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**Royal Commission  
on the Donald Marshall, Jr., Prosecution**

Volume I: Findings and Recommendations

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Chief Justice T. Alexander Hickman  
*Chairman*

Associate Chief Justice Lawrence A. Poitras  
*Commissioner*

The Honourable Mr. Gregory T. Evans, Q.C.  
*Commissioner*

*December, 1989*

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### **Recommendation 38**

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*We recommend that:*

- (a) the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;*
- (b) the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:*
  - (i) the triviality of the alleged offence or that it is of a "technical" nature only;*
  - (ii) the age, physical health, mental health or special infirmity of an alleged offender or witness;*
  - (iii) the staleness of the alleged offence;*
  - (iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);*
  - (v) the likely effect of a prosecution on public order and*

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- morale;*
- (vi) the obsolescence or obscurity of the law;*
  - (vii) whether the prosecution would be perceived as counter-productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);*
  - (viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;*
  - (ix) the prevalence of the alleged offence and any related need for deterrence;*
  - (x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;*
  - (xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;*
  - (xii) the attitude of the victim of the alleged offence to a prosecution;*
  - (xiii) the likely length and expense of a trial;*
  - (xiv) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;*
  - (xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;*
  - (xvi) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice;*
- (c) the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:*
- (i) the alleged offender's race, religion, sex, national origin, political associations, or beliefs;*
  - (ii) the prosecutor's personal feelings concerning the victim or the alleged offender;*
  - (iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or*
  - (iv) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision;*
- (d) where the prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question;*
- (e) the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.*
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