though professing sickness, personality disorder, mental imbalance and so on and so forth. It may be the pleasure and the interest of the state to attempt rehabilitation, and in most cases more than an attempt there cannot be; but it is the duty of the state to punish the infraction of its laws and that duty is no less acceptable when these infractions are caused by cruelty and lust which is wreaked upon children, incomprehensible to its victims and tending to corrupt their childhood and destroy its happiness.

The disorders in Mount Cashel which have been described in this report with some restraint - not always displayed in other chronicles but with a view to maintaining the balance of the scales of justice - might never have occurred had there been available to the young boys in that institution the care and nurture of women, and the involvement of the Christian Brothers in their education alone. The tragedy of Mount Cashel is that men of blameless and perhaps saintly lives have been tarnished by association with men who have broken their vows, not inadvertently but deliberately and by stealth. One would hope that the possibility of recurrence has been much reduced by the lessons learned in the course of this inquiry

Chapter IX

and the police investigations which accompanied it, and by the increased vigilance which on all sides has been manifest in the detection and investigation of child abuse. The treatment of the victims is another matter and is full of difficulty. Those who have come forward to assist the commission at the cost of acute mental distress are perhaps the healthiest of the victims of abuse. It is logical to believe that a majority of the abused will never come forward and will never be known.

The ancients believed that history would always repeat itself; in later times we have become less sure that future phases of life will be predictable and recognizable when they materialize. But one policy may be fruitfully pursued by the providers of social services in Newfoundland and Labrador and that is never to lose touch with those whom it is in the public interest to protect; specifically never to allow an institution like Mount Cashel or Exon House or Whitbourne or any of the kind to claim a special position in the scheme of things and resist inspection and compliance with authorized procedures.

Prosecutorial Discretion

As a corollary to the proposition that the state has a duty to punish infractions of its laws - a duty arising from its obligation to provide for the safety of its citizens to put it no higher - the vexed question of prosecutorial discretion must be addressed, since it was under the guise of exercising this that Vincent P. McCarthy either promoted or acquiesced in the decision to halt the investigation of allegations of child abuse at Mount Cashel in December 1975. The case of *Regina v. Commissioner of Police of the Metropolis, ex pane*

The Chance of Prevention

Blackburn,¹⁹¹ has provoked a now historic debate the echoes of which still reverberate. Have the police the unfettered right to lay charges in a case where they have reasonable grounds to believe that an offence has been committed, or must they submit their conclusions to a Crown prosecutor for his endorsement before they do?

I have no intention of attempting to review the course of the debate which has been maintained and documented by legal scholars and practitioners to this day, but once Lord Denning had given his ringing affirmative in the case of the first part of the question two protagonists in Canada entered the lists: the Honourable Roy R. McMurry, Q.C. sometime Attorney General of Ontario and Canadian High Commissioner in London who adopted and embellished Lord Denning's opinion and Mr. Gordon F. Gregory, Q.C., Deputy Minister of Justice of New Brunswick, who did not. Since then the advocates of the untrammelled right of the police to charge, a position long maintained by the R.C.M. Police, have steadily gained ground and their views as already noted, were publicly embraced early in 1989 by the Department of Justice of Newfoundland. Now it can be said that only in New Brunswick, Quebec and British Columbia is the policy of prosecutorial review, and required endorsement of a charge contemplated by the police, still observed.

Nevertheless the line apparently cleanly drawn between the police and prosecutorial prerogatives in most of the common law jurisdictions in Canada has been blurred by unanimous recognition of the equally untrammelled right of the prosecutor to secure a stay or dismissal of proceedings arising from the charges laid, a discretion exercised for a number of

[1968] 1 All E.R. 763.

Chapter IX

reasons of which "public interest" heads the list. In this connection Mr. McMurtry again drew his sword in debate and in the case of the Honourable Francis Fox defended his decision not to prosecute the federal minister on the grounds of public interest, citing the expressed views of several distinguished ex-attorneys general of England. Is it possible that in this important aspect of enforcement the law giveth and the law taketh away? Evidently it is, and the views at present held by the Director of Public Prosecutions in Newfoundland and Labrador must be examined. In a memorandum entitled "The Decision to Prosecute" signed and distributed by Mr. Colin J. Flynn, Q.C. on April 24, 1990 to Crown attorneys of the criminal law division in the department¹⁹² he reviewed his policy statement of May 2, 1989 "with respect to separation of police and prosecutorial powers" concluding as follows:

"Once a charge has been laid, then the onus switches to the law officers of the Crown to determine if there is sufficient evidence to proceed to trial. And, it is also the obligation of the law officers of the Crown to consider any public interest matters which might preclude prosecution. These are the general roles of the two main players in the criminal justice system and the differentiation of these roles. A more detailed view of these will be provided below."

The director then analyses the problem under various heads beginning with "Prima Facie Case" and, on the assumption that there is jurisdiction to proceed and the police evidence is admissible in law, adverts to what the Crown must further consider when the police ask for its opinion.

¹⁹² Exhibit C-0555.

The Chance of Prevention

"As indicated above, the police may on occasion seek the advice of the Crown prior to the laying of an Information. This may be with respect to the sufficiency of evidence with regard to a particular fact situation. If such a request is made, the Crown has but one consideration in mind - is there on the evidence as provided reasonable grounds to believe that X has committed the offence. In order to determine this particular point, the Crown should generally be involved in a two-stage analysis:

- i. Is it possible to proceed?

This involves two types of questions:

- (1) Is there jurisdiction to proceed?

This issue is strictly a legal issue and relates to questions with respect to the type of offence (whether summary or indictable), type of court, where the offence was alleged to have been committed and other matters similar to these.

- (2) Is the evidence which the police have uncovered admissible in law?

This is again a strictly legal issue and relates specifically to the question of the type of evidence that is available and whether such evidence can be admitted for the purpose of consideration by the trial judge. Some such evidence may be admissible. If the evidence available is not admissible, then of course the opinion would end there.

- ii. If it is possible to proceed, does the admissible evidence raise a prima facie case?

Chapter IX

As indicated earlier, the test in such circumstances is whether or not on the admissible evidence there are reasonable grounds to believe that X committed the offence as alleged. This is a very low standard, but it is one which is the test outlined in section 504 of the Criminal Code with respect to the grounds required of an individual before he swears an Information.

The process that the Crown goes through is to assess the evidence as it is presented, to apply the law as it is known at the time, and to ask objectively whether a peace officer would have reasonable and probable grounds to believe that X committed a particular offence.

Once an objective conclusion is made with respect to the evidence and the law, then the police must be informed of the conclusion. If the opinion is that there is sufficient evidence to proceed, then the police must be told objectively that that appears to be so. However, the police officer must have his own subjective belief before he can swear an Information. This would include the knowledge of the law as he knows it or as it is presented in evidence. It really necessitates the officer deciding himself that issue based principally on the legal opinion that has been provided and the facts as he knows them.

If the Crown feels there is insufficient evidence to conclude that there are reasonable grounds to proceed, he should point out where the evidence is deficient and can also point out what types of evidence would be sufficient to raise its strength to a prima facie case. The police can then pursue the investigation further to determine whether such evidence exists. If no response is forthcoming, the

The Chance of Prevention

Crown should advise the Senior Crown of the difficulty and it will be pursued at a different level."

So far so good, and orthodox too; but under the heading of "The Prospects of Conviction" the learned director proceeds:

"Once the Crown has concluded that there is a prima facie case, then if there is concern about the strength of the evidence available the Crown should go further in its opinion to the police. This involves the invocation of a higher standard than one of reasonable grounds to believe. It involves a question of the success of the prosecution based on the sufficiency of the evidence, the credibility of the various witnesses, the capacity of the witnesses and the types of onus that may be placed on the Crown and the accused in a particular set of circumstances."

The image that is conjured up by the second and third sentences of this paragraph is one of arrogating to the Crown the function of the court, weighing the evidence and the credibility of the witnesses and, particularly in a jury trial anticipating what properly instructed jurors, all laymen by law, may decide as sole judges of the facts. But there is more:

"If the above noted factors are there to be assessed at the time the opinion is sought to lay an Information, the Crown may be in a position to assess them then and indicate to the police not only if there are reasonable grounds to believe but also the probability of a conviction. The Crown may have to indicate to the police that although there are in law reasonable grounds to believe, the evidence is so weak or the witnesses are so weak that there is no probability of

Chapter IX

conviction. In such a case, the Crown must indicate to the police that if a charge is laid, it will not be proceeded with by the Crown."

What then is the position if a charge has been laid by the police on reasonable grounds that the offence has been committed, there is a *prima facie* case and only a *possibility* of a conviction in the opinion of the prosecutor? However serious the offence, however damaging to the victim, whatever the concern of the public as to its circumstances, the case does not proceed and is withdrawn from the courts, regularly assisted as they are by representatives of the community when juries are empanelled with the exclusive constitutional right to pronounce the words "guilty" or "not guilty".

The learned director then proceeds to discuss the difficult question of public interest, using the following words:

"This is the final question which the Crown must consider - is it in the public interest to proceed. There has always been a question as to whether any prosecution should be brought unless it is in the public interest. Public interest, in essence, is what the criminal law is all about. Prosecution of criminal matters are of public interest and it is only when it is deemed not to be in the public interest that even though there is sufficient evidence to proceed, a prosecution does not proceed."

He acknowledges that in October 1989, at the annual meeting of Crown attorneys, he and his colleagues agreed, after examining criteria of public interest as stated by the "United

The Chance of Prevention

Kingdom Director of Public Prosecutions,"¹⁹³ to reduce them for local purposes, and enumerates them as follows:

- "i. Stateness (age of the offence, type of offence, length of time before a complaint made, motive of the complainant, age and mental capacity of the complainant at the time of the offence).
- ii. Age of the Accused and Physical Disability of the Accused.
- iii. Age of the Victim and Physical Disability of the Victim.
- iv. Mental Incapacity of the Accused or the Victim, v. Victim's Stress.
- vi. General Wishes of the Complainant (especially in sexual assault offences and assaultive offences).
- vii. Seriousness of Offence (de-minimus principle).¹⁹⁴
- viii. Whether the accused has co-operated with the investigation or prosecution and the extent of that co-operation.
- ix. The cost of returning the accused and/or witnesses to the Province for purposes of prosecution."

This is a misnomer. The Director of Public Prosecutions in England has no jurisdiction in Scotland and Northern Ireland.

Evidently a reference to the maxim *de minimis non curat lex* and usually written "*de minimis*".

I should observe that the mental capacity of an accused is, in the case of indictable offences, for the judges of the Supreme Court of Newfoundland to determine, again with the assistance of either an especially impanelled jury or the jury of trial in cases where a jury is provided, and that in my respectful view the wishes of a complainant should not be a factor where other considerations require prosecution. Mr. Flynn very fairly says in respect of the above enumeration:

"It is a cost benefit analysis in essence which is undertaken here with any or all of these factors being weighed to determine whether it would be in the public interest to proceed. It is generally a very difficult matter with which one has to deal and on where, in essence, the Crown would be required to carefully weigh the public interest factors, the opinion of the victim, the opinion of the police and any other relevant factors. It is our view that except for the issue of cost raised in ix. above, cost of prosecution should not be a factor to be considered as a public interest factor."

My concern with this subject is based upon my belief that prevention of recurrence of the events of Mount Cashel, and many more besides, largely depends on a resolute prosecution of offenders where there is a *prima fade* case and no absence of jurisdiction or other legal impediment. In short, if the Crown shares the opinion of the police that there are reasonable grounds for believing that an offence has been committed, and there is a *possibility* of conviction, it should not flinch because the odds are against success. The exercise of prosecutorial discretion should be rarely resorted to and

only in the confines of a recognized compulsion to enforce the enacted law, bringing those who offend to justice.

The Mount Cashel Investigation

The relevance of the forgoing observations may be justified by what actually occurred. Although the director of child welfare was in possession of complaints of child abuse before December 1975, or should have been, there was in that month a police investigation of complaints involving at least twenty-five of his wards resident at Mount Cashel. Detective Robert Hillier, the recipient of admissions by two Christian Brothers had ample, let alone reasonable and probable grounds to make an arrest, and was ordered not to. The deputy attorney general, Vincent P. McCarthy, Q.C., acting as director of public prosecutions during the period between the resignation of John Connors and the appointment of John Kelly, received police reports which justified the laying of charges, even in their edited form, and here the possibility that Chief John Lawlor had shut his eyes to the insufficiency of the editing must not be overlooked. In any event, no charges were laid, which meant, according to the doctrine then prevailing, that the police were bound to accept the decision of the department under which they operated; nor were the investigating officers Hillier and Pitcher told as to the reason why. The director of child welfare, whose first step was to seek the assistance of the superintendent of Mount Cashel, was also deprived of information by the deputy attorney general and, without the names of the alleged victims, could

Chapter IX

explain, if not justify his failure to come to the aid of his wards.

A number of recommendations must be made out of reviewing these events in the light of their examination in detail earlier in this report. The first has been foreshadowed and must be as follows:

Recommendation 17:

No institution, place or person should be allowed special status in exercising foster-care of any ward of the Director of Child Welfare and all should be equally accountable to the said director, submitting the required reports and maintaining the same standards of care.

The director of child welfare, Frank J. Simms, insisted on special treatment for the Christian Brothers as "foster-parents", and reports emanating from Mount Cashel went direct to him over the heads of district and regional offices of the department of social services. Consultation with Superintendent Kenny or Brother Nash was probably the inevitable result of this policy and the general feeling that the Roman Catholic Church was "on a pedestal", but it is unnecessary to say that a police investigation would be fatally compromised by the nature of the complaint being prematurely revealed to a suspect with absolute control over the complainant. As it was, the superintendent was in a position to threaten the young complainants, as was alleged, on their way to the police station as well as being given the unprecedented advantage of being the source of their transportation.

Recommendation 18:

Complaints of child abuse must be independently investigated by the police or social workers and not disclosed *in limine* to those responsible for the care of the child complainants.

Frank J. Simms quite properly sought inspection of the police reports of the Mount Cashel investigation. He made the application in a routine manner through Mrs. Mary Noonan in the department of justice, who was legal adviser to his department generally. She was denied access by Vincent P. McCarthy, and later Mrs. Sheila Devine, assistant director, was in effect denied information as to the names of the boys involved in the complaint, not by Mr. McCarthy but by Brother Gabriel McHugh, then Provincial Superior of the Christian Brothers. Either way any assistance to the alleged victims was precluded, and no attempt was made to pursue the matter on a ministerial level. It is probable that it would be treated differently at present, but it is nevertheless recommended:

Recommendation 19:

All allegations of child abuse, physical, sexual or emotional, contained in any police report or arising from any police investigation should be communicated to the Director of Child Welfare and all police officers concerned so advised.

The police investigation at Mount Cashel in December 1975 was ordered stopped although incomplete, and in spite of there being reasonable and probable grounds to believe that

Chapter IX

offences against children had been committed. Again the climate today is clearer, but at the time no reasons were given to the investigating officers and no explanation given to the complainants, other than in the case of Carol Earle, that the cause of complaint had been taken care of. It is therefore recommended:

Recommendation 20:

Since every police officer has a duty to enforce the law and a responsibility to make sure that every allegation of criminal conduct is fully investigated and all relevant facts are contained in his or her report; and where charges have been laid in accordance with the responsibility of investigating police officers to do so if they are satisfied that there are reasonable grounds to believe an offence has been committed; if because of legal issues or impediments arising from the investigation a Crown attorney decides a prosecution should not proceed, the investigating officer should be promptly notified of that decision and the reasons for it, and in turn, he or she should ensure that all complainants are advised.

Reasonable (and Probable) Grounds

The terms "reasonable and probable grounds" and "reasonable grounds" have been variously used in the text of this report to reflect a change in the text of section 504 of the *Criminal Code of Canada* created by the *Revised Statutes of*

The Chance of Prevention

Canada, 1985 Act, S.C. 1987 c.48 and the proclamation of the coining into force of the *Revised Statutes of Canada, 1985* on December 12, 1988 by which that section of the Criminal Code was in effect amended by the removal of the words "and probable". Accordingly the expression "reasonable and probable grounds" is used here in relation to all transactions before December 12, 1988 and the expression "reasonable grounds" for all subsequent thereto and for the present and future. The circumstances of the change and a comment thereon by me may be found at appendix L in Volume Two of this report.

The Director of Public Prosecutions

The conclusions reached and the recommendations made by the judicial inquiry into the case of Donald Marshall Junior in Nova Scotia brought the position of the director of public prosecutions into the legislative limelight. The result has been new legislation in the form of *An Act to Provide for an Independent Director of Public Prosecutions* of the General Assembly of Nova Scotia, 39 Elizabeth II, 1990, assented to by the Lieutenant Governor on June 19, 1990 as chapter 21 of the Acts of 1990. The act is reproduced hereunder:

"Be it enacted by the Governor and Assembly as follows:

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

2 The purpose of this Act is to ensure fair and equal treatment in the prosecution of offences by

Chapter IX

- (a) establishing the position of Director of Public Prosecutions;
- (b) providing for a public prosecution service; and
- (c) providing for the independence of the Director of Public Prosecutions and the public prosecution service.

3 In this Act, "prosecution" includes the decision whether to prosecute or not, the prosecution proceeding itself and matters arising therefrom, and appeals.

4 There shall be a Director of Public Prosecutions who

- (a) is the head of the public prosecution service and is responsible for all prosecutions within the jurisdiction of the Attorney General conducted on behalf of the Crown;
- (b) may conduct all prosecutions independently of the Attorney General except that the Director of Public Prosecutions shall comply with all instructions or guidelines issued by the Attorney General in writing and published pursuant to this Act;
- (c) is, for the purpose of the Criminal Code (Canada) and the Summary Proceedings Act, the Attorney General's lawful deputy in respect of prosecutions;
- (d) shall advise police officers in respect of prosecutions generally or in respect of a particular investigation that may lead to a

The Chance of Prevention

prosecution when the police request such assistance;

- (e) may issue general instructions or guidelines to a chief crown attorney, a regional crown attorney or a crown attorney in respect of all prosecutions or a class of prosecutions, and shall cause such instructions or guidelines to be published;
- (f) may issue instructions or guidelines to a chief crown attorney, a regional crown attorney or a crown attorney in a particular prosecution.

5 (1) The Director of Public Prosecutions

- (a) shall be a barrister of at least ten years standing at the Bar of Nova Scotia or of another province of Canada, and if of another province, shall, within one year of appointment, become a practising member of the Bar of Nova Scotia;
- (b) shall be appointed by the Governor in Council after consultation with the Chief Justice of Nova Scotia, the Chief Justice of the Trial Division of the Supreme Court and the Executive of the Nova Scotia Barristers' Society;
- (c) holds office during good behaviour;
- (d) has the status of a deputy head of the provisions of the Civil Service Act and regulations relating to a deputy or a deputy head apply to the Director of Public Prosecutions; and
- (e) shall be paid the same salary as the Chief Judge of the provincial court.

Chapter IX

- (2) The Director of Public Prosecutions may be removed from office for cause by a resolution of the Assembly.
- (3) Where, while the Assembly is not sitting, the Director of Public Prosecutions fails to be of good behaviour, or is unable to perform the duties of office, the Governor in Council may appoint a person to be Acting Director of Public Prosecutions until fifteen sitting days after the Assembly is next sitting or until the Governor in Council sooner rescinds the appointment of the Acting Director of Public Prosecutions.

6 The Attorney General is the minister responsible for the prosecution service and is accountable to the Assembly for all prosecutions to which this Act applies and

- (a) after consultation with the Director of Public Prosecutions, may issue general instructions or guidelines in respect of all prosecutions, or a class of prosecutions, to the prosecution service and shall cause all such instructions or guidelines to be in writing and to be published at the direction of the Director of Public Prosecutions as soon as practicable in the Royal Gazette;
- (b) after consultation with the Director of Public Prosecutions, may issue instructions or guidelines in a particular prosecution, and shall cause such instructions or guidelines to be in writing and to be published at the direction of the Director of Public Prosecutions as soon as practicable in the Royal Gazette except where, in the opinion of the Director of Public Prosecutions, publication would not be in the

The Chance of Prevention

best interests of the administration of justice, in which case the Director of Public Prosecutions, instead, shall publish as much information concerning the instructions or guidelines as the Director of Public Prosecutions considers appropriate in the next annual report of the Director of Public Prosecutions to the Assembly;

- (c) may consult with the Director of Public Prosecutions and may provide advice to the Director of Public Prosecutions and, subject to clauses (a) and (b), the Director of Public Prosecutions is not bound by such advice;
- (d) may consult with members of the Executive Council regarding general prosecution policy but not regarding a particular prosecution;
- (e) may exercise statutory functions with respect to prosecutions, including consenting to a prosecution, preferring an indictment or authorizing a stay of proceedings, after consultation with the Director of Public Prosecutions.

7 The Director of Public Prosecutions may, from time to time, designate a barrister in the public service to be Deputy Director of Public Prosecutions who is responsible to the Director of Public Prosecutions and who may exercise all of the powers and authority of the Director of Public Prosecutions and, for that purpose, is a lawful deputy of the Attorney General.

8 There shall be crown attorneys to conduct prosecutions and the crown attorneys are responsible to the Director of Public Prosecutions and, where applicable, to a chief crown attorney or a regional crown attorney.

Chapter IX

9 There may be a regional crown attorney to supervise crown attorneys within a geographic area determined by the Director of Public Prosecutions, and a regional crown attorney is responsible to the Director of Public Prosecutions.

10 There may be a chief crown attorney to supervise crown attorneys and, where applicable, regional crown attorneys, and a chief crown attorney is responsible to the Director of Public Prosecutions.

11 A chief crown attorney, a regional crown attorney and a crown attorney have all the powers, authorities and duties provided by the criminal law of Canada for prosecutors, for prosecuting officers or for counsel acting on behalf of the Attorney General.

12 All chief crown attorneys, all regional crown attorneys and all full-time crown attorneys shall be barristers appointed pursuant to the Civil Service Act upon the recommendation of the Director of Public Prosecutions after a completion.

13 The Director of Public Prosecutions shall report annually to the Assembly in respect of prosecutions.

14 (1) The Director of Public Prosecutions may appoint a barrister to take charge of and conduct a particular prosecution or to take charge of and conduct criminal business to the extent specified in the terms of the appointment.

(2) A barrister appointed pursuant to this Section shall be known and designated as a crown attorney and, when acting within the terms of the appointment, has all the powers and authority of a crown attorney.

The Chance of Prevention

- (3) **The Director of Public Prosecutions may, from time to time, vary the terms of appointment of a crown attorney pursuant to this Section or may, at any time, revoke the appointment.**

15 Notwithstanding Section 12, all prosecuting officers and assistant prosecuting officers employed by the Province immediately before the coming into force of this Act are crown attorneys for the purpose of this Act.

16 Clause (c) of subsection (1) of Section 30 of Chapter 210 of the Revised Statutes, 1989, the House of Assembly Act, is amended by striking out the punctuation and words, "prosecuting officer" in the second and third lines thereof.

17 Chapter 362 of the Revised Statutes, 1989, the Prosecuting Officers Act, is repealed.

18 This Act comes into force on and not before such day as the Governor in Council orders and declares by proclamation."

The effect of this legislation is to put a director of public prosecutions on a higher plane than a deputy minister who, though not a member of the regular public service in the civil service sense, is the deputy head of a government department, but appointed only during pleasure, whereas the new dispensation in Nova Scotia provides for the director of public prosecutions not only independence of the deputy minister but tenure during good behaviour, only terminable by a vote of the General Assembly which for practical purposes would be a vote of the members supporting the executive on any given occasion. To this extent the provision in the Canadian

Chapter IX

Constitution in respect of judges appointed during good behaviour and requiring a two-thirds vote of both houses of Parliament, offers better protection.

To what extent is the Nova Scotian example to be followed in Newfoundland? Counsel for the government of Newfoundland and Labrador, Mr. George Horan, agreed in his argument to the commission given on June 27, 1990 that the director of public prosecutions in this province should continue to enjoy the independence that he has now without being the recipient of any special treatment by statute, except that his removal from office must be accompanied by a public statement as to its cause. Presumably this would be a statement in the House of Assembly and in my view should be notified to the public in the Newfoundland Gazette. Although the director does in fact, as I am advised, have direct access to the minister of justice and attorney general who in turn is responsible for the operations of his department to the House of Assembly, it seems that there should be statutory recognition of the fact that he has, and that he is not, in so far as his control of the prosecutorial function is concerned, accountable to the deputy minister or any associate deputy minister. Since I think it probable that professional public servants have security of tenure at least as good, if not better than deputy ministers and associate deputy ministers, he would not require the expressed status of a federally appointed judge nor would this be appropriate in my view. But in addition to recognition of his direct access to the minister, and the provision that his dismissal or removal to another position requires an explanation in the House of Assembly, the director of public prosecutions should be accorded a ministerial statement in that House whenever the minister should decline to act in accordance with his advice in

The Chance of Prevention

any prosecution. These provisions should be incorporated in an appropriate statute either as an amendment to the existing law or standing by itself.

Recommendation 21:

A Director of Public Prosecutions should be appointed in accordance with normal public service recruitment procedures administered by the Public Service Commission but it should be provided either by a special act or by an amendment to existing statute law that in respect of the business of criminal prosecutions he or she have direct access to the Minister of Justice and Attorney General as chief adviser in that behalf; that upon the dismissal or removal of the said director to another post, the minister should give an explanation of the reasons therefore forthwith to the House of Assembly and a similar statement should be made in the House of Assembly explaining the circumstances of, and the reasons for a refusal of the minister to act upon the advice of the director in the case of any prosecution of alleged offenders in Newfoundland and Labrador.

The Case for a Solicitor General

One of the circumstances present in 1975 and still present today is the control of the Royal Newfoundland Constabulary by the Department of Justice even though as pointed out by Mr. Horan in his argument, an assistant deputy attorney general has separate responsibilities in connection with them.

Chapter IX

If it may never be known whether in the case of the Mount Cashel investigation at that time chief of police John Lawlor took the lead by suggesting the solution to deputy minister Vincent McCarthy, or that the latter issued instructions to Lawlor, the close collaboration that must have occurred could not have happened if Constabulary affairs had not been in the hands of McCarthy's department. There is ample precedent for a separation between a department responsible for prosecutorial services and one responsible for police. I have already cited that of the Home Secretary in England; and closer to home the Solicitor General of Canada, not the Minister of Justice, is responsible to Parliament for the R.C.M. Police. Such is the case in Ontario where the provincial solicitor general is similarly responsible to the Legislative Assembly for the Ontario Provincial Police and for all police functions in the province. There are solicitors general in five other provinces and in Newfoundland the *Solicitor General's Act* was first enacted as S.N. 1953, No.53 appearing in the revision of 1970 as chapter 356:

"1. This Act may be cited as The Solicitor General Act.

2. The Lieutenant-Governor in Council may appoint by commission under the Great Seal an officer who shall be called the Solicitor General of Newfoundland who shall assist the Minister of Justice in the work of the Department of Justice and shall be charged with such other duties as the Lieutenant-Governor in Council may assign to him."

There is therefore almost an empty page on which might be inscribed new and useful provisions. In Canada the federal solicitor general no longer assists the attorney general in his

The Chance of Prevention

duties, as is still the case in England where they are both described as the "Law Officers of the Crown", and are members of Parliament but not members of the cabinet. The important point is that the recognized independence of the police in laying charges without the supervision of the Crown attorneys, however valuable their advice may be when sought, calls for the same ministerial separation as exists in those parts of Canada where solicitors general play individual parts in various governments. Under the umbrella of the Solicitor General of Newfoundland, whose constating statute has lain inoperative for so many years, there should be a small department of government to administer police affairs, complaints against the Constabulary, and adult and perhaps juvenile corrections. In my deferential view, if in December 1975 there had been dealings between deputy ministers of separate departments, instead of between a chief of police subordinate to a deputy minister in one, there would have been, whatever sectarian loyalties might have dictated otherwise, much less likelihood of the suppression and concealment which rendered the police investigation of Mount Cashel abortive. I therefore recommend:

Recommendation 22:

The post of Solicitor General of Newfoundland already established by law should be filled by a minister of the Crown henceforth, and a Department of the Solicitor General created by either amendment to the *Solicitor General's Act*, R.S.N. 1970, c.356 or by a separate statute for the management of all police affairs now under the control of the Minister of Justice and Attorney General as well as his or her responsibility for corrections and those of the Minister of Social Services.

Chapter X: Recommendations to the Commission

Participants and Others

Before addressing the last requirement of the terms of reference in which the commissioner is "to bring forward conclusions and any recommendations which you consider desirable to further the administration of justice", I must refer to the large number of recommendations made at public hearings of the commission by those persons and associations with standing, as listed in the Introduction to this report and often referred to as participants. In addition to these, submissions were made orally and in writing by those who did not have standing, and could not be described as participants with the attendant right of examining and cross-examining witnesses.

Because of the volume of recommendations as a whole a complete list, identified under the headings of the agency or group tendering them at the public hearings in mid-June 1990 with the names of those who presented them or made the submissions in which they were contained may be found in Volume Two of the report at appendix K. I shall not attempt to express an opinion on each of these many recommendations but some general comment is required.

The recommendations of the Provincial Advisory Council on the Status of Women seem to be unexceptionable except for the apparently rooted belief, not peculiar to this body, that judges should be subjected to special education on the subject of sexual assault, and the equally rooted determination to compel this commission to embrace the cause of adult victims when its proper mandate is child abuse. As to programmes

Recommendations to the Commission

for judges I am troubled at the lack of appreciation of their position. Any extraordinary expertise acquired by special training in techniques developed in connection with any offence would provide good grounds for not allowing the case to proceed before a judge possessed of it. Stating the position in another way a judge is by law bound to consider in any one case only the evidence that is adduced before him or her, and, where a jury is involved, to instruct them accordingly. Thus, if the opinions of an expert are required one may be called as a witness if duly qualified; nevertheless a judge must tell the jury that the opinions of an expert are not binding upon them and that such evidence may be rejected, particularly if there is expert evidence to the contrary. In short, the education of judges on the subject of any alleged offence takes place in court, and although inevitably they may recall other cases involving the same offence, or have read books or articles about other cases, they must not either show or apply their knowledge where it has not been established in the case before them. That is why judges ask so many questions, some of which appear to require an explanation of the obvious, but the answers to which are needed for the record.

The recommendations of the Working Group on Child Sexual Abuse seemed to me with respect to be wholly beneficial if affordable, and bring back into focus the question of child abuse from which it is again wrenched by those of the Interagency Committee on Violence Against Women. Recommendation number 8 of those submitted by the Interagency Committee should not be allowed to pass without comment:

Chapter X

"That the Department of Justice ensure that in every part of the justice system crimes against persons should be given priority over crimes against property."

It is difficult to understand how crimes against property can be other than crimes against persons, since the property affected is owned by persons or agencies to which persons contribute funds by way of donation or taxes. As to number 14, which reads:

"That the Department of Justice take measures to ensure there aren't any unnecessary delays in the judicial process, especially in cases of violent crime committed by someone known to the victim."

I can only offer my sincere assent and will have more to say on the subject in the next chapter.

Gwen Mercer, a participant from the beginning and a constant and consistent supporter of the work of the commission attended on almost all the days of the public hearings and examined witnesses on a number of occasions. Ms. Mercer presented her views in evidence to the commission on June 5, 1990¹⁹⁵ but filed some ninety closely typewritten pages of recommendations to the number of 140 and comments thereon and furnished the commission with a number of publications of which those entered in evidence were exhibits C-0515 and C-0516. Because of the length of her submissions and the allocation of available paper it was necessary to reproduce her recommendations at appendix K without the comments attached to them. These recommendations are heavily coloured by her own experience

Exhibit C-0514.

Recommendations to the Commission

as might be expected, but this has not diminished their value in several areas; on the subject of the necessity of the police providing information to complainants her views were generally endorsed by senior officers of the police forces involved.

Among the recommendations made by persons and bodies who did not have standing were those from two practising lawyers, the first being John W. McGrath who gave evidence on two occasions, once as a member of the department of justice staff in relation to events referred to in article I of the terms of reference, and then again in making a submission which he illustrated from the witness-stand. The other was Wayne Dymond who at the last minute was unable to appear being engaged in a trial, but who filed recommendations to be found in appendix K. The recommendations made by Mr. McGrath and Mr. Dymond are highly relevant to the commission's terms of reference, and must be considered, in principle at least, for any treatment of the mandate to make recommendations furthering the administration of justice. It will be recalled that I have already indicated the importance of looking to private practitioners to supplement departmental resources for dealing with prosecutions generally, but I agree that a *caveat* must be entered to the effect that agents of the attorney general in this field must be competent.

A comprehensive survey of the responsibilities of government departments in matters at least tangential to my terms of reference, if not always confined to child abuse, was given by the Canadian Mental Health Association in the course of nineteen recommendations. Numbers 4 and 9, providing respectively for treatment of adolescents convicted of sex offences and treatment for convicted offenders in custody and upon their release, require expenditure of public

Chapter X

funds now stretched to the uttermost for child protection. Much of what is recommended here in the field of training is worthy of support although the section entitled, "Accountability" seems to contemplate a large scale witch-hunt along lines not generally contemplated by the Constitution.

The recommendations of the Newfoundland Association of Social Workers¹⁹⁶ and those of the Memorial University School of Social Work¹⁹⁷ have much in common no doubt because of having been drafted by the same hand. Numbers 7 to 10 of the association's recommendations appear to be unexceptionable as does the principle inherent in number 18. Number 22 directs attention to what appears to me to be the indefensible practice of leaving positions unfilled as a means of saving money. It is not clear what is meant by "accountable" in number 27. The minister of social services and indeed the whole cabinet is accountable in matters of policy to the House of Assembly. The use of the word "client" may be entrenched in the lexicon of social work, but, if it is to be applied by public service social workers to other than the government of the province representing the people whose taxes pay them, it is misleading. Clients are those to whom a practitioner owes a duty because he or she has been retained and paid by them. "Subject" or even "patient" as recipients of professional services would be more appropriate, if less euphemistic. Number 39 is an example in my respectful view of what must be a suggestion to legislate against prejudice arising from a difference of opinion, and must fail. As Lord Holt said three hundred years ago "the

¹⁹⁶ Exhibit C-0545.

¹⁹⁷ Exhibit C-0545A.

Recommendations to the Commission

mind of man is not triable". Number 69 is an example of the regrettable tendency to keep changing the names of functions of government to make them sound nicer. Number 79 is admirable, and seems to reflect concern that is now recognized by all government agencies involved. Number 81 surely cannot be a serious comment, expulsion from the province not having been so considered since the early nineteenth century and now being plainly unlawful as a penalty.

I have already pointed out that there is much repetition of the recommendations put forward by the Newfoundland Association of Social Workers in the recommendations filed on behalf of the non-participant School of Social Work at Memorial University. Perhaps under this head it would be acceptable to make a brief comment upon the first recommendation which seeks to effect on behalf of social workers the type of professional recognition afforded to nurses. It would appear from recent announcements in the press that this has been agreed to by the minister of social services, which, if true, would preclude any comment by me other than to agree that, as a stimulus to morale in a sorely tried activity whose practitioners are especially subject to what is graphically described as "burn-out", it would be beneficial if not allowed to array members of the public service in a sort of professional phalanx against the people of the province as represented by the Government of Newfoundland and Labrador. Recommendation 13 can surely only be valid if the school can provide the professionally trained social workers.

No particular comment is called for in the case of the Women's Legal Education and Action Fund, and Children in Care Alumni Incorporated, except to notice the markedly rhetorical language used in expressing the recommendations of

Chapter X

these bodies. The Canadian Civil Liberties Association seems to promote, in the interests of public confidence in the Newfoundland justice system, a powerful agency at once expensive and irresponsible although, in my respectful view, rightly insisting on the need for addressing the problem of complaints about the administration of justice made by members of the public. The noncommittal but wise observations of the Brother T.I. Murphy Centre must be carefully borne in mind.

It will be observed that many of the recommendations made and filed at these public hearings have an *ad hominem* quality, some are irrelevant and very few seem to be concerned with the plight of the taxpayers of Newfoundland and Labrador; but all of them are expressive of views sincerely held and of the highest value to the commission in identifying problems and suggesting solutions. In so far as they are relevant to the furtherance of the administration of justice their tenor will be further discussed in the following chapter of this report.

The Panels

As a means of obtaining information, somewhere between evidence given on oath and submissions in writing, a number of panels were constituted, one of which in connection with the response of the administration of justice I have referred to in chapter IX, consisting of the Director of Public Prosecutions, Mr. Colin Flynn, and Superintendents Power and Kaiser. The distinguished and highly qualified men and women who were thus able to contribute their knowledge and

Recommendations to the Commission

experience to the deliberations of the commission, and for the edification of the public, were not of course witnesses in the ordinary sense, and were not sworn. I regret that a complete set of transcripts of what they had to say cannot, because of the constriction of time and space inevitably associated with any report of manageable proportions, be provided but I shall endeavour in the course of making further recommendations to comment on the opinions expressed by some of their members. For the present and for the record I list them below with their themes, composition and the dates of their appearance before the commission:

- | | |
|--------------------|---|
| June 20, 1990 | Investigation and Prosecution of Complaints ^{19*} |
| | Colin J. Flynn, Director of Public Prosecutions, St. John's |
| | Superintendent Leonard P. Power.
Royal Newfoundland Constabulary |
| | Superintendent Emerson H. Kaiser,
Royal Canadian Mounted Police |
| June 20 & 21, 1990 | Identifying the Complainant and Complaint ¹⁹⁹ |
| | Dr. John C. Yuille, Ph.D
University of British Columbia |

^{1M} Exhibits C-0559 to C-0560. ^{1W}

Exhibits C-0561 to C-0569.

Chapter X

Corporal Lillian Ulsh, M.A.
Fredericton Police Department, New
Brunswick

Mary Wells, B.A., B.S.W., Institute
for the Prevention of Child Abuse,
Toronto

Recruitment and Training[^]

Professor Rollie Thompson,
Dalhousie University Law School,
Nova Scotia

Gilbert Pike, Chairman,
Public Service Commission,
St. John's

Frederick Lynch, Atlantic
Police Academy, Holland
College, Prince Edward
Island

Professor Dennis Kimberley, Ph.D,
School of Social Work, Memorial
University of Newfoundland

June 22, 1990

State Response (No. I)²⁰¹

Melba Rabinowitz,
DayBreak Parent Child Centre,
St. John's

²⁰⁰ Exhibits C-0571 to C-0581.

²⁰¹ Exhibits C-0582 to C-0596.

Recommendations to the Commission

Mary Rebecca Clarke, Chairman,
Shalom Group Home, St. John's

George Norbert Lee, President,
Foster Parents Association of
Newfoundland and Labrador

June 25, 1990 Judicial Response ²⁰²

Wanda Lundrigan,
Chief Adult Probation Officer
for Newfoundland

James Joseph Smyth,
Barrister and Solicitor,
St. John's

Nicholas Avis, Barrister
and Solicitor, Corner
Brook

William A. Collins, Q.C., Barrister
and Solicitor, St. John's, Member of
Canadian Human Rights Commission

June 25, 1990 Social Services Response ²⁰³

Austin R. Cooper, M.D., Physician
Dr. Charles A. Janeway Child
Health Centre, St. John's

²⁰² Exhibits C-0597 to C-0603.

²⁰³ Exhibits C-0604 to C-0606.

Chapter X

Lynn E. Spracklin, Q.C.,
Barrister and Solicitor,
Department of Justice,
Newfoundland

Marilyn McCormack, B.S.W.,
M.S.W., Child Protection Services
Unit, Department of Social Services,
St. John's

Sergeant Elizabeth Constance Snow,
Criminal Investigation Division,
Royal Newfoundland Constabulary

June 26, 1990

State Response (No. 2)²⁰⁴

Richard J. Morris,
St. John's Adolescent Health
Counselling Service

Jocelyn D. Greene, B.S.W.,
Waterford Hospital and Emmanuel
House, St. John's

Susan McConnell,
Dr. Thomas Anderson Centre,
St. John's

The commission was further assisted by the solo appearances of Rix G. Rogers, Special Adviser to the Minister of National Health and Welfare on Child Sexual Abuse in Canada and Superintendent Emerson H. Kaiser, R.C.M. Police who made his third appearance before the commission. Mr. Rogers, who had completed a Canada-wide

Exhibits C-0607 to C-0609.

Recommendations to the Commission

study of the incidence of child sexual abuse discussed his report to the minister, *Reaching For Solutions*²⁰⁵ and Superintendent Kaiser gave an instructive review of the R. C. M. Police training in this field, and furnished the commission with extensive material on the force's training procedures as a whole.²⁰⁶ Mr. Rogers appeared on June 22 and Superintendent Kaiser on June 26, 1990.

²⁰⁵ Exhibits C-0558 and C-0558A. Canadian Government Publishing Centre, 1990.

²⁰⁶ Exhibits C-0610to C-0619.

Recommendations to the Commission

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²⁰⁵ Exhibits C-0558 and C-0558A. Canadian Government Publishing Centre, 1990.

³⁰⁶ Exhibits C-0610 to C-0619.

Chapter XI: Furthering the Administration of Justice

The National Crisis

If anything were required to establish the fact that the administration of justice embraced functions of government wider than the constitutional responsibilities of the Minister of Justice and Attorney General of Newfoundland, it was exposure to the views of the panellists and experts listed in Chapter X. An exact application of the terms of reference would appear to preclude further reflections upon the social services aspect of "furthering the administration of justice" but I conclude that no useful solutions can be found without recognition of the vital importance of the interdisciplinary approach to both training and operations. The seminal study entitled *The Report of the Committee on Sexual Offences Against Children and Youth*²⁰¹ - otherwise known as the Badgley Report - was commissioned by two members of the Government of Canada, the Minister of Justice and Attorney General and the Minister of National Health and Welfare in February 1981; it reported to them in 1984. As a result important amendments were made to the Criminal Code and the *Canada Evidence Act* to facilitate prosecution of such offences and the protection of complainants and witnesses who were children; this was for long, and still to this day, incongruously known as Bill C-15, as I have elsewhere observed and not surprisingly since it was not provided with a short title upon enactment but must be referred to as *An Act to Amend the Criminal Code and the Canada Evidence Act*,

Exhibit C-0507. Canadian Government Publishing Centre, 1984.

Furthering the Administration of Justice

S.C. 1987, c.24. The next step was the appointment of Mr. Rix G. Rogers as Special Adviser to the Minister of National Health and Welfare on Child Sexual Abuse, as noted in the previous chapter, to report, as he says in his foreword to *Reaching for Solutions*TM, "on the long-range direction of federal initiatives regarding child sexual abuse, their implementation and coordination." After two and a half years of "intensive consultations from coast to coast" in which he interviewed one thousand six hundred people, and incidentally spent considerable time in Newfoundland and Labrador, he produced *Reaching for Solutions* in June 1990, so that his discussion of it and explanation of the problem before this commission on June 22 of that year was the first of its kind since this valuable document had been delivered into the hands of the Honourable Perrin Beatty, the current minister in Ottawa.

My immediate and overwhelming impression was one of a national crisis not by any means confined to one or two provinces, a crisis involving some two million families across Canada in which child sexual abuse has occurred and is occurring during the span of Mr. Rogers investigation, in and outside the family where one in every two boys and one in every three girls have been to a varying extent demoralized by an abuser. As an additional horror we have begun to realize that across the country there is a welling-up of complaints which only partly indicates the dimension or the duration of child sexual abuse hitherto hidden away and unrevealed. All the resources of Canada and its provinces capable of being brought to bear on corruption so massive and so damaging to society must be mobilized, trained and

Exhibit C-0558.

Chapter XI

deployed. Considerable progress has obviously been made but any reader of *Reaching for Solutions*, or auditor of what its author had to say to this commission, must be convinced that there is still a great deal to be done. Important questions must be asked. How good is the training? Here I suggest it will be necessary to look to military models of which the R.C.M. Police has an abundance of information, and to pull back from the trenches as it were those who have experience or are facing "burnout" to act as instructors. How good is the deployment or, as it is known among planners, the "delivery of services"? Experience shows that without an amelioration of the staggering caseloads that social workers have in this province performance declines rapidly, and that a social worker, or a Crown attorney for that matter, whose enthusiasm is stifled by burdensome caseloads, lack of supplementary training, or the prospect of promotion fails to perform satisfactorily where association with human unhappiness is the daily lot. It is not enough to send public servants in these fields away on courses as a brief reward for many years of service; the training must be administered in large doses to the newcomers in the field.

Recommendation 23:

In the field of child abuse, sexual, physical and emotional, the training of social workers and police officers should be treated as basic and joint, and undertaken at the earliest possible time in their periods of service; it should consist of practical exercises in the techniques of interviewing complainants and preparation for trial; and it should

Furthering the Administration of Justice

be assisted or conducted by social workers and police officers with experience of delivering the services which are the subject of the training programme.

Training and the Public Service Commission

Among the significant steps already taken by the police forces and social services are recognition and implementation of joint interviews by police officers and social workers with children who complain of sexual abuse and recognition of the value of the video-taping of these interviews, not only for use in court as now permitted, but for encouraging pleas of guilt in proper cases. All the experts who testified, or otherwise advised the commission, agreed on the importance of combined training as well as combined operations, and urged the inclusion of as many other professionals as might be involved in the criminal law process relating to child abuse. I have written some cautionary words on the subject of indoctrinating judges except in the case of persuasion at trial, but lawyers appearing for the Crown, or for that matter for the defence, can justifiably be included in the training process as pupils or instructors. So far the commission has not been advised of any systematic attempts to include members of the bar engaged in private practice in their programmes, but to the extent that they can either contribute experience of the law and the courts, or be made more aware of the dimensions of the problem, their inclusion can hardly fail to further the cause of justice. It is clear that interdisciplinary training, calling upon experts from a number of occupations either as instructors or participants in training programmes, cannot be effectively organized and administered by individual departments of government, although the evidence of Mr.

Chapter XI

Gilbert Pike, Chairman of the Public Service Commission of Newfoundland and formerly deputy minister of social services, establishes that the department was doing just that. The public service commission is responsible for training in fields other than social services; it has relinquished the responsibility for training social workers and left it to the department of social services to go its own way, I doubt if joint or interdisciplinary training can be effectively organized and administered by any particular department of government, and since the public service commission is ideally placed - I do not express any view as to whether it is adequately staffed or funded - to coordinate this type of training of police officers, social workers and the like, with the cooperation and perhaps participation of department of justice solicitors and the practising bar, it is therefore recommended

Recommendation 24:

That the organization of interdisciplinary training programmes designed to meet the needs of child protection services be entrusted to the Public Service Commission and the said commission be staffed and funded for the purpose.

Complaints by the Public against the Police

Witnesses before the commission on several occasions expressed the need for a process by which an independent body could review public complaints, particularly complaints against the police. The office of Ombudsman - or Parliamentary Commissioner as officially described - was not

Furthering the Administration of Justice

constituted to deal with complaints, but in practice fulfilled public need in that quarter. It is now abolished and there have been ministerial statements indicating that the matter of providing for public complaints against the police was under advisement. The position of this commission is that such a provision should be made, although with some reservations about a guarantee of independence of all political control. There is no principle of democracy, as expressed in our parliamentary system, to justify complete removal from government of responsibility for the supervision of a body to which government is itself responsible as from time to time elected by the people of the province. **Over** the years there has been a tendency for parliaments and legislatures to shed responsibility for various matters by creating boards and commissions to discharge duties previously undertaken by parliamentary committees. This has culminated in a state of mind which suggests that anything political is somehow reprehensible, even though politics must, upon reflection, be recognized as a guarantee of freedom, sought and fought for over many generations.

It would be open to a solicitor general to create a police commission with a public complaints bureau as an emanation or as a separate body. It may be too late to suggest that an all-party committee of the House of Assembly could discharge the same function for less money and be in closer touch with complainants. If a police commission is decided upon it should, in my respectful view, consist of no more than three commissioners one of whom might be a provincial court judge, seconded for the position of chairman, and should be empowered to hear appeals from a decision of the chief of police in matters of discipline within the Constabulary, to make recommendations to government as to pay and

Chapter XI

allowances of this force and, if is deemed preferable to other solutions, to entertain and dispose of complaints about the police from members of the public. This solution would limit the responsibilities of the solicitor general with respect to such a commission to reporting in the House of Assembly upon its transactions and making provisions for its continued existence. After consideration of the various alternatives, and bearing in mind the situation of the R.C.M.P. Public Complaints Commission at Ottawa, it is recommended:

Recommendation 25:

That a Royal Newfoundland Constabulary Complaints Commission be established, reporting to the Solicitor General of Newfoundland and included for administrative purposes within his or her Department, consisting of not more than three commissioners, one of whom should be a Judge of the Provincial Court seconded for the purpose to act as chairman and chief executive officer.

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The Rogers report *Reaching For Solutions*²⁰⁹, is of critical importance in the fight against child abuse. Its recommendations under the chapter entitled "Child Sexual Abuse and the Justice System" run from numbers 23 to 53 and require public support. The report as a whole also deserves an index and I am astonished that a publication of this importance, and the fruit of much expenditure in other directions, could not have been supplied with one. It is not

Exhibits C-0558 and C-0558A.

Furthering the Administration of Justice

my function to review these recommendations which are addressed to a federal minister, but there is one which is echoed by recommendations made by participants and others to this commission which is number 33 on page 66:

"That provincial/territorial Attorneys General develop policies to give priority in court scheduling to child sexual abuse cases."

As to this Mr. Rogers comments "implementation of such a policy will require consultation with the Bar Associations and Judicial Councils."

Justice Delayed

Special priority or not, Mr. Rogers and those who agree with him on this point have pointed tentatively to one of the great scandals of the second half of the twentieth century - delay in the courts. The swift administration of justice is the very foundation of the free society of which we are accustomed to be so proud. Number one in the Statutes of the Realm is Magna Carta - "the Great Charter" - given by King John almost at sword point to his principal subjects in A.D. 1215, article 40 (or 29th chapter) of which says "*nulli vendernus nulli negabimus aut differemus am rectum el justitiam*: to no one will we sell, deny or delay either right or justice". It may be observed delay alone raises costs that only the prosperous can pay, and denial of justice and right follows as a matter of course. Scholars have pointed out that these momentous words had special meaning in the days of King John which do not respond to exact analysis today, but great charters and constitutions speak to descending generations contemporaneously. Magna Carta was the basis

Chapter XI

of parliamentary resistance to Charles I, just as the right of every free man to bear arms guaranteed by the constitution of the United States, so innocent in the eighteenth century, has been a curse to latter-day law enforcement agencies in the Union. Criminal cases which once took scarcely a week to try now often take months. Offenders who were brought to trial thirty years ago within the month after their apprehension are now often at liberty under judicial interim release until the public has forgotten why they are being tried at all. What has happened?

Complete answers to this question would fill volumes, but I venture to assert that the principal cause has been a change of attitude both on the bench and at the bar. Formerly adjournments or postponements, as they are generally called in this province, would rarely be asked for, and still more rarely granted; now application for them and their allowance is largely a matter of course. The prosecution of alleged offenders associated with this commission's investigation is a case in point. It may be said in explanation, if not in extenuation, that the *Charier of Rights and Freedoms*, legal aid, the growth of population, the refinements of expert evidence, greater sensitivity among judges and lawyers have played their part. They are nothing compared to the suffocating effect of postponement. If counsel agree to a postponement they are seldom questioned by judges though the reason for the application may be purely for the convenience of counsel. The interests of the accused and public are almost invariably subordinated to this. Recently the Supreme Court of Canada delivered a momentous judgement principally *per* Mr. Justice Cory in *Askov ef al. v.*

Furthering the Administration of Justice

The Queen" in which that learned judge, giving reasons in this respect concurred in by the other judges of the full court, said at page 691:

"The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without reasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays."

As previously observed the appellants' success had the disturbing result of charges being dismissed against a multitude of alleged offenders and the attorney general of Ontario, the province from which the case proceeded on appeal to Ottawa, said additional judges and Crown attorneys would be appointed to deal with delayed cases in the future. But in my respectful view, this is not and has never been the answer. What is needed is recognition that time in the courts is a precious commodity, that in the normal course postponements will not be asked for or granted and that the ominous words of Mr. Justice Cory in the last sentence of the passage quoted be taken to heart.

75 O.R. (2d) 673.

Chapter XI

I suggest with respect that Newfoundland is in an ideal position to lead the way back to a reasonable solution of procedural delays. Well supplied with judges and served by a highly professional and competent bar, much could be done voluntarily and in a spirit of goodwill. But rules of court will be required as they have always been required in procedural matters, however wise and well-observed the conventions of the courts may be. If caseloads are the bugbear of Crown and defence counsel alike, postponement is not the solution; and if that cannot be agreed upon then the Government of Newfoundland and Labrador can take up arms in a vital struggle and with the cooperation of the judges and the Law Society secure the enactment of rules of court severely limiting the number of postponements allowed to any party to a criminal trial, and one would hope a civil trial as well. On consent one should be enough, and for no more than ten days; thereafter almost none.

Recommendation 26:

That the Government of Newfoundland and Labrador through the Department of Justice, mindful of the inordinate delays in bringing both criminal and civil cases to trial in the courts, take such steps as may be possible to reduce the number of postponements or adjournments occurring therein by seeking the cooperation of judges and the Law Society of Newfoundland, and by enacting rules of court in aid thereof where necessary.

It is recognized that counsel's first duty is to his client, subject as I venture to believe to his or her responsibility as an officer of the court. There are regrettably practitioners

Furthering the Administration of Justice

who have ignored, forgotten or never been aware of the latter obligation. Referring again to *Askov's* case the passage that I have already quoted from Mr. Justice Cory's judgment is immediately continued as follows:

"Further, implicit support for the concept that there is a societal aspect to s.11(b) can be derived from the observation that the last thing that some wish for is a speedy trial. There is no doubt that many accused earnestly hope that the memory of a witness will fail and that other witnesses will become unavailable. This factor was noted by T.G. Zuber in his *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987), at p. 73:

It is, however, the observation of this Inquiry that those accused of crime and their counsel are often disinterested in trial within a reasonable time. Delay is perceived not as a factor which will impair the ability of the accused to present a defence but rather a factor which will erode the case for the prosecution.

Doherty J. wrote to the same effect in a paper delivered to the National Criminal Law Program in July 1989. He wrote:

Many accused do not want to be tried at all, and many embrace any opportunity to delay judgement day. This reluctance to go to trial is no doubt a very human reaction to judgment days of any sort; as well as a reflection of the fact that in many cases delay inures to the benefit of the accused. An accused is often not interested in exercising the right bestowed on him by s.11(b). His interest lies in having the right infringed by the prosecution so that he can

Chapter XI

escape a trial on the merits. This view may seem harsh but experience supports its validity.

This unique attitude on the part of the accused toward his right often puts a court in a position where it perceives itself as being asked to dismiss a charge, not because the accused was denied something which he wanted, and which could have assisted him, but rather, because he got exactly what he wanted, or at least was happy to have ~ delay. A dismissal of the charge, the only remedy available when s.11(b) is found to have been violated sticks in the judicial craw when everyone in the courtroom knows that the last thing the accused wanted was a speedy trial. It hardly enhances the reputation of the administration of justice when an accused escapes a trial on the merits, not because he was wronged in any real sense, but rather because he successfully played the waiting game.

As these comments from distinguished jurists indicate, the s.11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused,"

In the case of deliberate dragging of the forensic feet it would seem that those responsible for the administration of justice should be quick to provide or seek penalties, at least in the form of costs ordered to be paid personally by counsel, or his or her instructing solicitors or both. Some suitable penalty should also be ordered when counsel on either side of the case neglects to give timely notice of an inability to appear, or an application for a postponement so that witnesses and victims or otherwise need not start unwarned upon the journey to the court-house, only to find it empty. Cynthia

Furthering the Administration of Justice

Durdle's evidence in this regard was specific, but it is commonplace that witnesses, whether victims of an offence or not, are frequent victims of a lack of consideration by lawyers on both sides of a case putting them to inconvenience, not to mention a judge who acquiesces in a postponement of this type without rebuke or penalty. Especially is this the case in far-flung areas of the province where substantial journeys to court-houses must be undertaken. When the public gaze is directed to the administration of justice it is frequently from the eyes of witnesses summoned by the Crown or the defence, and in the former case, often the alleged victims of offences which have caused charges to be laid and prosecutions undertaken. As to these Mr. Justice Cory had this to say in *Askov's* case:

"It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law."

Chapter XI

Support for Victims and Witnesses of Crime

The need for a coordinated victim-witness support system, the subject of considerable comment by the commission's panellists and by those who made submissions orally and in writing to the commission, was underlined by Mr. Powell as part of his written argument:

"Evidence before the Commission from victims of abuse and submissions made by several interested groups stressed the need for some form of victim/witness support system within the justice system. The experience of your own staff within the Commission is proof that in dealing with victims of sexual abuse emotions are very much involved. Considerable time must be spent outside the courtroom properly preparing the witness and dealing with their emotional problems. At the present time this role is basically fulfilled by the police and Crown Attorneys. A simple matter like keeping victims and witnesses advised about the progress of the trial and any unexpected delays can be very important.

In my submission this is an important matter which can be addressed without incurring any real cost. It is a matter of recognition of the importance of this role and delegating someone to ensure that the appropriate steps are taken. As previously noted officers in the Constabulary currently investigating abuse cases feel they are best equipped to set up such a program and this may be the case but, in my view, the matter could be properly addressed by designating a secretary within the Crown Attorney's office as the

Furthering the Administration of Justice

victim/witness support co-ordinator. This person is familiar with the police officers and could be aware of any volunteer or other government agencies available in that territorial area. I am sure many fill this role at the present time but sometimes the recognition can be important.

In any event, it is my submission that the Department of Justice must recognize the importance of this service and assume the lead in establishing and co-ordinating support services to victims and witnesses in sexual abuse cases."

I adopt what counsel says in this respect, and make the following recommendation with the reservation therein contained:

Recommendation 27:

An officer of the Criminal Division of the Department of Justice should be appointed and relieved from time to time to coordinate the work of the police and of Crown attorneys assigned to cases in support of advisory services to alleged victims and others who are called to testify at trials, informing them of the scheduling of the cases in which they are interested and the procedure relating thereto, and paying as much attention to their comfort and convenience as is possible under the circumstances; provided that such services do not exceed what is necessary for the purpose and become sources of suggestion as to presenting their evidence or as to its content.

Chapter XI

It is appreciated that progressive changes are taking place in all departments of the Government of Newfoundland and Labrador. In the case of the administration of justice the Royal Newfoundland Constabulary and the Department of Social Services are closely linked for the purpose of dealing with child abuse. Important changes are, I believe, contemplated and some are afoot. In the case of the Constabulary there was evidence to suggest that the force was not fully equipped to conduct videotaped interviews with alleged victims and abusers. As to the importance of the videotaped interview I need do no more than quote extracts from what was said by Corporal Lillian Ulsh and Dr. John C. Yuille in the course of their panel discussion on training and interviewing techniques. First from Corporal Ulsh:

"Q. You referred to the videotaped interview with the victim, alleged victim, what are your views in relation to that. I understand here, for instance, in the Constabulary it is a practice that is not being used, a procedure that is not being used.

A. Right.

Q. Do you think it should be and what are the pros and cons of it?

A. It is absolutely a marvellous tool. I have been using videotape since 1983 and probably ninety-five percent of my interviews are done on videotape. There may be the odd occasion for different circumstances that it is not available, or whatever. But with training in our province and for instance the Crown prosecutors, the police and the child protection workers are receiving training together. They are learning

Furthering the Administration of Justice

methods like the step wise interview. They are learning statement validity analysis. And so you have that videotape and it is not that we are looking at using it under the new procedural and evidentiary changes of the criminal code, but because it has more far reaching benefits than that and, in my opinion, that is not why we started it or why we are still doing videotaping. But you are able to provide that tape to the Crown. Usually we are doing joint interviews so the child protection worker is there monitoring the interview anyway and sees it as well. So everyone is able to do things like statement validity analysis on the interview. The Crown then is provided with a clear picture. The court is provided with a clear picture if it ends up being utilized that way. The defense has a clear picture also of what the child has said and what the allegations are etc. The uses of the videotape just continue to go on and on and on.

Q. Have you any experiences as to whether or not it is affecting the outcome in court cases?

A. Oh absolutely. There is no comparison between those areas that are consistently videotaping their interviews and areas that are not, with guilty pleas.

Q. Would you expand on that a bit?

A. I would say that we enjoy, in our jurisdiction in Fredericton, we enjoy about a ninety-five percent success rate of our cases that are laid. And the majority of them would be guilty pleas. Very seldom do we go to trial and most often if

Chapter XI

we are going to trial it is usually third person assaults and it is usually jury trials.

Q. Is that because when a defense lawyer sees the videotape of the interview and has a chance to assess the alleged victim that results in the guilty plea?

A. Absolutely. And that videotape is there. The Crown can use it for other ways too, for instance in sentencing."

Counsel then turned to Dr. Yuille,

"Q. Do you have any views in relation to that, Dr. Yuille? The videotapes.

A. Oh I agree one hundred percent that there is every reason to use them and Lillian has touched on many of them. Certainly of the people that I have talked to across the country report things like a doubling in the confession rates when they go to videotapes. Also I know that it can be helpful to non-offending parents for example and in that they have a chance to find out exactly what happened by watching the videotape instead of just getting a sort of piecemeal report about things. There are a whole variety of benefits from it and there is only one reason not to videotape and that is if the interview isn't well done. And if people are properly trained and given a chance to get some experience with videotaping and become comfortable with it then there is every reason to do it."

Furthering the Administration of Justice

Corporal Ulsh later noted that in her province of New Brunswick some fifty-five to sixty percent of all complaints of child sexual abuse reached the courtroom and of these ninety to ninety-five percent resulted in convictions owing to the many pleas of guilty which the video-taped interviews of the complainants induce. There seems to be little doubt and certainly not in the minds of any witnesses we heard on the subject that, expensive as initial installation may be, video-taping interviews was "cost-effective". It is accordingly recommended

Recommendation 28:

That the Royal Newfoundland Constabulary be forthwith equipped with facilities for the videotaping of interviews for use in compliance with relevant sections of the *Criminal Code of Canada*.

In the Department of Social Services the *Child Welfare Act, 1972* is as I am advised in the process of amendment and a new act will no doubt be brought forward in line with what was begun in 1984 by Ontario and Alberta and this year by the province of Nova Scotia, the new act having been fully commented on to the commission by Professor Rollie Thompson, a prime mover in its production and drafting. During the course of writing this report the minister, the Honourable John Efford, kindly provided me with a copy of a recent study by a leading firm of management consultants whose recommendations seemed to be wholly beneficial. These experts have commented on the importance of using computers for the monitoring of child welfare cases and the substitution of electronic for manual records. Evidence was given by Neil Hamilton and one of his successors as

Chapter XI

provincial co-ordinator of child care and protection services, testifying to the limited use and laborious compilation of the child abuse register, an essential tool in the fight against child abuse. Depriving the child welfare division of the department of the means of computerizing this and other records would appear to be false economy. I have already commented on the need to have a record of this type freely available to all engaged in the multi-disciplinary interagency team attack on a social evil of frightening proportions. I therefore recommend:

Recommendation 29:

That no effective expense be spared in equipping the Child Welfare Division of the Department of Social Services with the means of storing and retrieving records of child abuse currently kept and in contemplation, and that all departments and agencies of government engaged in the combined attack of child abuse in Newfoundland and Labrador have access to such information, and in particular what is referred to as the "child abuse register".

Publicity Under the Summary Proceedings Act, S.N. 1979, c. 35

The *Summary Proceedings Act*, assented to December 14, 1979, provides in Part III for the holding of inquiries into the cause and circumstances of fires injuring or destroying property and in respect of deaths other than accidental, formerly provided for in sections 126 to 128 of the *Summary*

Furthering the Administration of Justice

Jurisdiction Act, R.S.N. 1970, c. 364, as amended. No jury is empanelled as in the case of coroners inquests in other jurisdictions. It was under the provisions of this part that the deaths of Alonzo Corcoran and Trudi Butt were the subject of judicial inquiries ordered by the director of public prosecutions. At the time of the judicial inquiry presided over by Judge Barnable in the case of Alonzo Corcoran in 1984 and 1985 the section dealing with reporting to the attorney general by the judge read as follows:

"29.(1)The judge who holds an inquiry, shall after hearing the testimony adduced at the inquiry, send to the Attorney General a written report that includes

- (a) the conclusions of the judge as to the cause and origin of the fire or the cause of death, as the case may be;**
- (b) all the evidence taken at the inquiry; and**
- (c) any recommendations the judge may have as a result of the inquiry.**

(2) Notwithstanding any order under subsection (2) of section 26, the Attorney General may make available to any person, on payment of the prescribed fee, a copy of the report or any part of it."

By the *Summary Proceedings (Amendment) Act, S.N. 1987, c.7*, that section was repealed and replaced by the following contained in section 3 thereof with unusual numbering:

"29.(1)At the conclusion of the inquiry the presiding judge shall make a written report to the Attorney General which shall contain findings as to the following:

Chapter XI

- (a) the identity of the deceased;
- (b) the date, time and place of death or the fire;
- (c) the circumstances under which the death or fire occurred;
- (d) the cause of death or the fire; and
- (e) the manner of death.

(1.1) A report under subsection (1) may contain recommendations as to the prevention of similar deaths or fires.

(1.2) The findings of the judge shall not contain any findings of legal responsibility or any conclusion of law.

(1.3) The report of the presiding judge shall be made not later than six months from the date of commencement of the inquiry unless an extension of the time is granted by the Chief Provincial Court judge."

Undisturbed was section 26:

"26.(1)An inquiry shall be held in public.

(2) At any stage in the inquiry, the judge may, on application by a party, or otherwise, make an order directing that the evidence taken at the inquiry, or any portion of it, shall not be published or broadcast except by leave of the judge granted at a time subsequent to the inquiry."

Furthering the Administration of Justice

There were left the provisions of section 26(2) and section 29(2) whereby the attorney general could ignore an order of the court on payment of a prescribed fee.

The implications of section 26 are that in the normal course the evidence is available to the public, but not the report to the attorney general who "may" make it available even though it were to contain quotations of evidence given at the inquiry which the judge has ordered not to be published. It will be recalled that at page 320 the assistant director of public prosecutions, Robert Hyslop, was quoted in a confidential letter to deputy minister of social services Gilbert Pike which enclosed the report of Judge Barnable in the Corcoran inquiry as follows:

"Our Minister has not made a decision to release the report publicly. In all likelihood, since the report deals with an aspect of public safety, I would anticipate that it will be released in due course." (sic)

This confirms the discretionary power of the minister of justice and attorney general to offer or withhold a judicial report of an inquiry open to the public, about a matter of public concern, possibly containing recommendations as to what steps should be taken to prevent a recurrence of the event investigated. Under the circumstances one would think that all such reports should be made public in due course and I so recommend:

Recommendation 30:

The *Summary Proceedings Act*, S.N. 1979, **c.35** as amended should be further amended by repealing subsection (2) of section 26 and amending subsection (1) thereof so that the same shall read "an inquiry

Chapter XI

shall be held in public except when the presiding judge shall order that part of it be held *in camera* on grounds that would be lawful in any criminal proceeding in court"; and that subsection (2) of section 29 should be amended to provide for the tabling of all such reports by the Attorney General in the House of Assembly.

The Public Enquiries Act, R.S.N. 1970, c.314

This act has not been amended since the statutes of Newfoundland were revised as of 1970, the revision taking effect in 1973 and needs the scrutiny of the law officers. If one examines section 2 references to "the Lieutenant-Governor in Council" and to "this Province" indicate a post-Confederation origin although the phrase "the peace, order and good government of this Province" is language associated with federal power under the Canadian Constitution and would not, it is suggested, be appropriate in provincial legislation at this time. Section 3 presents a number of anomalies and should be set out in full:

"3.(1) The Commissioner or Commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of law in civil cases; and any wilfully false statement made by any such witness on oath or solemn affirmation shall be a misdemeanor punishable in the same manner as wilful and corrupt perjury."

(2) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to

Furthering the Administration of Justice

establish his liability to a civil proceeding at the instance of the Crown or of any person.

(3) If with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act or the Canada Evidence Act the witness would therefore have been excused from answering the question and although the witness is by reason of this Act or the *Canada Evidence Act* compelled to answer the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

Subsection (1) conferring power on a commissioner to enforce the attendance of witnesses and "to compel them to give evidence as is vested in any court of law in civil cases"¹¹ is now inconsistent with the provisions of the *Evidence (Public Investigations) Act*, R.S.N. 1970, c.117 by which a commissioner must apply to the Supreme Court of Newfoundland to punish a contemnor for his or her contempt of court. The word "misdemeanor" must be an indication of pre-Confederation origin since the Criminal Code has never recognized the classification of offences as felonies on the one hand or misdemeanours on the other. Subsection (2) and subsection (3) should now be examined for the purpose of finding out to what extent section 13 of the *Charter of Rights and Freedoms* has rendered their provisions unnecessary or in apparent conflict. In particular the concluding words of subsection (3) are a plain invasion of the federal power to enact the criminal law.

At the same time I do not suggest that a public inquiries

Chapter XI

act of any other province should be uncritically adopted. Since royal commissions are older than parliaments in the long history of British constitutional development, it is as well to recognize that their creation is still a function of the prerogative in England where they are appointed by royal warrant²¹, and there is no reason why a royal commission could not be appointed by lieutenant governor's warrant as long as the appointing function does not become entrenched in a statute which deprives the executive of discretion as to the procedure employed. Since most, if not all of the provincial statutes as to public inquiries across Canada do not require the use of the great seal of the province there are positive, albeit imponderable advantages to retaining this aspect of section 2 as to appointment by "the Lieutenant-Governor in Council may by Commission under the Great Seal appoint such person or persons (hereinafter called the Commissioner or Commissioners) as he may select to hold such enquiry" thus preserving the ability to issue such commission in Her Majesty's name and justify, as it only can be justified, the use of the term "royal".

The government may also wish to consider some provision in a revised Public Enquiries Act to allow for an expeditious challenge to the jurisdiction of a commissioner such as is contained in the Ontario *Public Inquiries Act*, R.S.O. 1980, c.411 which reads as follows:

"6.(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into

See the report of the Royal Commission on Criminal Procedure, January 1981, Cmnd 8092.

Furthering the Administration of Justice

question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

(2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

(3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

(4) Pending the decision of the Divisional Court on a case stated under this section, no further proceedings shall be taken by the commission with respect to the subject-matter of the stated case but it may continue its inquiry into matters not in issue in the stated case. 1971, c.49, s.6."

The reference to the Divisional Court is of course inappropriate in the case of Newfoundland, and in any event access to the Supreme Court of the province can be secured under the common law although perhaps less expeditiously. Presumably the language of subsection (1) of section 6 of the Ontario statute is an attempt to spell out what is involved in a challenge to jurisdiction and it is recommended that if such provision is made in a revised Public Enquiries Act for Newfoundland and Labrador that it be made clear that judicial review of the type contemplated be confined to questions of jurisdiction alone. It is therefore recommended:

Chapter XI

Recommendation 31:

That the *Public Enquiries Act*, R.S.N. 1970, c.314 be reviewed with a view to enacting such amendments as may

- (a) in the case of section 3 thereof remove such material as is inconsistent with the constitutional position of Newfoundland as a province of Canada and with due regard to the provisions of section 13 of the *Charter of Rights and Freedoms*; and**
- (b) provide for the stating of a case by a commissioner or commissioners to the Trial Division of the Supreme Court of Newfoundland with effect similar to that of section 6 of the *Public Inquiries Act of Ontario*, R.S.O. 1980, c.411 and confined to questions of jurisdictions only.**

Recommendation 32:

The substance of section 2 of the said *Public Enquiries Act*, R.S.N. 1970, c.314 be retained, and in particular those provisions of the said section which provide for a commission of inquiry being issued under the Great Seal of the Province and in Her Majesty's name.

The Compensation Issue

I have already mentioned that my terms of reference contain no explicit direction as to this commission's mandate on the question of compensating those who make claims

Furthering the Administration of Justice

against the government as victims of sexual abuse at the hands of persons at Mount Cashel entrusted with their care by the Director of Child Welfare and I was careful not to consider any evidence relevant to the issue. However, Mr. John Harris, acting as counsel for some, if not all, of the alleged sufferers made an eloquent plea in his final argument for recommendations on it. He said in part:

"I will therefore ask you to make a recommendation concerning the approach that government might take in terms of rectifying that wrong and my submission is that you recommend to government that there be established a separate body; whether it be a commission or tribunal or whatever, to assess the aspect of compensation for the victims because it is a special case that has given rise to this inquiry."

After prolonged reflection I am of the opinion that the question becomes relevant under the general authorization to make recommendations for the "furtherance of the administration of justice" and that to ignore it on the grounds that it was once explicitly provided for and subsequently abandoned would not be in the public interest.

Further inducement to make an extended comment and a recommendation on the subject of compensation has been provided by the Minister of Justice who made a public statement suggesting that the principle of compensation might be favourably considered by the government, subject to some qualifications as to a determination of liability by the courts which appeared to postpone any out-of-court assessment of damages to a time perceivably far in the future. If the mechanism of settlement by arbitration is decided upon the process should be prompt and contrast favourably with proceeding by way of civil litigation. The arbitration should

Chapter XI

be consensual and based upon the assumption without admission that the government is liable to the complainants as victims of sexual abuse while wards of the director of child welfare during a designated period, and confined to those who have already made complaints to the police or this commission or both.

It is suggested that submission to arbitration should be voluntary, and that no attempt should be made to make arbitration conditional upon all the claimants submitting to it, but those who do must provide the government with a release of all claims relating to their complaints in consideration of receiving the compensation awarded by arbitration. All claimants submitting to arbitration should be on an equal footing including those whose claims would otherwise be statute-barred. Those who reject arbitration and choose to pursue their causes in the courts should not, it is suggested, be given the latter consideration by a government however benevolent which has the interest of taxpayers in mind.

If the government decides to allocate a "global" sum within the confines of which the arbitrator would assess the compensation payable to each claimant, with consequential abatement if the sum set aside proves less than the sum of the individual amounts as at first calculated, such a limitation on assessment would emphasize the *ex gratia* nature of the resulting payments as contrasted with compensation based upon a confession of liability or a finding of such by a court. It is also desirable as being in keeping with normal constitutional practice in estimating expenditures and informing the public through the House of Assembly of their place in the public accounts. The course of arbitration should be expeditious, particularly if the arbitrator selected is generally familiar with the evidence before this commission

Furthering the Administration of Justice

and the nature of the police investigation. To require an arbitrator to begin afresh, viewing all the evidence accumulated over the last eighteen months with an inexperienced staff, would be to ensure substantial delay. The following recommendations are offered:

Recommendation 33:

That the Government of Newfoundland and Labrador invite all claimants against it for compensation on the grounds of having suffered sexual abuse at the hands of persons entrusted with their care at Mount Cashel Boys' Home and Training School as wards of the Director of Child Welfare pursuant to the provisions of the *Child Welfare Act, 1972* with respect to all complaints made in good faith during a designated period to consensual arbitration, on the assumption, but without an admission, that it is liable to the said claimants.

Recommendation 34:

That the Government of Newfoundland and Labrador set aside a sum of money within which the arbitrator may assess the amounts payable by it to each of the claimants referred to in recommendation 33 submitting to arbitration.

Recommendation 35:

That the provisions of the *Limitation of Actions (Personal) and Guarantees Act, R.S.N. 1970, c.206* as amended be inoperative as against those claimants who submit to arbitration without prejudice to the position of the Government of Newfoundland and Labrador in defending an action in court.

Chapter XII: Concluding Reflections

The Incessant Glare

This report has been written in close conformity with the terms of reference issued to me in Her Majesty's name by your Honour in Council on June 1, 1989 and in accordance with the evidence adduced at public hearings of the commission which itself was presented within the same framework. Some of that evidence, as already observed, was of such a nature as to shock profoundly the conscience and susceptibilities of the people of Newfoundland and Labrador and was widely disseminated by telecast within and beyond the boundaries of the province. There can be little doubt that its dissemination was of public importance and accelerated a determination to advance the cause of child protection. There is also little doubt that the effect of televising the *viva voce* evidence dealing with child abuse caused painful and injurious identifications to be made and raised the possibility of prejudicing the prospect of a fair trial for those charged with offences under circumstances relevant to the commission's inquiry. These difficulties were encountered at a relatively early stage in its proceedings and dealt with by commission counsel with the co-operation of all parties having standing. Steps were taken, laborious and sometimes confusing, to edit exhibits by deleting names of people and locations and to order questioning of witnesses accordingly.

I have referred in the Introduction to the economic advantages of the videotaped record supplied by the telecaster for which no charge was made to the commission, and to the importance of keeping the public fully and fairly informed by

Concluding Reflections

telecasting the whole proceedings of the commission, unedited except for what I considered necessary to be confined to *in camera* hearings. On the other hand there now looms over the legal horizon the portent of the Supreme Court of Canada's decision in *Starr et al. v. Houlden et al.*, [1990] 1 S.C.R. 1366 which ruled as unconstitutional a provincial commission of inquiry behaving as would a police investigation of alleged criminal activity on the part of the appellants. The Honourable Mr. Justice (now Chief Justice) Lamer, who gave the judgement of the majority of the court, said this at page 1389 of the report:

"I am of the view that the province of Ontario has exceeded its jurisdiction by the manner in which it has framed this public inquiry. Although it may not have intended this result, the province has created an inquiry that in substance serves as a substitute police investigation and preliminary inquiry with compellable accused in respect of a specific criminal offence under s. 121 of the *Criminal Code*. This inquiry is, therefore, *ultra vires* the province as it is in pith and substance a matter related to criminal law and criminal procedure under the exclusive jurisdiction of Parliament pursuant to s.91(27) of the *Constitution Act, 1867*."

An interesting excursus on this was made by a member of the concurring majority, the Honourable Mr. Justice Sopinka in an address to the Canadian Institute for the Administration of Justice in Winnipeg on August 24, 1990, providing the added piquancy of the speaker having been counsel to the central characters in two celebrated inquiries conducted by Mr. Justice Grange of the Ontario Court of Appeal and Chief Justice Parker of the Ontario High Court, being respectively Nurse Susan Nelles and the Honourable Sinclair Stevens. In

Chapter XII

opening his analysis of the impact of *Starr's* case the learned judge said this:

"The Starr decision is not the death-knell for public inquiries in Canada, but it will have some profound effects on the conduct of further public inquiries. Some inquiries will be left unscathed by the decision; others may be stopped dead in their tracks."

Although it is presumably too late to affect any part of the transactions of this commission in the course of its public hearings, it is useful to speculate as to what might have been the case had *Starr's* case been so resolved before they began.

Mr. Justice Sopinka classifies public inquiries in sprightly language:

"Public inquiries actually come in two separate breeds. The distinction between the two may be apparent from the ambit of the terms of reference, but such clarity is rare. One breed, the truly public inquiry, is both valuable and permissible. These inquiries are established to look into general matters of public import. The commissions generally hold hearings, weigh policy considerations, and make recommendations for the course of future legislative action. Canada has a long and successful history of inquires of this nature. The MacDonald Commission into the economy which ultimately proposed the implementation of a free-trade agreement with the United States is but one notable example. As fact finding and policy developing instruments these policy commissions are a valuable complement to the other branches of public government in this country. Of course, it has been observed that inquiries of this ilk are routinely held, and their recommendations almost as routinely ignored by the legislatures, but

Concluding Reflections

nevertheless, these public inquiries still serve a valuable, and legitimate role in the collection of instruments of public governance available in a parliamentary democracy.

There is however, another, quite distinct breed of inquiries. They are not true public inquiries. They are criminal investigations masquerading as public inquiries. Some, of which the Starr is but one example, are in effect surrogates for the regular criminal process. Many of these inquiries are unacceptable because insufficient attention is paid to the interest of the target individual."

The casual inquirer might find the lineaments of both breeds on the face of the inquiry concluded by this report. The first part of it dealing with the Mount Cashel investigation of 1975, and the complaints which were then suppressed, took place almost side by side with the revived police investigation which began before the commission was appointed and continued after the public hearings had ended, resulting in a considerable number of charges which at the time of writing have not yet been brought to trial. Later stages of the inquiry dealing with various aspects of employment of government forces in the struggle against child abuse would fall one may hope into the learned judge's first category, the true public inquiry. To what extent does the Mount Cashel episode fall into his second, "criminal investigations masquerading as public inquiries"?

First of all it may be said that this commission's investigation under article I of the terms of reference was directed to a police investigation cut short in December 1975 under circumstances which I was asked to explore. Answering the questions in article I required findings of fact upon which criminal prosecutions might have been

Chapter XII

undertaken; perhaps the most sensitive of all was the question: "whether any person or persons impeded or obstructed any police officer in the investigation of these matters". It will be recalled that at page 209 this question was answered with some circumspection. Of the "compellable accused" - to use Mr. Justice Lamer's phrase in *Starr* - who might have been called before the commission the providential decision not to call any persons charged or chargeable made in November 1989 must be considered favourably by any informed critic of the commission's process. The only other potential offender still alive is the former chief of police John F. Lawlor, who in the end allowed much in Robert Hillier's original report of a "sexual nature" to go forward to the deputy minister in the form of the report of December 18, 1975. This was also the case for the report of March 3, 1976 but by that time the confessed offenders had left the province. The fact that the rules of evidence had been relaxed to permit questions to witnesses put by commission counsel to take the form of cross-examination is, in itself, a questionable basis for allowing criminal charges to be framed against one who has been compelled to testify at an inquiry, but, as I have said, no one was compelled to testify by this commission and none of the "targets" did, unless one makes the assumption that John F. Lawlor is among their number, not yet justifiable.

Mr. Justice Sopinka spoke even more vigorously about the effect of media reporting on the central figures of the two public inquiries which he represented as counsel, using the following expressive language.

"The glare of attention should not be underestimated. The coverage was probing, and it was incessant. The scrutiny is of a level that I have never experienced elsewhere. I am not completely certain why we as a

Concluding Reflections

society have this fixation for inquiries, but in general terms it appears that all the right elements are in place for a public spectacle. First, the issue is normally one of interest, and controversy. Second, the inquiry, which gives the impression of being a trial becomes the focus of considerable drama. Finally, once underway the proceedings begin to develop their own momentum so that any hint of salacious detail immediately becomes front page news."

One other passage must be quoted being particularly apposite to the situation of this commission as being the latest example of a public inquiry using television not only as a means of informing the public but as constituting the record itself. Again let Mr. Justice Sopinka speak as he spoke in Winnipeg on August 24, 1990:

"Obviously, the presence of journalists, and the dissemination of information about the proceedings serves a valuable public interest. In fact, for policy inquiries the widespread interest and discussion that the inquiry sparks is a vital component of the overall success of the process. It is the rare commission who can resist these arguments of public interest as well as the lure of the T.V. lights. However, resist they must. The public interest can be served without television coverage of the proceedings. The interests of the individuals involved dictate that this be so."

Many years ago, when I held the same views in what appeared to be a losing fight against the introduction of television cameras into courtrooms, there did not seem to be any need to struggle against their surveillance of the proceedings of public inquiries, and I conducted two, the *Royal Commission on Atlantic Acceptance* in 1965 - 1969 and

Chapter XII

the *Royal Commission on Waste Management Inc.* 1977 - 1978 prohibiting the use of cameras of any kind inside the rooms while hearings were being conducted. But then came the two inquiries in which Mr. John Sopinka, Q.C. (as he then was) was engaged. The first was the *Royal Commission of Inquiry into Certain Deaths at the Hospital For Sick Children and Related Matters* which produced in December 1984 the report of the Honourable Mr. Justice Grange, a provincial inquiry in Ontario. Next was the *Commission of Inquiry into Allegations of Conflict of Interest of the Honourable Sinclair M. Stevens* conducted by the Honourable Chief Justice W.D. Parker, a federal inquiry in 1987. Another federal commission - the *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* upon which the Chief Justice of Ontario, the Honourable Charles L. Dubin reported in 1990 - came hard on their heels. These three commissions made no difficulty about the intrusion of television and their proceedings were photographed and disseminated at length. Under the circumstances I yielded without a qualm to the suggestion that the proceedings of this commission should be televised, especially since it was accompanied by an offer of a free video and audio record at a very considerable saving to the public. Because the telecast was complete and continuous there was no editing or undue emphasis on any part of the evidence but as to its reception in other parts of Canada and perhaps the United States of America I am afraid that it may have deserved the strictures on Mr. Justice Sopinka's "jury of anchormen".

No one would readily impugn his own process and there is much to be said for keeping the public fully and fairly informed, but there is also the possibility that unfair and

Concluding Reflections

unfounded allegations may be made against persons affected by an inquiry however hard a commissioner or counsel may try to undo its harmful effects. For the future it may well be that the government of the province, in consultation with a commissioner before or after his appointment, should decide the question of the presence of television at public hearings by order in council instead of introducing some intractable provision into the *Public Enquiries Act*. I am advised that the Newfoundland branch of the Canadian Bar Association, making its annual submission to the Minister of Justice, has urged the amendment of that statute to protect the reputations of those called before a public inquiry. I have not been advised that its recommendations included the denial of television at its hearings.

Acknowledgements

As if to emphasize the singularity of royal commissions of prerogative origin, commissions of inquiry derived from statute, or a combination of both as would appear from the language of the one I have had the honour to conduct they tend to grow from small beginnings in proportion to the complexity of their tasks, unlike standing committees of the Legislature and other investigative bodies with a continuous existence. A body of dedicated workers, impatient of routine and filled with a sense of the unique importance of their task is urgently assembled and urgently operates until the time for dissolution comes. Such a time is bound to be attended with regret like the unheralded departure of an old friend from familiar haunts. While this feeling prevails I hasten on the eve of presenting my report to pay tribute to my associates of nearly two years without whose labours and assistance it

Chapter XII

would never have appeared.

To everyone whose name appears on the list of commission staff at the beginning of this volume I am deeply indebted. The work of commission counsel was beyond praise. In the Introduction I have already referred to the problem of combining investigation with the concurrent presentation of evidence and the continuous pressure to fill every moment with productive work. The comprehensive experience of criminal trials and investigations enjoyed by Mr. Powell and Mr. Day stood me in good stead. Their investigative labours owed much to the work of the commission's investigators Mr. Orser and Mr. Home both of whom as former members of the R.C.M. Police contributed not only a wealth of experience but sleepless vigilance and energy to counsel's work.

Over the whole process of the commission's activities ranged the discerning eye of Mr. Vivian, the executive secretary, responsible directly to the commissioner for all aspects of its administration. Armed also with the experience of a career in the R.C.M. Police as well as with its sequel in the Department of Justice from which he was seconded to the commission, he not only performed the many tasks associated with this responsibility but acted as registrar in the public hearings of the commission for every one of the 150 days on which they occurred. To these preoccupations were added the taking of depositions from various witnesses and some investigations entrusted to him by counsel; finally upon his shoulders fell the task of seeing my report through the press. For all this indispensable assistance and devotion to the work of the commission I am grateful beyond measure.

My own responsibilities fell into two periods. In the first I presided over the public hearings of the commission in St. John's and in the course of receiving and considering the

Concluding Reflections

evidence of 220 witnesses who made 282 appearances and provided 794 actual exhibits I was sustained at every step by all those whose names appear on the list I have referred to. Among those Miss Sandra M. Burke of the Newfoundland Bar an associate of Mr. Day began her productive connection with the work of the commission in the performance of various tasks of legal research for counsel and myself, and ended by undertaking the presentation of certain aspects of the evidence, examining witnesses in court, particularly in relation to some of the child welfare and criminal investigation profiles, as assistant counsel and to the great advantage of the commission's work. Throughout the time spent by me in St. John's Miss Virginia Connors performed the double duties of secretary to the commissioner and to the executive secretary, to our entire satisfaction, with many excursions into liaison with government departments for which her experience qualified her. After my return to Toronto and the establishment there of the commission's offices devoted to the writing of this report Miss Patricia Devereaux, whose secretarial skills and knowledge of the sophisticated electronic equipment at the disposal of the commission throughout the day and night for preparation of the evidence ending in June 1990 managed the Toronto office, and produced the text of the report with the same skill and devotion displayed in her earlier work, while Miss Connors remained to assist Mr. Vivian at the office in St. John's. The third of the commission's invaluable secretaries Miss Margaret Linehan, like Mr. Vivian seconded from the department of justice, after also playing a full part assisting counsel and investigators during the period of the public hearings, returned to the department at the end of June 1990. A remarkable tribute was paid to Miss Devereaux and Miss

Chapter XII

Linehan by Mr. Michael Harris in his recently published book, "*Unholy Orders*", for the sustaining friendliness given to witnesses during the ordeal of their sometimes painful testimony.

Clerical duties of a less specific nature, but involving work of great importance to the commission such as the copying of many thousands of pages of documents were admirably performed by Mrs. Bride Higgins until the end of 1989 and thereafter by Miss Colleen Power who continued with the commission until her talents were sought and secured by Mr. Justice O'Regan for the work of his commission investigating transactions of the Sprung companies. Miss Joanne Truscott and Miss Colleen Ryan worked exclusively at night on the many tasks requiring sometimes intensive preparation for the hearings of the morning. In addition they were engaged in preparing transcripts of evidence from the audio cassettes where required in the commission's proceedings. The day and night work of the staff made special demands on security but measures devised by Mr. John Clarke of the Department of Public Works, Services and Transportation and admirably applied by Commissionaires Follett and Taylor in all weathers were equal to the challenge.

The work of counsel, so prominent in the public eye when engaged in the commission's hearings, entered a new phase of no less importance to me after they were over. The writing of this report required constant checking of details, references to statutes and matters requiring professional opinion. The report will itself reflect the extent to which I am indebted to Mr. Day and Mr. Powell and particularly in the later stages to Mr. Powell whose presence in Toronto made consultation, never withheld, easier to arrange. Nevertheless Mr. Day supplied me with answers to the many questions I had raised

Concluding Reflections

during the hearings upon which he had undertaken to provide information and responded to many other requests. As many commissioners find, busy counsel returning to their practices after a period of close association seem to disappear from their lives. In this case our association has been close and continuous. Mr. Day has supplied me with numerous memoranda of evidence and expressions of opinion on a number of matters particularly in the field of child welfare. Mr. Powell, with his expert knowledge of criminal law and procedure and the interaction of the public and the police, has kept me similarly advised and has in addition performed the vital function of reading drafts of the report at every stage giving me the benefit of his seasoned advice. Mr. Vivian and Ms. Judy Power closely examined the text of the report throughout and have saved me from many inadvertencies. The provision of an index by Mrs. Heddy Peddle should and will be invaluable. At the same time all recommendations and expressions of opinion in the report are my own, even where they have happily coincided with those of my advisers, and are my responsibility.

Not the least of the amenities provided for me by the Government of Newfoundland and Labrador was the arrangement made between Mr. Vivian and Mr. Roland d'Abadie of the Ministry of the Attorney General in Ontario which provided me and Miss Devereaux with accommodation in the ministry's premises at 180 Dundas Street West, Toronto, free of charge to the province of Newfoundland. At this address the various commissions of inquiry undertaken on behalf of the Government of Ontario in recent years have conducted their proceedings, and a permanent section of the ministry created to house and assist them has assembled a library and support services the availability of which has been

Chapter XII

an example of inter-provincial co-operation of the greatest help.

Having made these specific acknowledgements I must not overlook the whole-hearted efforts of all departments of government who have been called upon for assistance by the commission, particularly former and currently serving officers of the Department of Justice and the Department of Social Services who have furnished information and in many cases voluntarily testified at least once, and in many cases more often, about departmental transactions for the past twenty years. Particular mention should be made of the officers of the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police who not only contributed unstintingly to the testimony at the commission's hearings but co-operated wherever appropriate with commission counsel and investigators. My debt to all these members of the public service was enhanced by the opinions and information which they gave as members of the various panels who advised the commission in the closing stages of the public hearings, and by those of their colleagues of other provinces who joined them in giving the commission the benefit of their professional knowledge and experience.

To the many men and women in the province and across Canada who have responded to inquiries by counsel, and thus assisted me, I offer thanks and apologies for not specifically naming them with the excuse that to do so would not only overbalance this section of the report but would in some cases unnecessarily identify those who might prefer to remain anonymous. But there are two general expressions of obligation that I wish to make. From first to last I have enjoyed the friendly stance of those members of the government who have had particular responsibility for the

Concluding Reflections

administrative welfare of the commission, which the government as a whole advised your Honour to establish. As well I was conscious of the goodwill of the people of Newfoundland and Labrador and their support for the sometimes delicate task in which I was engaged. This was particularly evident in many chance encounters in public places on the Avalon peninsula during the time my wife and I spent in the province in 1989 and 1990, and was, as it were, an expression at large of the warmth of our reception by many friends of earlier days and those made during the period of this brief residence. To all those named and unnamed who eased a sometimes thorny path and left us with an indelible impression of their ancient traditions of hospitality and understanding I record our grateful thanks.

Consolidated Recommendations

Recommendation 1:

Policy manuals and directives should be drafted in precise language, avoiding the use of terms which do not give clear direction to field staff in departments doing work such as is undertaken by that of Social Services avoiding the use of expressions such as "etc", "serious"¹¹, and "reasonable".

Recommendation 2:

That existing policy dealing with the destruction of files in the Department of Social Services be reviewed to ensure that the social history of children taken into care, child progress reports and child placement reports, be preserved indefinitely for investigative and historical purposes on a confidential basis in the custody of the Director of Child Welfare subject to such confidentiality and exemption from the application of the *Freedom of Information Act* as the minister may deem proper acting on the director's advice.

Recommendation 3:

Close observance of the provisions of the *Child Welfare Act, 1972* should be consistently maintained by the Child Welfare Division of the Department of Social Services and unauthorized practices and expedients not implemented until authorized by either amendments to the statute or by regulations made thereunder.

Consolidated Recommendations

Recommendation 4:

The Director of Child Welfare and the police forces of the Province should forthwith begin to lay charges under section 49 of the *Child Welfare Act, 1972* in cases where they have reasonable grounds to believe that reports of child abuse, as required by the said section, have not been made.

Recommendation 5:

The provisions of section 11.1 (7) of the said statute to the effect that an order made under section 15 shall recite the facts so far as ascertained in an investigation under the latter section and that the presiding judge shall deliver a certified copy of the order to the said director should be observed by judges in courts over which the Province of Newfoundland has jurisdiction, and such judges should give their reasons in writing for making or declining to make the orders sought.

Recommendation 6:

If Recommendation 5 is adopted and section 11.1 (7) amended as suggested non-compliance therewith should not be considered acceptable and an order by way of *mandamus* should be sought in the Supreme Court of Newfoundland.

Recommendation 7:

The Director of Child Welfare should act as intended by the House of Assembly in enacting section 3 of the *Child*

Criminal Justice and Complaints

Welfare Act, 1972 providing that he or she shall be appointed by the Lieutenant Governor in Council and empowered to administer and enforce the act "under the control and direction of the Minister" enjoying direct access to the minister and freedom from direction in matters of policy by the deputy minister with whom he or she should be equal in status in all matters over which the said director is given authority by the statute.

Recommendation 8:

The *Child Welfare Act, 1972* should be amended to validate arrangements for care of children between the Director of Child Welfare and parents, guardians or persons providing foster-care not at present expressly authorized therein.

Recommendation 9:

Section 47 of the *Child Welfare Act, 1972* should be amended to provide that in any such arrangement the said director must assume the status and duties of guardianship in respect of a child under his or her care and control.

Recommendation 10:

Caseloads of solicitors in the Department of Justice should be reduced by immediate recruitment to established positions not now filled, and the provision, if necessary of a special salary scale not conforming to any generally

Consolidated Recommendations

applicable scheme of public service pay as exemplified by provisions made for advisory counsel in the Department of Justice of Canada.

Recommendation 11:

Crown attorneys and all agents of the Attorney General of Newfoundland should ensure that plea negotiation involves only counsel for the Crown and counsel for the defence, that the facts, course and expected result of such negotiations should be disclosed to the judge presiding at any trial material to such negotiation in open court, and not discussed with him or her at any time in chambers or otherwise.

Recommendation 12:

Where expedition and the reduction of caseloads of Crown attorneys situate either at headquarters of the Department of Justice or anywhere else in the Province of Newfoundland are required the Director of Public Prosecutions should retain the services of members of the bar in private practice to act on behalf of the Attorney General.

Recommendation 13:

Members of the Royal Newfoundland Constabulary assigned to the Major Crime Section of the Criminal Investigation Division should receive training in all the procedures and techniques necessary to enable them to detect, investigate and testify in respect of the sexual

Criminal Justice and Complaints

offences defined in those sections of the *Criminal Code of Canada* introduced by an *Act to amend the Criminal Code* and the *Canada Evidence Act* S.C. 1987, c.24; R.S.C. 1985, c,19 (3rd Supp.) to standards the same as or equivalent to those observed by the Royal Canadian Mounted Police without delay.

Recommendation 14:

The Director of Public Prosecutions should forthwith make arrangements for the contents of police reports in any case of physical or sexual abuse of a child to be made available to the Director of Child Welfare, subject to such reservations that may properly be based upon the requirements of security to ensure effective prosecution of offenders.

Recommendation 15:

As a corollary to and in contemplation of the implementation of Recommendation 14 the Director of Child Welfare should make available to the police the contents of the register of child abuse cases now maintained in the Child Welfare Division for statistical purposes.

Recommendation 16:

A child abuse unit under such name as may be considered inoffensive and desirable be maintained in the Major Crime Section of the Criminal Investigation Division of the Royal Newfoundland Constabulary to investigate, report upon and

Consolidated Recommendations

charge in cases involving the sexual and physical abuse of children, being unmarried boys or girls under the age of sixteen years separate and apart from any subdivision of the said section dealing with sexual offences not so specified.

Recommendation 17:

No institution, place or person should be allowed special status in exercising foster-care of any ward of the Director of Child Welfare and all should be equally accountable to the said director, submitting the required reports and maintaining the same standards of care.

Recommendation 18:

Complaints of child abuse must be independently investigated by the police or social workers and not disclosed *in limine* to those responsible for the care of the child complainants.

Recommendation 19:

All allegations of child abuse, physical, sexual or emotional, contained in any police report or arising from any police investigation should be communicated to the Director of Child Welfare and all police officers concerned so advised.

Criminal Justice and Complaints

Recommendation 20:

Since every police officer has a duty to enforce the law and a responsibility to make sure that every allegation of criminal conduct is fully investigated and all relevant facts are contained in his or her report; and where charges have been laid in accordance with the responsibility of investigating police officers to do so if they are satisfied that there are reasonable grounds to believe an offence has been committed; if because of legal issues or impediments arising from the investigation a Crown attorney decides a prosecution should not proceed, the investigating officer should be promptly notified of that decision and the reasons for it, and in turn, he or she should ensure that all complainants are advised.

Recommendation 21:

A Director of Public Prosecutions should be appointed in accordance with normal public service recruitment procedures administered by the Public Service Commission but it should be provided either by a special act or by an amendment to existing statute law that in respect of the business of criminal prosecutions he or she have direct access to the Minister of Justice and Attorney General as chief adviser in that behalf; that upon the dismissal or removal of the said director to another post, the minister should give an explanation of the reasons therefore forthwith to the House of Assembly and a similar statement should be made in the House of Assembly explaining the circumstances of, and the reasons for a refusal of the

Consolidated Recommendations

minister to act upon the advice of the director in the case of any prosecution of alleged offenders in Newfoundland and Labrador.

Recommendation 22:

The post of Solicitor General of Newfoundland already established by law should be filled by a minister of the Crown henceforth, and a Department of the Solicitor General created by either amendment to the *Solicitor General's Act*, R.S.N. 1970, c.356 or by a separate statute for the management of all police affairs now under the control of the Minister of Justice and Attorney General as well as his or her responsibility for corrections and those of the Minister of Social Services.

Recommendation 23:

In the field of child abuse, sexual, physical and emotional, the training of social workers and police officers should be treated as basic and joint, and undertaken at the earliest possible time in their periods of service; it should consist of practical exercises in the techniques of interviewing complainants and preparation for trial; and it should be assisted or conducted by social workers and police officers with experience of delivering the services which are the subject of the training programme.

Recommendation 24:

That the organization of interdisciplinary training programmes designed to meet the needs of child protection

Criminal Justice and Complaints

services be entrusted to the Public Service Commission and the said commission be staffed and funded for the purpose.

Recommendation 25:

That a Royal Newfoundland Constabulary Complaints Commission be established, reporting to the Solicitor General of Newfoundland and included for administrative purposes within his or her Department, consisting of not more than three commissioners, one of whom should be a Judge of the Provincial Court seconded for the purpose to act as chairman and chief executive officer.

Recommendation 26:

That the Government of Newfoundland and Labrador through the Department of Justice, mindful of the inordinate delays in bringing both criminal and civil cases to trial in the courts, take such steps as may be possible to reduce the number of postponements or adjournments occurring therein by seeking the cooperation of judges and the Law Society of Newfoundland, and by enacting rules of court in aid thereof where necessary.

Recommendation 27:

An officer of the Criminal Division of the Department of Justice should be appointed and relieved from time to time to coordinate the work of the police and of Crown attorneys assigned to cases in support of advisory services to alleged victims and others who are called to testify at trials, informing them of the scheduling of the cases in

Consolidated Recommendations

which they are interested and the procedure relating thereto, and paying as much attention to their comfort and convenience as is possible under the circumstances; provided that such services do not exceed what is necessary for the purpose and become sources of suggestion as to presenting their evidence or as to its content.

Recommendation 28:

That the Royal Newfoundland Constabulary be forthwith equipped with facilities for the videotaping of interviews for use in compliance with relevant sections of the *Criminal Code of Canada*.

Recommendation 29:

That no effective expense be spared in equipping the Child Welfare Division of the Department of Social Services with the means of storing and retrieving records of child abuse currently kept and in contemplation, and that all departments and agencies of government engaged in the combined attack of child abuse in Newfoundland and Labrador have access to such information, and in particular what is referred to as the "child abuse register".

Recommendation 30:

The *Summary Proceedings Act*, S.N. 1979, c.35 as amended should be further amended by repealing subsection (2) of section 26 and amending subsection (1) thereof so that the same shall read "an inquiry shall be

Criminal Justice and Complaints

held in public except when the presiding judge shall order that part of it be held *in camera* on grounds that would be lawful in any criminal proceeding in court"; and that subsection (2) of section 29 should be amended to provide for the tabling of all such reports by the Attorney General in the House of Assembly.

Recommendation 31:

That the *Public Enquiries Act*, R.S.N. 1970, c.314 be reviewed with a view to enacting such amendments as may

- (a) in the case of section 3 thereof remove such material as is inconsistent with the constitutional position of Newfoundland as a province of Canada and with due regard to the provisions of section 13 of the *Charter of Rights and Freedoms*; and
- (b) provide for the stating of a case by a commissioner or commissioners to the Trial Division of the Supreme Court of Newfoundland with effect similar to that of section 6 of the *Public Inquiries Act* of Ontario, R.S.O. 1980, c.411 and confined to questions of jurisdictions only.

Recommendation 32:

The substance of section 2 of the said *Public Enquiries Act*, R.S.N. 1970, c.314 be retained, and in particular those provisions of the said section which provide for a commission of inquiry being issued under the Great Seal of the Province and in Her Majesty's name.

Consolidated Recommendations

Recommendation 33:

That the Government of Newfoundland and Labrador invite all claimants against it for compensation on the grounds of having suffered sexual abuse at the hands of persons entrusted with their care at Mount Cashel Boys' Home and Training School as wards of the Director of Child Welfare pursuant to the provisions of the *Child Welfare Act, 1972* with respect to all complaints made in good faith during a designated period to consensual arbitration, on the assumption, but without an admission, that it is liable to the said claimants.

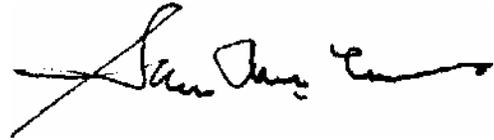
Recommendation 34:

That the Government of Newfoundland and Labrador set aside a sum of money within which the arbitrator may assess the amounts payable by it to each of the claimants referred to in recommendation 33 submitting to arbitration.

Recommendation 35:

That the provisions of the *Limitation of Actions (Personal) and Guarantees Act, R.S.N. 1970, c.206* as amended be inoperative as against those claimants who submit to arbitration without prejudice to the position of the Government of Newfoundland and Labrador in defending an action in court.

**ALL OF WHICH I RESPECTFULLY SUBMIT FOR
YOUR HONOUR'S CONSIDERATION.**

A handwritten signature in black ink, appearing to read "San Juan" followed by a flourish.

Commissioner

St. John's May
31, 1991

Index

Page references to recommendations are given in **bold type**.

Act to Amend the Criminal Code and Canada Evidence Act 458
Alexander, Karen 161, 165, 295-6, 301-2
Anderson, Dr. John P. 278, 281, 283
Andrews, R.L. 9
Askov case 386, 466-7, 469, 471
Association of Registered Nurses of Newfoundland 363-4
Atkins, Samuel Cyril 303

Badgley report see Report of the Committee on Sexual Offences Against
Children and Youth Baird, Carol 136-7 Baird,
Francis Patrick 116, 201, 230 Baird, Malcolm
116, 201 Barnable, Judge G.J. 317-22, 323-4,
380, 479 Barnes, Detective Kelvin E. 351-60
Barron, Brother John Francis 6, 9, 23, 84, 222
battered child syndrome see child abuse
Bellows, Brother Gordon Raphael 6, 112-3, 117, 132, 149, 164
Benevolent Irish Society 2 Bennett, Corporal Tom 304-5
Bill C-15 see Act to Amend the Criminal Code and Canada Evidence Act
Bradbury, Robert 27, 38, 58, 77-9, 81-2, 85-91, 94, 100, 217, 323
Brett, Hon. R. Charles 56, 261, 313, 321, 410 Brinston, Gerard Joseph
201 Brother T.I. Murphy Centre 452 Brown, Peter Robert 201
Browne, John R., chief of police 59-60, 152, 209, 213
Bucher, Brother Louis 6, 166-7, 176-8, 188, 241, 322
Buckingham, Brother Gordon 80-1, 83 Burke, Brother
Joseph Peter 97-8, 100-1, 129, 134 Burke, Sandra M. xiv
and throughout the report Bursey, Marion Pearl 119-22
Burt, Ivy 95
Burton, Brother David Jerome 161-4, 167, 175, 367
Butt, Marlene 294-6, 302 Butt, Tammy 302-3 Butt,
Trudi 294-5, 299-301, 479

Criminal Justice and Complaints

- Caddigan, Katherine 179, 184 *Cahill, Catherine see*
Sinclair, Catherine (Cahill) Callahan, Sharron 57, 86-
8, 261, 314-8, 322-4, 331 Cameron, Hon. Madam
Justice Margaret 285 Campbell, Marilyn 295-6,
298, 302-3 Canadian Broadcasting Corporation 150,
197 Canadian Civil Liberties Association 452
Canadian Mental Health Association 449 *Canadian*
Newspapers Co. Ltd. see Evening Telegram *C.E.C.*
see Roman Catholic Education Committee Chancey,
Brenda 212 child abuse
 alleged, by Christian Brothers 77-81, 84-98, 125-9, 136, 161-4,
 180-2, 189-90, 220-2, 225
 alleged, by foster-parents 244-63
 alleged, by teachers 73, 325-6
 battered child syndrome 233-4, 236, 274, 278-81
 definition 233
 examination by Royal Commission of investigations 229-33
 federal views and initiatives 458-60
 "Guidelines Relating to Child Abuse" 89-90
 handling of complaints by Royal Newfoundland Constabulary 392-
 400, 403-4, 433
 "Interdepartmental Statement on Child Abuse" 410-4
 joint interviews of alleged victims 305, 391, 408-9, 413, 460,
 461, 474-5
 medical examinations 101-4, 264-5, 348-60
 priority of charges of in the court system 465
 reporting requirements 104, 236-7, 377-8
 sources of complaints of 405
 statistics 404-5
 suppression of allegations of 288, 373, 445
 training in identification and investigation 409, 412-3, 459, 460
 treatment of perpetrators 421, 449
child abuse register 239-40, 418, 478
child welfare
 computerization of records 478
 policies 235, 377-82
 profiles compiled by Royal Commission 229-33
 profiles, child welfare 228-30, 292-4, 325

Index

- profiles, child welfare and criminal investigation 229, 231-2, 288-96, 333-6, 337-9, 340-62
- profiles, criminal investigation 229, 231, 292
- Child Welfare Act, 1972 8, 9, 39, 41-56, 218, 224, 235, 238, 266-7, 332, 339, 366, 377, 379-80, 401, 407, 411, **415**
 - declaration of a "neglected child" 47-55, 335-6
 - definition of "neglected child" 43-7
 - Director's powers 52
 - judicial powers 49-55
 - non-compliance with 378, 381-2, **415**
 - non-ward agreements 8, 340, 383-5
 - placement of children in need of protection 380-1
 - reporting of "abused child" 80, 224, 236-7, 265, 399-400, 406, 411-2
 - reporting of "neglected child" 56, 266, 335, 379
 - wardship periods 55 Child Welfare
- Board 39, 41-3 Children in Care Alumni
- Incorporated 451
- Christian Brothers of Ireland* see Congregation of Christian Brothers
- Clowe, Sergeant Leonard 213 Coady, Edward L, chief of police 59, 182, 185, 191 compensation to victims of abuse 487-8, 489 Complaints Commission 464 Congregation of Christian Brothers
 - 50th anniversary in Newfoundland 6, 27-8
 - 75th anniversary in Newfoundland 6, 28
 - 100th anniversary in Newfoundland 6-7, 28, 30, 120, 130
 - alleged "bargain" with Department of Justice 213-7
 - appearance before the Royal Commission of members charged 199
 - assistance to victims of abuse 132-3, 163, 178, 222
 - history 1-8, 10-5, 219
 - incorporation 1, 4
 - liaison with Newfoundland government departments 23-7, 30, 34, 82, 130-3, 167, 178
 - meetings with Department of Justice 117-20, 214-6
 - Mount Cashel Advisory Board 131
 - objectives 4-5
 - organizational structure 3-4, 7
 - presence in Canada (outside Newfoundland) 7
 - role in educational system 3, 7-8, 11-2, 28-9, 219
 - treatment facilities 154, 373
- Connors, Brother T.D. 83

Criminal Justice and Complaints

Connors, Gregory Patrick 201
Connors, Robert Michael (Bobby) 84, 89, 201
Connors, John, Q.C. 63, 123, 186, 431
Constabulary Act RSN 1970, c.58 61-2, 116
Corcoran, Alonzo 230, 313-24, 367, 479
Corcoran, Lieutenant Jerome Joseph 102, 105
Cory, Hon. Mr. Justice Peter 466-7, 469, 471
Crawford, Elizabeth 31, 43, 94-5
Crawford, Hugh Stead 91, 95-6, 165-74, 323
Crewe, Alice (Walters) 82, 100, 103, 110-1, 210, 217-8
Criminal Code of Canada
 "reasonable grounds" 434-5
Crosbie, Dr. John C. 267
Crown prosecutors 63, 387-8, 417, 423, 460, 472-3
 caseloads 389-90, 417, 460
 plea negotiation 386-7, 417

Daily News 148, 150
Dalton, Constable Zita 328
Darcy, Brother J.B. 9
Darte, Dr. John 269
Davis, F.A. 24-6
Day, David C., Q.C. v and throughout the report
Delaney-Smith, Constable Paulette 305-7
Dempsey, Ethel 296-7, 300, 302-3
Denning, Lord 423
Denominational Education Committees 65-7
Devine, Brendan 25
Devine, Brother G. Andre 177
Devine, Sheila 57, 91, 94-5, 132, 138, 239, 270, 286, 313, 433
Dicks, Hon. Paul, Q.C. vii, 302
Dingwell, Lillian 63
Dominic, Dr. Rufus G. 273-5, 280-1
Dubin, Hon. Chief Justice Charles L. x-xi, 496
"due process of law" 375-7
 avoidance of 375, 377-90
Dunne, Roberta Joyce 91, 95
Durdle, Cynthia 292-8, 300-1, 303, 309-12, 470-1
Dwyer, Allan, chief of police 59
Dymond, Wayne 449

Index

- Earle, Carol* *see* Summers, Carol (Earle)
Earle, Richard (Rick) 83-4, 97
Earle, Shane Michael 83-4, 92, 96-105, 111, 128, 188-90, 192-3, 197,
211, 230, 330-3
Earle, William Ronald (Billy) 84, 89, 94, 97, 197
Earle, William Michael 83-5, 331-2 *Education*
Act *see* Schools Act, RSN 1970, c.346 Education,
Department of
 organization 74-5
 Registrar of Teachers 70, 74-5
 Teachers Certification Committee 69-70, 74-5
 teacher decertification 73-5
Education (Teacher Training) Act, RSN 1970, c.103 69, 71, 75
educational system in Newfoundland 63-4
 Denominational Education Committees 65-7
 educational districts 68
 school boards 68-9
 teacher certification 69-70, 73-4 Efford, Hon. John 302, 328,
477 *Elizabeth Towers fire inquiry* *see* Soper inquiry Emmanuel
Convalescent Centre, Aurora, Ontario 154, 157, 373 emotional abuse of
children 233 English, Brother Edward Patrick 78, 80, 85-7, 89, 112-3,
119, 129, 132,
 134, 138, 154-5, 217, 373 English,
Craig Edward 116, 201 English, William
162 Evening Telegram 136-8, 148, 150,
197 Exon House 292, 340-64, 422

Fahey, Raymond Joseph 220
Faour, Alphonsus 92-4
Flynn, Colin Joseph 179, 185, 310, 391, 403, 410
 "The Decision to Prosecute" 424-31
foster care
 accountability for 432
 administration of 34-5
 child placement reports 241
 child progress reports 241
 example in Mount Pearl 230, 244-63
 Exon House 292, 340-64
 in group homes 325-9, 363
 in institutions 421

Criminal Justice and Complaints

- licensing of foster-parents 235
- monitoring by Department of Social Services 258-63
- Fox, Hon. Francis 424 Fox, William 332 Fradsham, Dr. Boyce T. 74-5 French, Brother Edward George 10 Fry, Corporal Lloyd 398
- Globe and Mail 197
- Godfrey, Stuart R. 31-2
- Goodridge, Hon. Chief Justice Noel 339
- Grange, Hon. Mr, Justice S.G.M. 491, 496
- Gregory, Hon. Gordon F., Q.C. 423
- Griffith, Constable Raymond 296-7, 300
- Hamilton, Neil 57, 82, 165, 167, 239, 270, 276, 286, 477
- Hamlyn, Sergeant Douglas Murray 296, 300-1, 311
- handicapped children in foster care 231, 293, 364
- Harris, John 487
- Harris, Michael 189-90, 500
- Hatch, Christopher James 79-80
- Hearn, Hon. L. 410
- Hepditch, Brother Francis Gerard 3, 6
- Herder, Stephen 137
- Hickey, Father James 188
- Hickey, Hon. Thomas V.P. 165, 315-7, 367
- Hickman, Hon. Chief Justice Thomas Alexander 60, 119, 122-4, 128, 158-61, 209, 269, 373 Higgins, Hon. Mr. Justice James J. 270
- Hillier, Inspector Robert 60, 107-17, 140, 196, 201, 207, 218, 431, report of December 18, 1975 vi, 108, 115-7, 129, 138, 152-3, 180, 182-3, 185, 198, 201, 208-13, 494 report of March 3, 1976 vi, 108, 125-28, 133, 138, 152-3, 180, 183, 185, 201, 208-13, 494
- Hollett, H. Vernon 56, 132, 220, 235, 243, 287, 312, 367
- Horan, George P. 442-3
- Home, G, Frederick 120 and throughout the report Hutton, Dr. Charles 234, 273, 276, 278-9, 285 Hyslop, Robert, Q.C. (Judge) 153-6, 175-6, 179-88, 212, 310, 391, 481

Index

- Interagency Committee on Violence Against Women 447 *Irish Christian Brothers* see Congregation of Christian Brothers Izaak Walton Killam Hospital for Children 278
- Janeway (Dr. Charles A.) Child Health Centre 100-5, 210, 272-7, 293, 295, 341-3, 348-59
files on child abuse 228
- Justice, Department of
administration of Royal Newfoundland Constabulary 61-2
advice to Royal Canadian Mounted Police on the laying of charges 366, 402, 412
advice to Royal Newfoundland Constabulary on the laying of charges 112, 191-2, 365-7, 391, 395, 397, 412, 422-30
alleged cover-ups 139-51, 182-3
and Department of Social Services 236-7, 334, 368-72, 407, 415, 418
Director of Public Prosecutions 437, 439, 442, 443
location and state of files 138, 151-6, 183, 185, 212-3, 226-7
Minister's responsibilities 61-2, 368-72
on the decertification of teachers 75
policy on laying of charges 368-72, 388
policy regarding child abuse 223-4, 365
prosecutorial discretion 386-7, 422-30, 434, 443
response to medical reports of child abuse 353-60
staffing 62-3, 387-9, 417
victim and witness support system 470-1, 473
- Kaiser, Superintendent Emerson Havelock 60, 301, 310, 391, 398, 401-2, 405, 409, 457 Kane, Dr. Thomas A. 153, 155-6, 213 Kelly, John Geoffrey 63, 123, 138, 144, 158-60, 187, 431 Kelly, Father Ronald Hubert 156-61, 231, 366, 373, 379 Kelly, William Patrick 136-8 Kenny, Brother Douglas 9, 12, 24, 27, 78, 83, 87, 91, 110, 112, 117, 128-9, 134, 196, 432 Kielly, Lieutenant Alex 188, 195
- Lamer, Rt. Hon. Chief Justice 491, 494
Langdon, Judge E.J. 162-3
J^awlor, John F., chief of police 59-60, 111-2, 121-2, 125, 207, 210, 431, 444, 494
Legge, John 315

Criminal Justice and Complaints

- Limitation of Actions (Personal) and Guarantees Act, R.S.N. 1970, c.206
489
Lundrigan, Brenda Ann Marie 77-9, 126-7, 211
Lynch, Brother Barry 177-8
- Macaulay, George B., Q.C. 63
MacLean, Corporal B.A. 304
Magna Carta 465
Mahoney, Hon. Mr. Justice John W. 179, 184
Maloney, Eileen 135, 138, 153 Mallard, Carl
Edward 255-6 Marshall, Donald, Jr. xi, 435
Martin, Gerard Joseph 157, 161 Matthews, Hon.
W. 410
McCarthy, Vincent P., Q.C. (Judge) 61, 117-9, 123-4, 138-9, 152-3, 186,
209-10, 212-8, 422, 431, 433, 444
meetings with Christian Brothers 117-9, 133-4 McCormack,
Marilyn 285 McGrath, John W. 135, 449 McGrath, W.T. 323-4
McGuire, Sergeant Gerald T. 98 McHugh, Brother Gabriel 6, 113-5,
117-9, 130-3, 149, 153, 211, 214-6,
313, 433
McMurtry, Hon. Roy R., Q.C. 423-4 Memorial University School
of Social Work 450 Mercer, Gwen 448-9 Mifflin, Hon. Mr.
Justice A.S. 284 Miller, Brian 319 Molloy, Father Kevin 188
Monaghan, Michael Joseph Patrick 157-61 Mono Mills, Ontario 5,
7, 153, 178 Moore, Brother G. Ignatius 137 Moores, Hon. Frank,
364 Morris, Sandra 165-6 Mount Cashel Orphanage (later Boys'
Home and Training School)
acceptance of wards of the province 8-9, 11
advisory board 131-2
child progress reports 241
funding 9, 14-5, 26-7, 29-30
history 3, 6-7
organization 10-5
organizational reforms 131-2, 177-8

Index

- population 8, 14, 17, 21-3, 177, 196
- social workers on staff 18-9, 24-6, 131, 176
- the building 11-2, 15
- Murphy, Hon. AJ. 26, 56, 268
- Murphy, Sarah 165-6 Murray,
- Brother John M. 222 Myers,
- Bernadette (Walsh) 262-3

- Nash, Brother Dermod Pearce 28-9, 99, 113, 117-9, 130-33, 218, 313, 432
- Nash, Gerald Edward 201 Nelson, Ramona, report of 9-23, 27
- Newfoundland Association of Social Workers 450-1 *Newfoundland Constabulary* see Royal Newfoundland Constabulary Noel, Albert John
- 135 Noonan, Hon. Madam Justice Mary Elizabeth 55, 138, 147, 151-2, 168, 174-6, 212, 218, 269, 330-1, 335, 381, 383, 433 Norman, John R., assistant chief of police 60, 111-2, 115, 120, 207 Norman, Corporal Terrence 308 Nurse, Staff Sergeant Noel 304, 307-8

- O'Brien, Dereck 77, 97, 126, 201, 244-63
- O'Brien, Ronald (Ronnie) 77, 244-5
- O'Brien, Roy Joseph 116, 201, 244, 252-5, 257-8. 262
- O'Driscoll, William 70, 73-4
- O'Regan, Hon. Mr. Justice Seam us Bernard 282-5
- Ottenheimer, Hon. Gerald R. 367-72
- Ouelette, Constable Michael 305
- Orser, Weldon H. 278-9, 282 and throughout the report

- Panels for Royal Commission
 - on Identifying the Complainant and Complaint 453-4, 474-7
 - on Judicial Response 455
 - on Police Response in Investigation and Prosecution of Complaints 403-7, 410, 452-3
 - on Recruitment and Training 454
 - on Social Services Response 455-6
 - on State Response (No. 1) 454-5
 - on State Response (No. 2) 456 Parker,
- Hon. Chief Justice W.D. 491, 496 Patey, Dr. Paul 102-4, 127. 210-11 Peet, Elaine 119, 151

Criminal Justice and Complaints

- Penney, John Joseph 221-2
Pike, Arthur 60, 107, 115, 128, 139-48, 179
Pike Dr Eric 278
Pike! Gilbert 167-8, 174, 316, 320, 462, 481
Pitcher, Inspector Ralph 60, 102-5, 107-8, 196, 201, 207, 431
Pittman, Edgar A., chief of police 59
plea negotiation 386-7, 417
Pope, George 24, 56, 94-5, 132, 167, 242, 287, 312, 316, 320, 324, 367
Powell, Clay M., Q.C. v and throughout the report
Power, Carol 128
Power, Larry 316
Power, Superintendent Leonard Patrick 58, 60, 91-4, 161, 167, 177, 179, 184, 191, 194, 391, 403
Preshyon, Gregory James 201
Provincial Advisory Council on the Status of Women 446-7
Public Enquiries Act, R.S.N. 1970, c.314 482-5, 486, 497
public inquiries 492-6
 as "royal commissions" xi-xii
 effect of media reporting on 496
 jurisdiction of 492-3
 reports of 479-81
 televising of proceedings 490-1, 495-7
Public Prosecutions Act, 1990 (Nova Scotia) 435-41
Public Service Commission 461, **462**
Puddester, Hon. Mr. Justice H. James 270
Pumphrey, Ian Cameron 201
Pumphrey, John Dwyer 201
- Quinlan, Jerome 57, 263
- Ralph, Brother Allan 84-5, 112-3, 116, 129, 132, 134, 138, 154-5, 217, 373
Randell, E. Donald, chief of police 59
recommendations, consolidated 504-15
recommendations to the Royal Commission 446 (*see also* Volume 2 Appendix K)
 Brother T.I. Murphy Centre 452
 Canadian Civil Liberties Association 452
 Canadian Mental Health Association 449-50
 Children in Care Alumni Incorporated 451
 Dymond, Wayne 449
 Interagency Committee on Violence Against Women 447

Index

- McGrath, John W. 449
- Memorial University School of Social Work 451
- Mercer, Gwen 448-9
- Newfoundland Association of Social Workers 450-1
- Provincial Advisory Council on the Status of Women 446-7
- Women's Legal Education and Action Fund 451-2
- Working Group on Child Sexual Abuse 447 Reid, Judge M.R.
- 333 Report of the Committee on Sexual Offences Against Children and Youth
 - 239-40, 458
- Rice, Brother Edmund Ignatius 1-2
- Rice, Leo Gerard 197, 201
- Richards, Ronald James, Q.C. v, 161-64, 179, 185, 317-9
- Riche, Chesley 97-103, 111, 128, 217-8 Roberts, Judge M.L. 96 Roberts, Patricia 261-3 Roche, Richard J., chief of police 59, 392 Roche, Judge William Michael 157-9
- Rogers, Rix G. 456-7, 459, 464-5 Roman Catholic Education Committee 70-4 Roman Catholic School Board of St. John's 68-70
 - hiring of teachers 69, 73 Resales, Dr.
- Teodoro 233-4, 264-9 Rowe, Hon. Dr. G. 269
- Royal Canadian Mounted Police 62, 208, 275-6
 - and Department of Justice 307
 - and Department of Social Services 301, 391, 398-400
 - availability of information on investigations 307, 309
 - charges resulting from child abuse investigations 277-8, 282-5, 288-90, 301, 307-9
 - files on child abuse 228
 - investigation of sexual abuse 288, 291, 292-309, 405-6, 408-9
 - investigation policies 366
 - policy on handling child and sexual abuse cases 297-8, 310-2, 391, 398-400
 - policy on laying of charges 310-1, 366, 402
 - Solicitor General of Canada, minister responsible 444
- Royal Commission
 - consolidated recommendations 504-15
 - in camera* hearings xii, 197-8, 201
 - interviews with the former Mount Cashel residents 198, 201, 205-6

Criminal Justice and Complaints

order of witnesses 108 parties with standing xiv-xvi televising of proceedings ix, 490-1, 494-5 terms of reference vi-vii, 207-34, 365-74, 375-90, 420-45 Royal Newfoundland Constabulary administration by the Department of Justice 61-2 advice from the Department of Justice on the laying of charges 112, 191-2, 209, 236, 354, 391 and Department of Social Services 111, 237, 394, 397, 406, **433** availability of information on investigations 188, 193, 307, 309, 392, 433, **434** caseloads 60, 194 charges resulting from Mount Cashel investigation 130, 138, 142, 177, 202-5, 211-2 charges resulting from child abuse investigations 333-5, 338, 415 complaints against 462-4 Complaints Commission 464 complaints handling procedures 104-6, 392-3, 406-7 Criminal Investigation Division 60, 102, 408 Criminal Investigation Division Child and Sexual Abuse Unit 406, 419 handling of victims and witnesses 396 history and organization 59-61 interviews with Congregation of Christian Brothers 112-3, 196 interviews with Mount Cashel boys 108-10, 188, 192, 196, 201 investigation policies 207-9, 365 Mount Cashel investigation 107-8, 115-7, 125-30, 152, 180-2, 184-8, 213 occurrence book 105, 210 "Policy and Procedures Manual" 391-8 reports on Mount Cashel 107-8, 115-7, 125-30, 152, 180-2, 184-8, 213 special investigation unit 194-6 training in handling child and sexual abuse cases 460, 477 Ruelokke, Violet 363 Russell, Sergeant R.D. 306

St. Francis Foundation 325 Seabright, Judge Gordon 157, 283 Schools Act, RSN 1970, c.346 64, 67 Short, Brother Kevin 129, 134

Index

- Simms, Frank J. 24-5, 27, 39-41, 55, 57, 82, 86, 88, 90-6, 99, 128, 132, 138, 167, 176, 218, 263, 266, 286, 312, 315, 321, 331, 432-3
- Sinclair, Catherine (Cahill) 24, 27, 57, 79, 263, 330
- Skinner, Archbishop P.J. 8, 69, 221
- Social Services, Department of
and Department of Justice 236-7, 334, 390, 407, 415, 418
and Mount Cashel 23-7, 34, 81, 131-2, 165-7, 313
and Roman Catholic School Board 325-7
and Royal Newfoundland Constabulary 270, 328, 388, 397, 474
- Child Protection Unit 406
- child social histories 241, 243
- Child Welfare Board 39-43
- Child Welfare Division 37-41, 224, 236, 478
- Child Welfare Division child placement reports 241, 244
- Child Welfare Division child progress reports 241, 244, 346-8
- Child Welfare Division, Director of 415 *see also* Frank J. Simms
- files, computerization of 477, 478
- files, state and location of 81, 91, 94, 185, 205-6, 224, 226-8, 287
- files, retention of 242-3, 244
- functions 32-3
- "Guidelines Relating to Child Abuse" 89-90
- handling of battered child case 265-71, 276-85
- history 31-2
- monitoring of Mount Pearl foster-home 258-63
- organization 34-9, 57
- policy manual 235-8, 239, 241, 243, 312, 389
- policy regarding child and sexual abuse 224, 301-2
- reporting of child abuse 217-8, 266, 270-1, 313
- response to medical reports of child abuse 360-3
- visits from wards and families 77-9, 85-6, 99-100
- visits to foster-homes 253-4, 257
- wardship reviews 230, 330-1
- social workers
at Mount Cashel 18-9, 24-6, 131, 176
caseloads 57, 366, 389, 460
professionalism 450-1
qualifications 57-8, 460
training in interviewing 460, 461
- Solicitor General 444, 445, 463
- Somerton, Kimberley 292, 303-9
- Soper, Judge Lloyd (Hon. Mr. Justice)* *see* Soper Inquiry
- Soper Inquiry 139-48, 179, 186

Criminal Justice and Complaints

Sopinka, Hon. Mr. Justice John 491-2, 494-6
Southdown see Emmanuel Convalescent Centre, Aurora, Ontario
Squires, Frederick 63
Stapleton, Geraldine 100,111
Starr case 491-2, 494
Stephenson, Shirley 166
Stone, Magistrate C.C. 266, 270
Strickland, Edward 116,201
Summary Proceedings Act, S.N. 1979, c.35 478-80, 481
Summers, Carol (Earle) 83, 98-9, 116, 127, 210, 217, 434
Sunday Express 189-90, 193

Teacher Certification Committee see Education, Department of
Thistle, Allan, deputy chief of police 107, 110-1, 192
Thistle, James, Q.C. vii
Thompson, Professor Rollie 454, 477
Thorne, Brother Harold 10, 83-4
Tizzard, Ronald 325-6, 328
Tobin, Veronica 127
Turner, Brother Timothy 6
Tworney, Hon. L.H. 410
Twyne, Lieutenant Freeman 193-5

Verge, Hon. Lynn v, 138, 179-80, 410
victims of child abuse
 assistance to 133, 396-7, 408, 470-1
 consideration by the courts 472-3
 interviewing of 408, 460
 compensation for 487-8, 489
victims and witnesses of crime
 support system 396, 408, 472, 473, 477
video cameras as a tool in investigations 409, 461, 474-6, 477
Vincent, M, 9 Vivian, Herbert A. v and throughout the report

Wakeham, Robert Joseph 136-7
Wall, Darren 314
Wall, Mrs. 79
Walsh, Andre Joseph 127, 197, 201
Walsh, Bernadette see Myers, Bernadette (Walsh)
Walters, Alice see Crewe, Alice (Walters)
Welfare of Children Act 9, 39

Index

Wells, Hon. Clyde, Q.C. vii Whalen,
Marcella 80 Wheeler, Cynthia Lois 295
Whelan, William 69-70, 73, 326 Whitbourne
School for Boys 313-5, 317, 322
 apprehension of runaways 315, 319
 closure considered 316-7
 overtime policy 315-6, 318-9, 322-3
 social worker on staff 320
Whitten, Catherine 240 Williams,
Jerome 77, 126
Williams, John Cyril (Johnny) 77-82, 89, 117, 126-7, 201, 245
Williams, Ruth 82-3
Women's Legal Education and Action Fund 451
Working Group on Child Sexual Abuse 447

Yetman, Inspector Chesley 60, 102, 112, 115, 129, 209
Young Offenders Act 39, 316-7

