

RE 144
Vol. 350
+ 3

ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION

VOLUME XXVI

Held: November 9, 1987

At: St. Andrew's Church Hall
Bentinck Street
Sydney, Nova Scotia

Before: Chief Justice T. A. Hickman, Chairman
Assoc. Chief Justice L. A. Poitras, Commissioner
Hon. G. T. Evans, Commissioner

Counsel: George MacDonald, Q.C., Wylie Spicer, & David Orsborn:
Commission Counsel

Clayton Ruby, Ms. Marlys Edwardh, & Ms. Anne S. Derrick:
Counsel for Donald Marshall, Jr.

Michael G. Whalley, Q.C.: Counsel for City of Sydney

Ronald N. Pugsley, Q.C., Joel Pink, Q.C.,:
Counsel for John F. MacIntyre

Donald C. Murray: Counsel for William Urquhart

Frank L. Elman, Q.C., & David G. Barrett:
Counsel for the Donald MacNeil estate

Jamie W. S. Saunders, & Darrel I. Pink:
Counsel for Attorney General

James D. Bissell: Counsel for the R.C.M.P.

Al Pringle: Counsel for Correctional Services Canada

William L. Ryan: Counsel for Evers, Green and MacAlpine

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

Bruce H. Wildsmith, & Graydon Nicholas:
Counsel for Union of Nova Scotia Indians

E. Anthony Ross, & Kevin Drolet: Counsel for Oscar N. Seale

E. Anthony Ross, & Jeremy Gay: Counsel for Black United Front

Court Reporters: J. Graham Robson, & Judith M. Robson, OCR, RPR

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COURT REPORTER'S CERTIFICATE	ZZ
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INQUIRY RECONVENED AT 9:35 o'clock in the forenoon on Monday, the 9th day of November, A.D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia.

1 MR. MacDONALD:

2 Good morning, My Lords.

3 SIMON J. KHATTAR, Q.C., resumes testimony, as follows:

4 BY MR. MacDONALD:

5 Q. Mr. Khattar, I just want to go back over a few things we dealt
6 with the other day briefly, if I can, just to clean them up.
7 Did you know Junior Marshall prior to being retained in this
8 case?

9 A. No, sir.

10 Q. Okay. You were retained first, I think you said, by the local
11 Band, and after that, Mr. Rosenblum was retained you thought
12 perhaps by the Federal Department?

13 A. Of Indian Affairs.

14 Q. Yes. Did you ever determine why Mr. Rosenblum was retained in
15 face -- given that you were already retained?

16 A. It may be he had a reputation of being the -- an outstanding
17 criminal lawyer and probably one of the best in the city. You
18 notice I qualify by saying, "one of the best."

19 Q. Yes.

20 A. There may be others you may compete for that title.

21 Q. Okay. In any way -- In any event, you didn't take any offence
22 that he was brought in with you?

23 A. Mr. Rosenblum and I were friends, and I had -- was very pleased
24 to collaborate with him in the defence of the Marshall case.

25 Q. Okay. You had told me Friday, I think, that prior to the

- 1 Preliminary Inquiry, you and Mr. Rosenblum visited the scene
2 of the murder.
- 3 A. That's correct.
- 4 Q. Do I understand that correct? And that one of you would've
5 positioned yourself behind the bush or the tree and the other
6 up in front of the -- where the place -- where the stabbing
7 occurred and then vice versa. Do you switch roles?
- 8 A. That's correct. We didn't do the vice versa. I went behind
9 the tree.
- 10 Q. Okay.
- 11 A. And Mr. Rosenblum didn't repeat what I did.
- 12 Q. Okay. Where I have a little confusion, and you can perhaps
13 clear it up for me, I understood you to say also you weren't
14 aware prior to the Preliminary that there were going to be
15 eyewitnesses, and I'm just trying to determine how then you
16 would know where to position yourself.
- 17 A. I must have had some knowledge that there was a suggestion that
18 one of the witnesses was behind the tree. I'd have some know-
19 ledge, otherwise there'd be no reason for me to go through
20 that dramatics, so to speak.
- 21 Q. Exactly. You had -- You would've had to have knowledge prior
22 to the Preliminary that someone was going to testify they were
23 in a particular spot --
- 24 A. Right.
- 25 Q. -- and saw the murder.

1 A. That's correct.

2 Q. Thank you. Now, following the Preliminary, did you and
3 Mr. Rosenblum believe that these eyewitnesses were lying? Was
4 that your belief?

5 A. I don't know if we expressed ourselves in that manner, but we
6 felt that it was strong evidence, which if believed -- which
7 if worthy of belief, put us in a great deal of difficulty, and
8 we took the view that they must be lying.

9 Q. That they must be lying?

10 A. They must be lying.

11 Q. Okay. Now, this is what I'm interested in because you have two
12 people supposedly totally unconnected -- did not know each
13 other but were both telling the same story. Now, did you give
14 any thought to that? How could they be lying? How could two
15 unconnected people come up with the same story?

16 A. I've noticed in my practice at the bar that there are many
17 people go on the stand and they -- very definite about facts,
18 and I've had the feeling, so-called gut feeling, that they're
19 not telling the truth, and many occasions, we're able to
20 establish that they were not telling the truth. And I took
21 this no different from my experience in other cases.

22 Q. Okay. So you had a gut feeling at the Preliminary that Chant
23 and Pratico were not telling the truth?

24 A. That's correct.

25 Q. Okay. And then you started out -- Your view at the trial was to

1 | try and discredit these particular witnesses?

2 | A. That was the object.

3 | Q. Okay. Did you and Mr. Rosenblum discuss the details of the
4 | cross-examination you would carry out of those key witnesses?

5 | A. With respect to Pratico, I had the assistance of information
6 | I received from some of the members of Membertou Reservation
7 | and in my cross-examination, I referred Pratico to his talking
8 | with those people.

9 | Q. Yes, his fact that he had talked with Tom Christmas?

10 | A. That's --

11 | Q. And Mary Theresa Paul?

12 | A. Mary Theresa Paul.

13 | Q. Those were the two people that he had --

14 | A. I think there's one other. I'm not sure now though.

15 | Q. Did you give any thought though or discussion with Mr. Rosenblum
16 | as to how you would cross-examine these two key witnesses on
17 | their evidence of what they saw and how they saw it and these
18 | sort of things?

19 | A. Rather flatteringly put, I felt that Mr. Rosenblum felt that
20 | I would know how to handle them --

21 | Q. Okay.

22 | A. -- without his direction, although there'd be -- I wouldn't
23 | be offended if he suggested to me how to handle them. He did
24 | not.

25 | Q. And you didn't suggest to him how he --

1 A. How he should handle the Chant examination.

2 Q. Now, do you recall the evidence being given by these people?

3 You've read it recently, I understand, have you?

4 A. Yes.

5 Q. My understanding of the evidence of Chant, who gave evidence
6 first, and he's given evidence here, Mr. Khattar, is that he
7 was coming down Bentinck Street, and I'm just pointing to the
8 map here. He was heading southerly on Bentinck Street, and
9 he was heading up to George Street. He was going to take a
10 shortcut through the park, and he was then going to hitchhike
11 out to Louisbourg. That was his intent, and as he was on
12 his way, he happened to see this murder. He testified that
13 he came down Bentinck Street and then he came to the tracks
14 and came across the tracks, and when he got to approximately
15 this area, he saw something. Now, this just strikes me as not
16 being very much of a shortcut that one would come down to these
17 tracks. The shortcut would appear to be this way. Did you
18 give any thought to that?

19 A. No, sir.

20 Q. Pardon?

21 A. I did not.

22 Q. Okay. Now, the evidence also is that when he saw the murder,
23 he then ran along the tracks back down this walk to Byng
24 Avenue and was heading back toward the bus station, which
25 seems a little illogical as well.

1 A. Yes. Yes.

2 Q. And then he saw Marshall running toward him along Byng Avenue.
3 He turned around and started to walk away, and Marshall over-
4 took him. That was Chant's story. Do you recall that?

5 A. Yes.

6 Q. Okay. Now, this is what I understand Pratico said. That he
7 was behind the bush here. He saw the murder, and then he ran
8 away up Bentinck Street going home. That's what he testified.
9 This was a guy that was pretty drunk. Can you recall that
10 evidence?

11 A. So drunk that I don't know how he was believed.

12 Q. Yes. Okay.

13 A. However, that's not the matter.

14 Q. Yes. But what I had difficulties understanding, if he was
15 running along here and Marshall was running along here, how
16 Marshall didn't overtake him.

17 A. Yeh.

18 Q. But he was never asked those sort of questions.

19 A. No, I -- In fact, the knowledge didn't occur to me. There are
20 a great many questions now that I look back and read the
21 transcript maybe I should've asked.

22 Q. Hindsight's a great thing. I appreciate that.

23 A. It's great and wonderful, yes.

24 Q. You and Mr. Rosenblum then, just so it's -- I understand
25 perfectly, Mr. Khattar, stayed to your own devices. You were

1 going to take Pratico, he was going to take Chant, and that
2 was it?

3 A. Yes. Of those key witnesses.

4 Q. Yes. Okay.

5 A. You'll note that Moe Rosenblum took most of the witnesses.

6 Q. Okay. You told me last day that it was your practice not to
7 approach the Crown Counsel to obtain any information.

8 A. That's correct.

9 Q. And you understood Mr. Rosenblum followed the same practice,
10 and I understood you -- from our discussions, that you have
11 checked that with Mr. Rosenblum since this Inquiry was called,
12 isn't that correct?

13 A. That's correct.

14 Q. And Mr. Rosenblum told you that in fact he did not approach
15 Donny MacNeil on this case either.

16 A. That's my recollection of what he said.

17 Q. Yes. Now, is it your evidence, Mr. Khattar, that that was the
18 practice of all counsel in Sydney at that time, or it's just --
19 it was your practice and Mr. Rosenblum's practice?

20 A. I can't speak for others, but that is a practice that I adopted
21 from the first day of my practice.

22 Q. Okay. I understand from other counsel that -- They would give
23 evidence that Mr. MacNeil in fact was approachable and would
24 in -- would give out statements and would give out information.
25 But you can't speak to that?

- 1 A. Not from my experience.
- 2 Q. Okay. Thank you. And when you say it was not your practice
3 to approach Crown witnesses and not Mr. Rosenblum's, again you're
4 only talking about what your practice was?
- 5 A. That's correct.
- 6 Q. Thank you. Is it your practice -- Was it your practice when
7 you had a client who was going before a jury or indeed before
8 a judge to give them any instruction as to the demeanor they
9 should adopt in court or as to the manner of dress they should
10 take and this sort of thing?
- 11 A. Yes. Yes, it was my practice.
- 12 Q. Okay. And did you give instructions to Mr. Marshall?
- 13 A. No, sir, I did not. Mr. Rosenblum was dealing directly with
14 Mr. Marshall. Mr. Rosenblum intended to examine him if he is
15 called, and he did most of the talking with Mr. Marshall prior
16 to Marshall giving evidence.
- 17 Q. Okay. So you did not then have any direct contact with Marshall
18 to tell him, "Dress up. Wear a tie," or anything of this
19 nature?
- 20 A. No, sir. That's correct. I did not have any direct contact.
- 21 Q. The re-investigation that the R.C.M.P. conducted in 1971, I
22 understand you weren't --
- 23 A. '71?
- 24 Q. Yes. You weren't aware that ten days after Marshall's convic-
25 tion, Jimmy MacNeil and Roy Ebsary were interviewed by the

1 Sydney police?

2 A. I didn't know the existence of Jimmy MacNeil and Ebsary.

3 Q. Yes.

4 A. Until this investigation. Not of '71. Of --

5 Q. '82.

6 A. -- the last few years back.

7 Q. Yes. Thank you. The -- And you told me last day that if you
8 had been asked in November, 1971, after the conviction was
9 entered, whether Donald Marshall, Jr., could submit to a lie
10 detector test, you would've said, "No."?

11 A. That's correct.

12 Q. Okay.

13 A. That hasn't changed.

14 Q. Let me show you Volume 18.

15 MR. MacDONALD:

16 And I'm looking at page 12 of that volume, My Lords.

17 BY MR. MacDONALD:

18 Q. Mr. Khattar, this is a letter, sir, of February the 2nd, 1982,
19 written to Chief John MacIntyre of the Sydney police by a
20 Eugene Smith. Mr. Smith is the man who conducted the polygraph
21 examinations of MacNeil and Ebsary in November of '71. I
22 just want to address your attention to the third-last paragraph
23 in the letter, and that's on page 13. It says this:

24 The results of Ebsary's polygraph
25 examination were given to Mr. Donald
MacNeil, and it is my understanding

1 that he so advised Donald
2 Marshall's lawyer and gave him
3 the opportunity to submit his
4 client to the examination. It
5 is also my understanding that
6 Marshall through his lawyer
7 declined the examination.

8 Now, was that approach by Smith -- or MacNeil, was that made
9 to you?

10 A. No, sir.

11 Q. Do you know if such an approach was made to Mr. Rosenblum?

12 A. I have no knowledge of it.

13 Q. If an approach was made to you by Mr. MacNeil at that time
14 though --

15 A. I would've said --

16 Q. -- you would've denied it?

17 A. I would've. That's correct.

18 Q. You did tell us last day as well you had nothing to do with
19 the appeal.

20 A. That's correct.

21 Q. Your retainer ended --

22 A. Ended after --

23 Q. --after the conviction.

24 A. -- the conviction.

25 Q. And you had no discussion with Mr. Rosenblum at any time about
26 the grounds of appeal or what to be raised in the Appeal
27 Division?

28 A. Nothing other than the fact that Mr. Rosenblum said, "I have

1 several grounds of appeal, and I feel quite confident that
2 one of them will be successful."

3 Q. You did read the appeal decision?

4 A. Yes, I did.

5 Q. And the appeal decision is found, among other places, in
6 Volume 2.

7 A. Chief Justice MacKinnon.

8 Q. Yes. It's in Volume 2 of the transcript. It starts at page 116.
9 And the actual opinion starts at page 118. As you --

10 A. Yes.

11 Q. -- noted, it's Chief Justice MacKinnon's decision. And starting
12 on the bottom of page 118 and over to the next page. The Chief
13 Justice set out the grounds of appeal that were relied on --

14 A. Yes.

15 Q. -- by Mr. Rosenblum in the appeal. Now, none of those grounds
16 covered the point we discussed last day about the refusal of
17 the Trial Judge to permit you to examine Pratico fully on his --

18 A. Fully.

19 Q. -- statement out in the hall.

20 A. That's correct.

21 Q. Now, were you -- Would you have raised that point on the appeal?

22 A. Yes, I would've.

23 Q. Thank you. There was a subsequent R.C.M.P. investigation in
24 1982, and at that time, that gave rise to the re-hearing of
25 Mr. Marshall's case in the Appeal Division. Were you contacted

1 at that time?

2 A. No, sir.

3 Q. I'm going to show you, Mr. Khattar, an affidavit, sir, that
4 was sworn by you.

5 MR. MacDONALD:

6 Seventy-nine, My Lords. I apologize, My Lords. Some -- for some
7 reason this didn't get in the volumes of exhibits either.

8 BY MR. MacDONALD:

9 Q. Mr. Khattar, that is an affidavit, sir, that was sworn by you on
10 the 9th day of August, 1982.

11 A. That's correct.

12 Q. Can you tell their Lordships the circumstances giving rise to
13 your swearing that affidavit, please?

14 A. Yes. Mr. Aronson -- I think that's his name.

15 Q. Aronson, we've been calling him.

16 A. Aronson, yes.

17 Q. Yeh. Okay.

18 A. -- came to my office and told me that he was representing
19 Donald Marshall in connection with a re-investigation and that
20 he understood that I was one of the defence counsel and the
21 other was Mr. Rosenblum that he proposed to have both
22 Mr. Rosenblum and me execute an affidavit which he's preparing --
23 which he has prepared.

24 Q. Which he had prepared?

25 A. Which he had prepared at that time.

- 1 Q. Did he have it with him when he came to see you?
- 2 A. That's my recollection.
- 3 Q. Okay.
- 4 A. I looked at the affidavit, and I said I was not prepared to sign
5 it until I talked with Mr. Rosenblum and tried to get my
6 recollection of the facts in connection with the affidavit. I
7 then contacted Mr. Rosenblum. Mr. Rosenblum and I both reviewed
8 our recollection of the events, and we both concluded that the
9 statements in the affidavit were accurate, that we could both
10 correctly swear to them. The statements to which the reference
11 I recall were made are statements that were given by Chant and
12 Pratico subsequent to the trial in which they had recanted
13 statements that they had given at the trial, and my reference
14 in the affidavit and also to the reference to Patricia Ann
15 Harriss -- I think I had made a reference that I had not seen
16 them -- seen those --
- 17 Q. Yes.
- 18 A. -- statements before.
- 19 Q. Okay. Let me just take you then to --
- 20 A. Sure.
- 21 Q. -- some of the -- the reference in here, Mr. Khattar, and perhaps
22 your explanation will become more meaningful looking at the
23 actual statements. Now, the first four paragraphs are just a
24 recitation of history but paragraph 5 , if we can start with
25 that.

1 | A. Yes.

2 | Q. That I have now been provided by
3 | Stephen J. Aronson, present counsel
4 | for Donald Marshall, Jr., with copies
5 | of the Affidavits of:

6 | Chant, Pratico, and Patricia Ann Harriss. They were all sworn
7 | in July of 1982.

8 | A. That is correct.

9 | MR. MacDONALD:

10 | And those are all in evidence, My Lords, in this hearing. I can
11 | give you the references if you want them.

12 | BY MR. MacDONALD:

13 | Q. And then you say in paragraph 6:

14 | That I have read the Affidavits...
15 | and the Exhibits attached to the...
16 | Affidavits.

17 | Now, if you like, Mr. Khattar, I'll show you the actual
18 | affidavits of these individuals, but the statements that are
19 | attached to the -- those affidavits are the statements that
20 | were made by those individuals to the police prior to Marshall's
21 | trial.

22 | A. Yes. Oh, yes. I'm sorry.

23 | Q. Okay.

24 | A. You're correct, yes.

25 | Q. Those are the exhibits to the Chant affidavit --

A. To serve as reference, yes.

Q. -- and so on. And then -- This is what -- It's paragraph 7

1 that I want to direct your attention to.

2 That I was not provided with copies
3 of any of the Statements referred to
4 in the...Affidavits, purportedly
5 taken by the Sydney...Police prior
6 to the...trial in November of '71,
7 nor was I, at the time of the said
8 trial aware of the Statements.

6 Now --

7 A. That is correct.

8 Q. As I read that paragraph, I understand it to be saying that the
9 statements that were taken by the Sydney police prior to
10 November of 1971 -- That's prior to the conviction.

11 A. Yes.

12 Q. You didn't have copies of them, and you were not aware of them.

13 A. That is correct.

14 Q. That's what I read that --

15 A. Both statements are correct.

16 Q. Okay. Now, last day I referred you to references in the trans-
17 cript where Patricia Harriss said that she had given signed
18 statements to the police.

19 A. And -- Yes.

20 Q. So you were certainly would've been aware of that?

21 A. I recall -- Yes.

22 Q. And I referred you to the references where the examination of
23 Mr. Chant was being carried on, and he said he had given an
24 untrue statement and then a subsequent statement.

25 A. That's right.

1 Q. And I understood you to agree with me that you would certainly
2 expect that those would be written statements given John
3 MacIntyre's practice?

4 A. Yes.

5 Q. So I would've thought you were aware, at the time of the trial,
6 that there would be such statements so I -- That's why I'm
7 having difficulty --

8 A. Yes, you may -- Yes.

9 Q. Now, would you explain, sir, that --

10 A. My reference to being aware is having actual knowledge of the
11 statements other than -- The way you put is well, "Yes, you
12 knew statements were taken. They were taken in writing." But I
13 was not -- I had no knowledge of the particular statements --

14 Q. You didn't know the details of them.

15 A. But I'm aware of them.

16 Q. Is that what you're saying? You wouldn't have known what they
17 said in detail?

18 A. That's correct. Yeh.

19 Q. All right. Let us go on then. Paragraph 8 and 9 are merely
20 recitations of what's said in Chant and Pratico's affidavit
21 as is 10, Patricia Ann Harriss. Now, let's go to paragraph 11.

22 That every possible effort was made
23 at trial to obtain the truth from the
witnesses...

24 Chant, Pratico, and Harriss

25 ...but there was no indication at

1 that time that they were willing
2 to change their original testimony,
3 and I believe that if evidence of
4 the contents of the Statements and
5 Affidavits referred to herein, had
6 been adduced at trial, then the
7 jury might reasonably have been
8 induced to change its views regard-
9 ing the guilt of Donald Marshall, Jr.

6 Now, that's a statement that you swore to after reflection.

7 A. That's correct.

8 Q. And is it saying that -- Did you intend to say that if you
9 had had copies of the statements at the trial and had the
10 opportunity to cross-examine witnesses on those statements,
11 that you believe the jury would've --

12 A. May, yeh.

13 Q. -- come to a different conclusion?

14 A. That's correct. That's an opinion.

15 Q. That's an opinion. And you say there was no indication at the
16 time of the trial that they were willing to change their
17 original testimony. There certainly was an indication from
18 Pratico that he was willing to do that.

19 A. Yes. However, I'm thinking now of the very competent and able
20 cross-examination of Chant by Mr. Rosenblum, and he was unable
21 to get Chant to change other than to point out some incon-
22 sistencies.

23 Q. But he was able to confront Chant with the fact --

24 A. Yes.

25 Q. -- that he gave a prior inconsistent, lying statment --

1 | A. Yes.

2 | Q. -- to the police?

3 | A. Yes.

4 | Q. The only thing he didn't have --

5 | A. Was the actual statements.

6 | Q. -- was the actual statement, but why do you say that if he had
7 | the actual statement, there would've been some difference?

8 | A. Well, the jury would've at least been able to see the state-
9 | ments and know that this is not a suggestion that there may
10 | have been statements that contradict what he's now saying.

11 | Q. Okay.

12 | A. They'd have it before them in so-called black and white.

13 | Q. Well, in retrospect, in 1982 then, looking with hindsight, and
14 | I --

15 | A. Right.

16 | Q. -- appreciate that's easy to do. Are you saying in 1982 that
17 | now you wish you had gone to Donny MacNeil and asked for those
18 | statements?

19 | A. No, sir.

20 | Q. Yes.

21 | A. Because I would not go and ask him because I would not expect
22 | to get them.

23 | Q. Okay.

24 | A. As I pointed out in my examination last Thursday, it was not
25 | the practice to get those statements.

- 1 Q. Okay. Thank you. Your meeting with Aronson, that was just
2 on one occasion, was it?
- 3 A. That's correct.
- 4 Q. So Mr. Aronson had actually prepared what's shown --
- 5 A. Yes.
- 6 Q. -- in the affidavit, Exhibit 79, without having spoken with you?
- 7 A. That's correct.
- 8 Q. Did you ask him where he got the information and where he --
- 9 A. No, I did not.
- 10 Q. Did you ask him where he had --
- 11 A. I was very quiet in talking with Mr. Aronson. I asked him
12 practically nothing. I merely wanted to review the matter with
13 Mr. Rosenblum to ascertain what's going on.
- 14 Q. Did you ask him why he took it upon himself to express an
15 opinion on your behalf in paragraph 11 without even having
16 spoken to you?
- 17 A. No. As I indicated earlier, having received the affidavit, I
18 told him that I wanted to review it, and I wanted to talk with
19 Mr. Rosenblum. I talked -- Mr. Rosenblum and I both reviewed.
20 I've forgotten now what Mr. Rosenblum's affidavit -- It says
21 practically the same. We both agreed that that substantially
22 is correct. Not -- is correct. We found no fault with it --
23 saw no reason why we should hesitate to sign it.
- 24 Q. I can advise you, sir, that Mr. Rosenblum's affidavit is a
25 mirror image of that. It just changes his name for yours.

1 A. I should recall it, yes.

2 Q. Okay. If you'd been left to your own devices to prepare an
3 affidavit on your own, would you have changed --

4 A. It may have been slightly different.

5 Q. Would you've changed it?

6 A. Of course, we're using hindsight now. If I'd known that,
7 "Subsequent to you signing this affidavit, Mr. Khattar, bear
8 in mind that we're going to have an Inquiry, and you'll be
9 questioned on these matters." I'm just wondering now whether
10 I should put in all these things here. But that is correct
11 as far as I'm -- It's an opinion.

12 Q. Sure. And of course you being a member of the bar for the
13 length of time you have been are aware that when you sign an
14 affidavit, you are subject to cross-examination on it?

15 A. Oh, certainly. Very much so.

16 Q. Thank you.

17 A. I swore.

18 Q. Yes, of course you did. Okay. Following that, the swearing of
19 the affidavit, Mr. Khattar, you've had no further involvement
20 in this case of any kind, have you?

21 A. No.

22 Q. Thank you.

23 A. Other than -- Yes, other than the execution of the affidavit.

24 Q. Yes.

25 A. And the person who took the affidavit is a member of our staff --

1 -- one of the lawyers in our staff.

2 Q. Okay. Let me deal with another topic just for a moment and
3 quickly. You had told us the other day that you -- in your
4 practice, you did have quite a bit of experience with Natives --
5 with Indians?

6 A. Yes. I represented them on many occasions.

7 Q. And in many different types of offences?

8 A. Different types of offences.

9 Q. Was it your experience, Mr. Khattar, that Natives were treated
10 any differently with respect to sentencing by the courts that
11 you appeared before?

12 A. No, sir. I noted nothing different.

13 Q. What about with respect to discharges?

14 A. I have no knowledge -- no experience in discharges. I'm not
15 sure whether I was representing Indians at the times that dis-
16 charges became in vogue.

17
18
19
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- 1 Q. What about with respect -- the respect that was afforded to your
2 clients by the various Judges that they appear before, any
3 difference in the treatment of a Native compared to a White
4 person?
- 5 A. I'll give you two answers to that question, number one, I saw none;
6 number two, if there were, I would certainly be on my feet and
7 object to it. I've had no experience other than they're treated in
8 the same way as the treatment of any White persons or none
9 Indian persons.
- 10 Q. And then there's one other question, have you had the
11 opportunity to read in the -- at any time the evidence that
12 has been given by Junior Marshall in the Appeal Division or
13 at any of the Ebsary trials?
- 14 A. I did not -- I had no knowledge of the Ebsary trial. I wasn't
15 particularly interested in the Ebsary -- didn't show any
16 interest in the Ebsary trial. I did read the Appeal Court
17 Decision where Marshall -- there was some reference to his
18 evidence in that trial, and that was I think the opinion of
19 the entire Court. There's not -- no particular Judge was
20 identified.
- 21 Q. If -- At the original trial if Mr. Marshall had told this story
22 instead of the one that he did and the one that he had told you
23 initially, if he had told the story that he and Sandy Seale had
24 gone into the park, that they had accosted Ebsary and MacNeil
25 and it was their intent to take some money off of them, and in the

1 course of that a scuffle occurred and Ebsary killed Seale or
2 stabbed Seale. If he had told that story to the jury and still
3 was faced with the evidence of Chant and Pratico, that they had
4 seen Marshall stab Seale, do you think there would have been
5 any diffence?

6 A. Our -- The investigation and the conduct of the case would have
7 entirely changed, number one, our investigation would be
8 directed towards the information with respect to the attempted
9 theft or robbing, whatever the case may be. We would then
10 endeavour to get some -- check out that story. And if we were
11 able to get anything to support it or if we were not, we, of
12 course, have to decide whether we would put that -- put Marshall
13 on the stand. (At that time we hadn't made any decisions as to
14 whether Marshall would be called.)and to bring forth that story.
15 I think we would have done that -- would have conducted the
16 case in a little different category. It would have effected the
17 type of cross-examination of Pratico, of Harriss, and so on,
18 even though with some -- Now it appears with a little reservation
19 Harriss was questioned about other people, and the same thing
20 with Chant, so it may have directed the form of the cross-examination
21 in a different manner.

22 Q. Did you--When you were giving consideration and agonizing over
23 whether you would call Junior Marshall, did you give any
24 thought to asking that his evidence be given in his Native
25 language or in Micmac?

1 A. No, sir, and --

2 Q. Did you have any --

3 A. --if there was a impediment, neither Rosenblum -- neither
4 Mr. Rosenblum nor I were aware of any difficulty in him
5 expressing himself in the English language.

6 Q. But you did tell us last day that at the trial he certainly
7 if not had difficulty expressing himself, had difficulty on
8 the witness stand?

9 A. His mannerisms were bad, not his expressions.

10 MR. MacDONALD:

11 Okay. Thank you. That's all I have My Lord. Thank you.

12 BY MR. CHAIRMAN:

13 Q. Mr. Khattar, a couple of things I'd like to put to you before
14 the cross-examination, one, when Mr. Rosenblum was cross-examining
15 Chant with reference to Chant's first statement which apparently
16 he felt at that time was contradictory to the second statement.
17 I assume that Mr. Rosenblum must have been -- was obviously
18 aware that there had been an earlier statement?

19 A. There are two tips as to changing statements, one was if you
20 recall in the Statement of Facts that was delivered by the
21 Judge, the Trial Judge in determining whether there'd be a
22 Bill or No Bill in which Chant was in my recollection now and
23 subject to the records showing other wise in which the stories
24 that Chant had given one story and then he had lied and then
25 changed his story. So -- And then during the examination itself

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1 I gather that there must have been some information in
2 Rosenblum's mind to enable him to ask those questions.

3 Q. Now given that logical assumption, in your opinion would
4 Mr. Rosenblum have the right to insist that that statement
5 be then -- even though he had not seen it, then be produced
6 and tendered in evidence so the jury could --

7 A. I'm not aware of any obligation on Crown Counsel to produce
8 it or any effort that we could make before the Courts to
9 insist that they produce it. I've never had to test it and
10 I have no particular experience either as a Prosecutor or as
11 the Defence Counsel covering that particular question.

12 Q. The second item I just wanted to mention for my own
13 clarification, you had indicated to Mr. MacDonald that if you
14 had been aware at the time that your client Donald Marshall, Jr.,
15 had been in the park for the purpose of trying to obtain money
16 from these two gentlemen MacNeil and Ebsary that your cross-
17 examination may have been different of Pratico, I can see
18 that, but would that have affected your -- in any way your
19 investigation bearing in mind that Marshall had already told
20 you of the encounter?

21 A. Yes.

22 Q. With these two men?

23 A. There would be a little different -- an investigation towards
24 the suggestion about Ebsary -- Their names we didn't have.

25 Q. Yes.

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1 A. --About these other two persons, where they are supposed to have
2 lived and where these things had happened and we might have been
3 able through some investigation check the yard, check the area,
4 houses and so on and see if there is any person who fitted the
5 description of what Marshall was saying to help us.

6 Q. Okay.

7 A. We directed our entire -- I was going to say examination, I'm
8 trying to weaken the other stories of identification of
9 Marshall and Marshall only.

10 Q. You and Mr. Rosenblum concluded that Chant and Pratico were the
11 two key trial witnesses and that you had to break them if you
12 were going to succeed in your defence?

13 A. That's correct.

14 BY COMMISSIONER EVANS:

15 Q. Mr. Khattar, I have a few questions I would like to ask you.
16 In 1971 you say the policy of your office and Mr. Rosenblum's
17 office apparently was not to consult with the Crown Attorney to
18 ascertain any information from him by way of statements
19 obtained from witnesses or any information as to whether
20 statements had been made by the witnesses?

21 A. That is correct, sir.

22 Q. I see, and you didn't obvious, then did not approach the Police
23 Department either?

24 A. That's correct.

25 Q. And for some reason you felt that you were not entitled to

1 interview Crown witnesses?

2 A. That isn't -- That's not -- not absolutely the correct --
3 the correct view that I took. As I indicated in my evidence
4 last week, I on one occasion obtained a subpoena in order
5 to question a Crown witness and I felt that I had at least the
6 protection or the umbrella of the subpoena to enable me to
7 question him and I did not question the witness alone. So I
8 didn't take the view that I could not, but it was not the
9 practice to go and -- unless I was going to subpoena them and
10 call in the -- had in mind the intention of calling them as
11 a witness on my side. So my practice was, your first
12 statement is correct, it was not to interview Crown witnesses,
13 but I have on occasion interviewed them --

14 Q. Because you appreciate there's no property in the witness?

15 A. That's correct. Yes, that's right.

16 Q. They don't belong to the Crown or doesn't --

17 A. Exactly.

18 Q. And the only three witnesses whose evidence you were vitally
19 concerned with would be Chant, Pratico, and Harriss?

20 A. Correct.

21 Q. And if you had wanted to interview them, could you -- you would
22 have subpoenaed them, I understand, and then had somebody
23 else with you?

24 A. That's correct.

25 Q. Now you did not do that?

1 A. Did not.

2 Q. And you had said also that the matter of money was not a
3 problem in this case because --

4 A. That's right there was no -- no prohibition on that.

5 Q. --you had funds available? Had you considered at that time
6 the advisability of hiring an investigator to look into the --
7 to check out the stories of Pratico, Chant, and Harriss?

8 A. No, sir.

9 Q. I realize that when we look back on things --

10 A. Oh, yes.

11 Q. --it's very easy to make these decisions, but given the fact that
12 these witnesses were quite young, had it not occurred to you
13 that possibly the statements would require some investigation
14 and the circumstances of taking the statements would require
15 some investigation as to whether they were voluntary?

16 A. That as I felt would remain in exam -- cross-examination.

17 Q. You would wait then for the trial to make that examination?

18 A. That's correct.

19 Q. Because you did not ask any questions as I recall it at the
20 Preliminary --

21 A. At the Preliminary, but at the trial.

22 Q. And dealing with the -- You have told me that and told us that
23 you did have a minor input as far as the grounds of Appeal and
24 the Notice of Appeal?

25 A. Yes.

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1 Q. You were aware of it and the contents of it when it was
2 filed?

3 A. No, I really must say I was not. Mr. Rosenblum was handling it
4 entirely on his own. I was not asked to assist in any way with
5 him, not even to look it over, cursory.

6 Q. Do you know -- Quite apart from your own office practice, were
7 you aware of any practice in the -- those who operate in the
8 Criminal Bar in Sydney as to whether they would consult with
9 the police or with the Crown to obtain statements?

10 A. My -- My recollection, and I checked this with Mr. Rosenblum
11 within a month before he died to try and get our best
12 recollection, was that it was the practice and I also must
13 say that I checked with other lawyers who have been in practice
14 at the same time with respect to that practice of not getting
15 statements from the police or checking with the prosecuting
16 officers and they agreed that at the time of the Marshall trial
17 that was the practice that you did not get statements from the
18 police or the prosecutor.

19 Q. So you stayed some distance away from both the Crown and the
20 Police and the Crown witnesses?

21 A. Yes. That's right. There's always the fear of interfering
22 with witnesses. It was always a fear I've always had, to --
23 not to go near somebody who might say, "Well, look I was talking
24 to Defence Counsel and he suggested I do this". I had a
25 difficult time enough I felt in many of the cases on their

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1 defences without giving the Crown another ground for showing
2 that my client was guilty.

3 Q. So you were extremely cautious in that regard?

4 A. I was abundantly so.

5 COMMISSIONER EVANS:

6 Thank you very much.

7 BY MR. CHAIRMAN:

8 Q. If I may again apropos that, Mr. Khattar, I think you told
9 us on Thursday that on one or two occasions in your career you
10 acted as a Crown Prosecutor?

11 A. Yes, I did. I was prosecuting officer for Richmond County
12 and also for the County of Cape Breton for a period.

13 Q. During these two periods when you were the Crown Prosecutor
14 did Defence Counsel ever come to you --

15 A. No, sir.

16 Q. --and ask --

17 A. And ask for a statement, no, sir.

18 Q. The -- Another thing apropos your comments with respect to
19 the Appeal, the five grounds that were set forth, the practice
20 would appear to be that these grounds are made as general
21 as -- and as all embracing as possible?

22 A. That's true.

23 Q. Have you had any experience as to whether -- I know you've
24 had experience, but -- I suspect, but your experience in the
25 Court of Appeal, does that indicate to you that Appeal

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1 Courts restrict themselves then to the grounds that are
2 enumerated in the Notice of Appeal?

3 A. My impression is that they are not restricted and that they
4 do not restrict themselves only to the grounds in the Appeal --
5 or grounds of Appeal, but if -- And in -- With respect that if
6 in the course of reading the transcript of the trial evidence,
7 they come across some evidence, I've seen that appear in
8 judgements that while not a ground of appeal, this matter was --
9 appears in the evidence and may comment or make it a
10 ground for a decision.

11 MR. CHAIRMAN:

12 Thank you.

13 MS. DERRICK:

14 Thank you, My Lord.

15 BY MS. DERRICK:

16 Q. Mr. Khattar, we've met. My name is Anne Derrick and I
17 represent Donald Marshall, Jr.

18 A. I beg your pardon?

19 Q. I represent Donald Marshall, Jr.. My name is Anne Derrick.

20 A. Yes, I met you before.

21 Q. Yes, that's right.

22 A. Yes.

23 Q. Mr. Khattar, I believe you told us that you first met Donald
24 Marshall, Jr., at the County Gaol, is that correct, when you were
25 first retained?

1 A. That's correct.

2 Q. And how many times would you have seen him in the course
3 of preparing for his trial?

4 A. I would say about three occasions.

5 Q. And were these meetings to which you went alone or did
6 Mr. Rosenblum go with you?

7 A. On the first occasion I was -- I saw him alone, and I believe
8 on the second occasion I saw him alone, and on the third, the
9 other occasion which I don't particularly recall, I probably
10 saw him with Mr. Rosenblum.

11 Q. And are you aware whether there are any occasions when
12 Mr. Rosenblum would have seen Mr. Marshall on his own?

13 A. No.

14 Q. How long would these meetings have lasted?

15 A. My first interview with him would be about a half hour, the
16 second interview would be very short, just checking some
17 item, I just don't recall now, and the third interview would
18 be with Mr. Rosenblum in which we both reviewed the story that
19 Marshall had given me the first time and my reviewing with
20 him the second time some clarification.

21 Q. And was that third meeting for the purpose of preparing
22 Mr. Marshall for his testimony?

23 A. Preparing ourselves, not for his evidence.

24 Q. Well --

25 A. Preparing ourselves for the trial.

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1 Q. May I assume that there was an occasion when you prepared
2 Mr. Marshall for his testimony?

3 A. I'm sorry. I don't get that.

4 Q. Was there an occasion when you and Mr. Rosenblum met with
5 Mr. Marshall for the purpose of preparing him to testify at
6 his trial?

7 A. No, I think Mr. Rosenblum met him alone for that purpose.

8 Q. Are you aware of what was discussed at that meeting when
9 Mr. Rosenblum was preparing Mr. Marshall to testify?

10 A. Nothing other than what was reported to me by Mr. Rosenblum,
11 that I've talked with Donald and we're going to call him as
12 a witness and I've indicated to him to be clear in his
13 testimony about his mannerisms and watch out for -- take your
14 hand away from your mouth, and be truthful all the way, and to
15 have no hesitation in answering, just general advice on --
16 on giving evidence.

17 Q. So you're not aware whether anything of substance was discussed
18 with Mr. Marshall?

19 A. Nothing other than relate the events that led up to his own
20 injury into the stabbing of Seale as he had already told us
21 previously.

22 Q. So you're not aware whether there was ever a meeting to discuss
23 with Mr. Marshall what had been said at the Preliminary Hearing?

24 A. No, but Marshall himself would be present at the Preliminary
25 Hearing, but we did not review with him --

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1 Q. You did not review at any point, for instance, there was no--

2 A. I didn't personally. Now Mr. Rosenblum may have.

3 Q. And you're not aware whether Mr. Rosenblum ever reviewed
4 Patricia Harriss's testimony with Mr. Marshall for instance?

5 A. That's correct.

6 Q. Because as you may recollect from the trial, this seemed to
7 have caused some difficulty later on?

8 A. Yes.

9 Q. Now in terms of other preparation for Mr. Marshall's trial,
10 you say that you went to the scene before the Preliminary and
11 this was on one occasion. Is that correct?

12 A. That's right.

13 Q. You never went at night. This was during the day time, was it?

14 A. Day time.

15 Q. And what observations did you make on that occasion, for
16 instance, did you conclude that the witnesses couldn't have
17 seen what they -- what they said they were going to see?

18 A. Counsel, when I went to see Mr. Marshall on the first occasion
19 I knew nothing about the case, nothing whatsoever. One of
20 his friends I indicated earlier, a Mr. Lawrence Paul asked
21 me to go up and see Donald Marshall, Junior Marshall, that
22 he was charged -- I took it that he was charged with murder
23 at that time and I went up and told him that Lawrence Paul
24 asked me to come in to see him and that I understood that he wished
25 to retain me in connection with the charge against him, and

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1 I asked him if he'd like to tell me what took place and
2 so on and that's the information that he -- The information
3 he gave me is pretty consistent with what he'd given at
4 the trial -- at his trial.

5 Q. I understand that, Mr. Khattar, but I believe you said
6 earlier that somehow you must have got some information,
7 perhaps from the Indian people at Membertou that gave you some
8 idea of what certain eyewitnesses were going to say?

9 A. At that time, no.

10 Q. But when you went to the park to make these observations --

11 A. When -- I'm not sure whether it was before the Preliminary or
12 after the Preliminary, but some of the Indian people told us
13 that they mentioned -- Paul -- Mary Theresa Paul mentioned
14 Tom Christmas and I'm not -- It seems in the back of my mind
15 there was someone else, but at any rate I may be mistaken in
16 my recollection that these people would be able to confirm that
17 Pratico talked to them. And I used that -- that information
18 in my cross-examination of Pratico and also they gave me -- they
19 must have given me some information that on that night Pratico
20 may have been drinking. I'm not sure of that but it seems to
21 me in the back of my mind there's something on the drinking.

22 Q. So do you have some recollection that these conversations with
23 the Indian people from the Reserve took place prior to your
24 going to the park, that you had some knowledge when you went
25 to the park?

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- 1 A. Yeh, I think that's correct.
- 2 Q. And did that knowledge include a belief that someone was going
3 to say that they were standing behind a tree?
- 4 A. Yes, there must have been --
- 5 Q. And did you make any --
- 6 A. --because other wise I wouldn't be -- there's no reason for
7 me to go over behind a tree.
- 8 Q. To be standing behind a tree, sure. Did you make any
9 observations when you stood behind that tree about what a
10 person could see?
- 11 A. Yes, I thought it was a full--full view.
- 12 Q. So you felt someone standing behind a tree could see?
- 13 A. Yes.
- 14 Q. Do you recollect whether Tom Christmas gave you any information
15 about John Pratico?
- 16 A. I'm not clear in my mind now whether I talked with Tom Christmas
17 or whether somebody else told me that Pratico had been talking
18 with Tom Christmas, and that similar statement must be made with
19 respect to Mary Theresa Paul. I'm not sure whether I spoke with
20 her or whether somebody else said, "Now Pratico talked with
21 Mary Theresa Paul". "He also talked with Tom Christmas".
- 22 Q. So what you remember now is that you did know that Pratico
23 had had some conversations with Tom Christmas, but you're not
24 sure whether you got that information directly from -- from
25 Tom Christmas?

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1 A. From him directly or from somebody else.

2 Q. Did you have any understanding that John Pratico couldn't
3 have been in the park at the time of the stabbing because he'd
4 been seen near the dance?

5 A. I didn't have any such knowledge or understanding.

6 Q. Did you have any understanding that that's what Tom Christmas
7 would have told you if you'd spoken to him?

8 A. No, I didn't -- I don't have that understanding of what
9 Tom Christmas indicated to me.

10 Q. Now I believe you've said that had you heard the story about
11 the attempted robbery, that you would have endeavoured to
12 substantiate Mr. Marshall's story, and I assume by that you
13 mean you would have endeavoured to substantiate his story
14 about meeting two men in the park. Is that correct?

15 A. That's correct.

16 Q. Now what efforts did you make given what you did know to
17 substantiate Mr. Marshall's story?

18 A. My recollection is that we asked the people, friends so to
19 speak of Marshall, if they could give us any kind of
20 information that would help Marshall's defence, everything,
21 anything whatsoever in connection with it, and the best that
22 we got were these references that I've already given you about --
23 some information about Christmas and Mary Theresa Paul with
24 respect to Pratico, but nothing with respect to the other
25 persons.

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1 Q. Did you actually make any inquiries whether anyone else had
2 seen two men in the park that night?

3 A. No.

4 Q. So you didn't look for any witnesses that might have been in
5 the park that night?

6 A. I'm not -- Probably I should make myself a little clearer. When
7 we spoke to Marshall we asked him to give us any information
8 whatsoever that may help in his defence. That included having
9 his friends contact us and give us any information. And the
10 information that we got is what I already indicated to you.
11 We did nothing on our own other than what we followed as a
12 result of any information we received.

13 Q. So you depended on Mr. Marshall to provide you with information
14 but you didn't make --

15 A. Marshall and his friends.

16 Q. --you didn't make any independent inquiries yourself?

17 A. That is correct, no independent inquiry of our own.

18 Q. Now you've said that it's not -- was not your practice to
19 interview Crown witnesses. Was that the case even when their
20 credibility was at issue?

21 A. It applied in all cases. There was no qualification.

22 Q. And what was it that caused you to suspect Chant and
23 Pratico's credibility, was this an assessment you made once
24 you heard him testify as a witness?

25 A. I'm sorry, I didn't get that.

- 1 Q. What I was wondering is-- is at what point did you start
2 questioning Chant and Pratico's credibility? What made you
3 focus in on those two?
- 4 A. I questioned his credibility from the beginning of my
5 cross-examination. That was the whole purpose of it.
- 6 Q. Did you know at any point that Tom Christmas had been charged
7 with obstruction of justice?
- 8 A. No, I did not have that knowledge.
- 9 Q. So -- And I'm afraid I can't point you to the reference in
10 the transcript, but at some point I believe during the trial
11 Mr. MacNeil said that Tom Christmas was a resident in another
12 Province temporarily or some --
- 13 A. Yes, I recall that.
- 14 Q. --such words. At that time did you understand that that meant
15 that he was in Dorchester?
- 16 A. It didn't register with me at all.
- 17 Q. I'm not surprised. Were there any pre-trial conferences with
18 the Judge in those days?
- 19 A. No.
- 20 Q. Now I believe your testimony was that at the Preliminary
21 Hearing there was no cross-examination of Chant or Pratico and
22 the reason for this is that you were concerned about giving
23 away Mr. Marshall's case. Is that correct?
- 24 A. That's correct.
- 25 Q. What was it that you were concerned about giving away?

1 A. Any part of it.

2 Q. But if your intention was merely to cross-examine the Crown
3 witnesses vigorously at trial --

4 A. What I attempted -- What I attempted to tell Mr. MacDonald,
5 and maybe not gone over the way I had hoped, was it's my
6 practice and Mr. Rosenblum's practice to ask very little at
7 the Preliminary Inquiry and mainly the reason why the -- if
8 you directed a considerable amount of your cross-examination
9 you might give away as to your potential defence to the charges.
10 And that's the way we operated.

11 Q. But the defence in this case was that Mr. Marshall didn't do it?

12 A. Yes.

13 Q. And your strategy at the trial I assume was to vigorously
14 cross-examine the Crown witnesses, particularly Chant and
15 Pratico?

16 A. Yes.

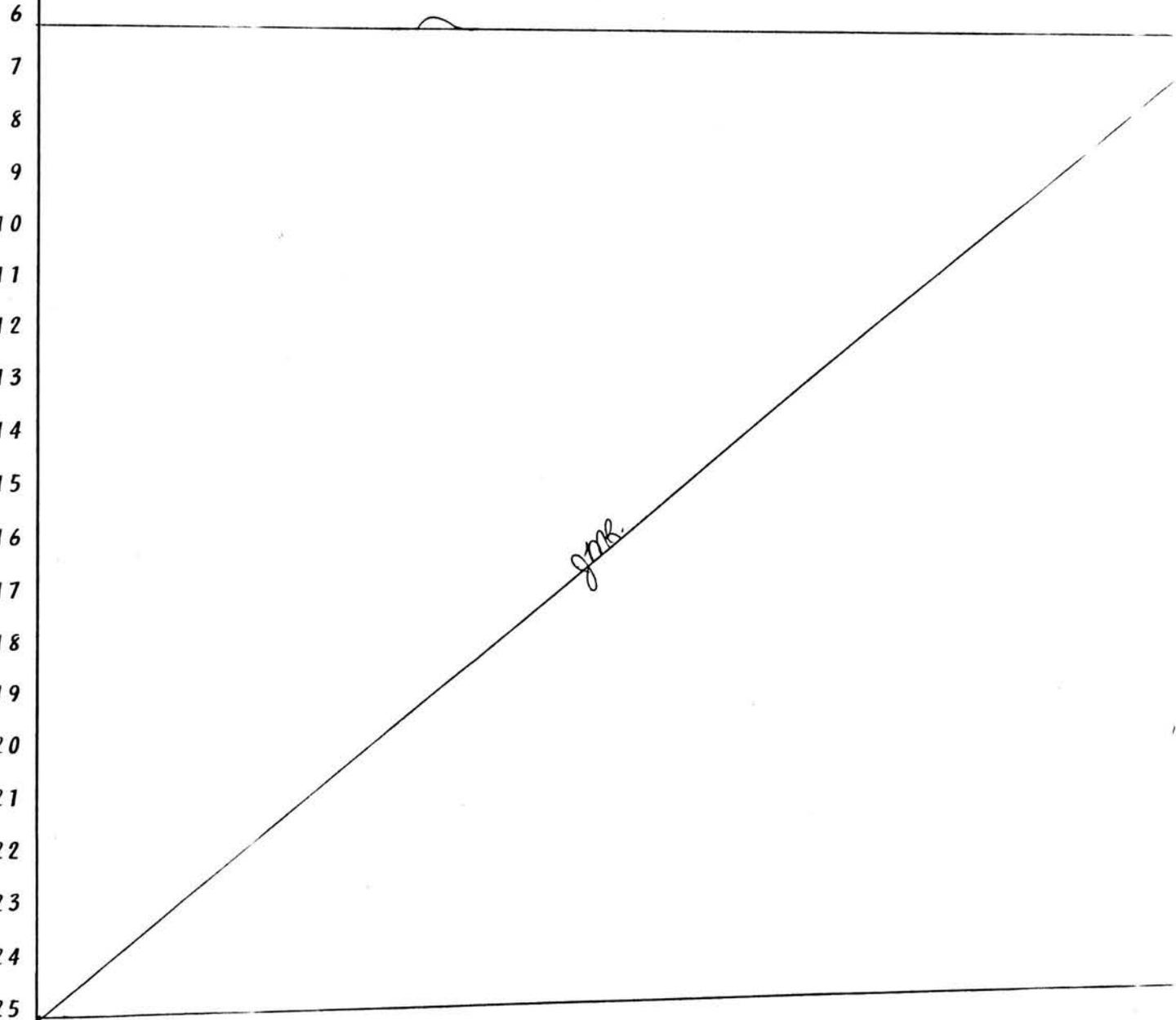
17 Q. So had you cross-examined them at the Preliminary, this would
18 have simply given you an early opportunity to test the
19 Crown's case?

20 A. That's questionable in my mind. It's a matter of opinion.
21 It's your opinion and that's the way you would do it. My
22 opinion is that's the wrong way to do it.

23 Q. Even on reflection you feel that?

24 A. Yes, on all questions. It may be that we'd cross-examine Pratico
25 along the lines that you suggest and we get some answers

1 and we're stuck with them so to speak unless we can prove
 2 that they're wrong in some way, but our practice is, find
 3 out what he's going to say and then see what we can do about
 4 answering them later. Don't get confined to answers that you
 5 received in the Inquiry in your cross-examination.



1 Q. Mr. Khattar, with respect to John Pratico knowing now what
2 you do about what happened at the trial, how he tried to
3 recant and how unreliable his evidence was, does that cause
4 you to think that it would have been desirable to have
5 cross-examined him earlier at the Preliminary?

6 A. Counsel --

7 Q. Perhaps shaken his loose sooner?

8 A. Counsel, let me make the comment that the Preliminary Inquiry
9 is held to determine whether there is enough evidence to
10 commit the person for trial. If that evidence comes out
11 and unless you think that you can through your cross-examination
12 indicate there's not enough here to warrant a committal, there's
13 not much practical reason in doing a great deal of cross-
14 examination of the witnesses. That's the view we took of
15 it. That's a judgement we made at that time.

16 Q. Did you know that Maynard Chant was on probation?

17 A. No, I knew nothing about him. Other than what I used in
18 cross-examination.

19 Q. Mr. Khattar, I believe prior to this time Mr. MacNeil was
20 sensed by the Nova Scotia Human Rights Commission for
21 racist comments concerning the Eskasoni Reserve. Do you --
22 did you have any knowledge of that?

23 A. I didn't have it exactly but at the Preliminary Inquiry I was
24 instructed or was informed that Mr. MacNeil didn't like
25 Indians and in the course of some presentation to the Court

1 I'd get up to oppose some -- some action of Mr. MacNeil and
2 I made the comment, "well, you wouldn't expect anything else
3 from Mr. MacNeil, he doesn't like Indians anyhow". It was
4 the wrong thing to say. I was promptly told that and Mr.
5 MacNeil didn't like it and for some months there's no
6 communication between Mr. MacNeil and me other than what
7 was absolutely necessary.

8 Q. And that information --

9 A. That was a result of what you -- the statement you made about
10 the comments he had made earlier.

11 Q. Yeh, that's what I was just going to ask you. That's where
12 that information --

13 A. Yes, yes.

14 Q. -- related to?

15 A. Yes.

16 Q. Mr. Khattar, with respect to selecting the jury for Mr.
17 Marshall's trial, what were the considerations that went
18 into it? What -- what were you looking for?

19 A. That's hard to tell you that now. I find it difficult to
20 answer that question. I can tell you that we looked over
21 this person and we tried to get, as I think I told Mr.
22 MacDonald, we had the jury lists and in concerning what
23 person might or may not be favourable towards our cause,
24 we determined to get as much information we could. We'd ask,
25 for example, what would this person's view be towards Indians?

1 Towards Blacks? And so on. And we used different methods
2 or different means of determining whether these persons would
3 be favourable or unfavourable.

4 Q. Was attitude towards race your principle concern then?

5 A. Racial.

6 Q. Yes, was attitude towards race on the part of a potential
7 jury member your -- your principle concern?

8 A. Yes, that would have -- I think we would think of that.

9 Q. Does -- does this relate in any way to your own experience
10 in representing Indians before juries?

11 A. Well, there -- there are people say, "Look I don't like this
12 Black so-and-so and I don't like these Indians". Well, if we
13 had any kind of knowledge that any of these potential jurors
14 had that feeling, they wouldn't be on our jury if we could help
15 it. We would challenge them or we would object to them. What
16 ever the case may be.

17 Q. And what was your experience with respect to these concerns?
18 Did this come from your professional experience in representing
19 Indians before juries?

20 A. No, as I -- well, yes, with respect to -- there are people
21 -- you got a loaded question there because I was answering
22 questions with respect to the feeling of Indians -- about
23 towards Indians and Blacks. Now I'm saying that with respect
24 to the jury, I'd think that I would want to check to see if
25 that particular potential juror did -- juror didn't like

1 Indians or didn't like Blacks because that would reflect
2 on his thinking and acting as a juror.

3 Q. Quite right, Mr. Khattar, but what I'm getting at is what
4 was your experience that led you to be concerned about this?
5 Had you had experiences as a lawyer representing Indians
6 in front of jurors that made you concerned about jury
7 attitudes? Was it your experience as a member of the
8 community just in social settings hearing people talk about
9 Indians and Blacks? Where did this concern come from?

10 A. I had no -- you mean, in taking the view that I did --

11 Q. Yes.

12 A. -- in the selection of the jury?

13 Q. And being concerned about race?

14 A. Just my common experience.

15 Q. Now Mr. Rosenblum makes a comment, this is in volume 2 at
16 page 48. I'm just going to read it. When he's addressing
17 the jury, he says:

18 I know that you will have no
19 part of any consideration which
20 would involve any intolerance,
21 any discrimination by reason of
22 colour, race, creed, or anything
23 of that kind.

24 So was it -- was it this concern that you're discussing now
25 that that was intended to identify?

A. No, I took it that we may have had a feeling, you know, there
might be some anti-Indian feeling you might say. Or pro-Black

1 feeling what ever the case may be and Mr. Rosenblum quite
2 fairly was saying now, "I'm asking you jurymen not to -- not
3 to consider the fact that the accused is a -- or the prisoner
4 is an Indian in affecting your judgement".

5 Q. Did your -- in your recollection of the case, did your
6 concern arise out of the fact that the victim had been Black
7 and the accused was Indian? Or would you have had these
8 same concerns if the victim had been White?

9 A. Same as if the victim had been White.

10 Q. There was an occasion, I believe, in recent years, 1986, when
11 one of the jury members was interviewed for the purpose of
12 a magazine article and in that article the jury member said
13 when asked whether there was any -- whether discrimination
14 played a part, the jury member said, "No". But then made
15 this quote, "With one Redskin and one Negro involved, it
16 was like two dogs in a field. You knew one of them was going
17 to kill the other. I would expect more from a white person.
18 We are more civilized". Is that the kind of attitude you
19 were concerned about?

20 A. No.

21 Q. Would you expect that kind of attitude from -- from a jury
22 in this area in 1971?

23 A. No, no, I would not.

24 Q. Does that surprise --

25 A. I don't think --

- 1 Q. -- you to --
- 2 A. -- I don't think it's a fair statement.
- 3 Q. Well, it's -- it's alleged to have been a direct quote from
- 4 one of the jury members?
- 5 A. Yes, I know.
- 6 Q. You don't accept it though as being --
- 7 A. I don't accept it.
- 8 Q. -- representative of the attitude of the jury -- of a jury
- 9 member?
- 10 A. That's what we were trying to avoid. There may be people
- 11 who have that feeling but we had no common knowledge. Now
- 12 look all these jurors, now, you're going to have a great
- 13 number of them who'll be anti-Indian or pro-Black, what
- 14 ever the case may be. There may be people who don't like
- 15 any -- any ethnic groups at all. They only like the
- 16 Anglo-Saxons or those with Scottish extraction. So you have
- 17 to be very careful.
- 18 Q. Did you ever have occasion in your experience to hear Indians
- 19 referred to in pejorative of terms by other lawyers or
- 20 by Prosecutors or by police?
- 21 A. What type of experience?
- 22 Q. In your experience in -- in the community in Sydney?
- 23 A. I don't understand the question. Did I have any experience
- 24 in what?
- 25 Q. Well, in -- in hearing Indians referred to in pejorative

1 of terms, in derogatory terms?

2 A. I've never heard that --

3 Q. You've --

4 A. -- never heard that from any --

5 Q. You never heard anybody --

6 A. -- not from any of my colleagues, confreres or anyone else
7 other than that -- I'm rather amazed to hear that statement
8 was made by a juror.

9 Q. And you never heard -- to them referred to "wagon burners"
10 or "arrow heads" any of those --

11 A. No, not personally.

12 Q. -- types of terms? Not personally. Looking back on this
13 case, do you think that racism, however subtle, could have
14 influenced the outcome?

15 A. That's difficult. There are people who think that if they
16 are a foreign extraction they won't get a fair deal. There
17 aren't many people think that. I do not share that feeling.
18 But I don't -- I actually don't share that feeling but there
19 are people and there may have been people on that jury who
20 had that feeling and that may be the reason that Marshall
21 was convicted. That there may have been a number of people
22 who felt that here's an Indian and he'll do anything.

23 Q. So, so you had some concern about that at the time and I
24 would -- I would take from what you're saying, that you
25 still have some question as to whether or not that may have

1 played a role? Is it fair to say?

2 A. No, I doubt that.

3 Q. What I remembered from your evidence is that you were concerned
4 about the issue of race at the time of Mr. Marshall's trial
5 and I understood you to just say that there may still be
6 some doubt in your mind as to whether or not that played a
7 role?

8 A. Yes. Yes.

9 Q. You can't say categorically --

10 A. I can't say it was there.

11 Q. But you can't say --

12 A. But there's some doubt in my mind.

13 Q. You can't say that it wasn't?

14 A. Sure.

15 Q. Now you -- You, I believe, said that you've had quite extensive
16 experience representing Indian clients over the years.

17 A. That's correct.

18 Q. In your own dealings with them, did you deal with them any
19 differently; for instance, taking into account language or
20 cultural differences?

21 A. I hadn't run into any of the language difficulty or cultural
22 aspects of it in any way. The people that I represented
23 apparently were able to communicate well enough for me to
24 understand them. There's never an impediment. I've never
25 had to use an interpreter. Maybe that I never had Indians
 who could not speak the English language.

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1 Q. So in your experience you saw no reason to treat them any
2 differently than you treated a client from any other ethnic
3 background?

4 A. That's correct.

5 Q. Now with respect to Mr. Marshall's actual trial, Mr. Khattar,
6 you have recalled the meeting in the barrister's room when
7 Mr. Pratico tried to recant on his evidence?

8 A. Yes, I was called into the corridor. Mr. Pratico was seated
9 in the corridor or the lobby of the courthouse on the second
10 floor where all the witnesses usually sit awaiting to be
11 called.

12 Q. And what resulted was a meeting in the barrister's room with
13 several other --

14 A. That resulted in our adjourning into the barrister's room.

15 Q. Do you recollect on that occasion whether Mr. Pratico was
16 threatened with perjury by Mr. MacNeil?

17 A. No, I don't recall that at all.

18 Q. Now you quite --

19 A. If it was said, I don't recall.

20 Q. You don't recall it being said?

21 A. No.

22 Q. You quite graphically described how Mr. MacNeil stood up and
23 basically towered over --

24 A. That's in the barrister's room, yes.

25 Q. -- Mr. Pratico and said, "I didn't threaten you"?

- 1 A. Yes.
- 2 Q. Could you say whether Mr. Pratico was obviously afraid of
3 Mr. MacNeil and Mr. MacIntyre in that setting?
- 4 A. It's -- it's difficult to understand Pratico because when
5 I had him in the hallway, he was very anxious to get off
6 his chest that things that had happened and I had -- had
7 difficulty to say, "Wait -- wait a minute, now, we'll get
8 the sheriff". He admitted -- he started off by saying, "Lock
9 Seale didn't", -- not Seale but "Marshall didn't stab him.
10 And what I said before, it's not true". Oh, well, I said,
11 "Let's hold it, hold it". He was very anxious to get -- get
12 this stuff off his chest so to speak. And when I got the
13 sheriff in, he wanted to start again.
- 14 Q. Yes.
- 15 A. And again, I had some difficulty, "Wait now, wait a minute".
16 So we finally got a -- when the sheriff got Mr. MacNeil and
17 Mr. MacIntyre following him, then we got into the barrister's
18 room, Pratico went through the process of telling us it again
19 and that's the time that MacNeil got up and said, "Did I
20 threaten you, did I scare you", and so on.
- 21 Q. And did this have an affect on Mr. Pratico, did he seem --
- 22 A. It must have had an affect on him.
- 23 Q. -- did he seem afraid?
- 24 A. I think it had an affect on him.
- 25 Q. Now the -- the suggestion was left once this matter got back

1 into court that Mr. Pratico was afraid of Donald Marshall,
2 Senior?

3 A. Yes.

4 Q. Why was it that Mr. Marshall, Senior, wasn't called to refute
5 that?

6 A. Judge Dubinsky made rulings. When I attempted to bring out
7 what took place in the barrister's room, he restricted my
8 cross-examination. And that's the end of it as far as he
9 was concerned. I couldn't go any further. He permitted
10 Mr. MacNeil to go so far, then he stopped him.

11 Q. Did you consider asking the Judge if you could call Mr. Marshall
12 Senior?

13 A. No, I did not because I -- I took Marshall -- Pratico's
14 testimony to indicate that he had not discussed the case
15 and as I recall in the reading of the testimony, he did
16 not discuss the case with Marshall, Senior. But in the
17 course of the reference and the examination of Pratico
18 by Mr. MacNeil, he left the -- Mr. MacNeil left the
19 impression that there may have been a discussion. But Pratico's
20 testimony said he did not discuss the case with Marshall.
21 That's my recollection of the evidence. I may be mistaken
22 on that.

23 Q. So -- so was it your decision that it wasn't necessary to
24 call Mr. Marshall?

25 A. To a point. And if it were -- if I intended or wanted to, I

1 wouldn't be permitted. The chapter was closed as far as
2 Justice Dubinsky was concerned.

3 Q. Now Mr. MacDonald when he was examining you told you that
4 during the course the trial, someone called Mr. Rosenblum's
5 office to tell him that -- that John Pratico couldn't have
6 seen what he said he had seen?

7 A. It's unfortunate Mr. Rosenblum is now dead --

8 Q. Now, I'm sorry, --

9 A. -- now excuse me, now let me just finishing answering, unless
10 you want to stop me now --

11 Q. -- no, I hadn't actually asked you a question yet though?

12 A. -- I said, it's unfortunate that Mr. Rosenblum is now deceased
13 but I have no knowledge any time that this incident took place.

14 Q. I appreciate that, Mr. Khattar.

15 A. I don't say it didn't take place.

16 Q. I know that you --

17 A. And I would be rather amazed that as competent a practioner
18 as Mr. Rosenblum would ignore a statement of someone saying
19 that they had information would help his case.

20 Q. Do you have any explanation was to why Mr. Rosenblum wouldn't
21 have told you about this?

22 A. That's another thing that I would find difficult. I have no
23 reason -- no knowledge whatsoever why Mr. Rosenblum if he
24 had the information, would not relay it to me.

25 Q. And you don't have any explanation as to why nothing was done

1 | about it either?

2 | A. Well, I won't -- not knowing it, you can't do something about
3 | that which you don't know.

4 | Q. No, no, I don't mean with respect to you but why Mr. Rosenblum
5 | didn't do anything about it?

6 | A. Well, as I said, I find it difficult to credit.

7 | Q. If this call had come to you, what would you have done about it?

8 | A. I would have pursued it. Found out what -- what there was in
9 | it. What there was to it.

10 | Q. Now in volume 1, this is the trial transcript I'm going to
11 | refer to, page 151. Volume 1, page 151.

12 | A. Yeh.

13 | Q. I'm down around line 15. It's Mr. Rosenblum cross-examining
14 | Mr. Chant. And Mr. Rosenblum confronts Mr. Chant with the
15 | statement that the police told him that it was Donald Marshall
16 | who pulled out the knife. In fact, he says:

17 | The only reason I'm suggesting to
18 | you that you mentioned in the Court
19 | below, in the Magistrates Court,
20 | from which my learned friend read
21 | to you, that it was Donald Marshall
22 | who pulled out this object that looked
23 | to be a knife was because the police
24 | told you it was Donald Marshall who
25 | did it.

22 | And Mr. Chant says:

23 | No, I never.

24 | And Mr. Rosenblum says:

25 | They're the ones who told you the

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1 name Donald Marshall. Don't
2 look at them, look at me.

3 And Mr. Chant says:

4 No.

5 Now it seems obvious from that that you and Mr. Rosenblum
6 came to the conclusion that the police had conditioned Mr.
7 Chant's testimony. What -- what -- what made you come to
8 this conclusion? And that's a strong statement?

9 A. The only -- the only explanation I can give you is that prior
10 understanding of the police and talking with Pratico and any
11 other witness, may've been having difficulty and may have said,
12 "We know that Marshall did it and you know too". And that
13 was the reason that he was making the suggesting that Pratico
14 -- not Pratico but Marshall was the author of this unfortunate
15 incident.

16 Q. Do you -- do you recollect having any discussions with Mr.
17 Rosenblum about this point?

18 A. No, no.

19 Q. So you --

20 A. I don't have -- no recollection of it at all.

21 Q. -- so that's just a supposition on your part?

22 A. That came up -- that came up in the course of his cross-
23 examination.

24 COMMISSIONER POITRAS:

25 The last line of that page --

1 | BY THE WITNESS:

2 | A. Page.

3 | COMMISSIONER POITRAS:

4 | One five one -- just at the bottom. See the last line at the
5 | bottom of 151.

6 | MS. DERRICK:

7 | The answer, "See I told them a story that wasn't true".

8 | BY MS. DERRICK:

9 | Q. Mr. Khattar, did it concern you that there had been no
10 | proper pathological examination of Mr. Seale? There was no
11 | post-mortem, no autopsy performed?

12 | A. No, in effect it didn't concern us at all.

13 | Q. Would that --

14 | A. There may have been -- there may have been. I don't know
15 | if there was or not.

16 | Q. -- no, no, we know that there wasn't and -- and I think
17 | that that --

18 | A. Did Doctor Naqvi say that. I'm not sure now.

19 | Q. Well, we've heard evidence in front of this Commission that
20 | there, in fact, was no post-mortem. Would that be usual that
21 | there would not be a post-mortem?

22 | A. No, it would be -- the charge in this case is that Seale was
23 | stabbed and he met his death from stabbing. That's what the
24 | evidence of Doctor Naqvi says. I don't know what a
25 | pathological examination might reveal. It might reveal that

1 he had a heart condition too and that his heart may have been
2 -- just the threat of being stabbed might have caused him a
3 heart failure. It didn't bother us. It didn't bother Mr.
4 . Rosenblum and me with respect to our conduct of the defense.

5 Q. No, it certainly came out at the trial what the cause of
6 death was but there -- there were certain questions that
7 you didn't get the -- or didn't ask concerning the direction
8 of -- of the knife wound and what --

9 A. I can't see where --

10 Q. -- kind of weapon would have been used? Those are the sorts
11 of things, wouldn't you agree, that a pathological examination
12 would have determined?

13 A. With respect, I didn't think that a path -- pathological
14 examination would have assisted our defense.

15 Q. Your role came to an end after the conviction, is that correct,
16 Mr. Khattar? You're role ended --

17 A. Ended yes.

18 Q. -- after the conviction?

19 A. Yes.

20 Q. Why was that?

21 A. I have no knowledge at all. No one wrote me a letter and
22 said thank you very much. You did or didn't do a good job.
23 Send us your bill. All I knew was all I was asked to do
24 was submit my account. Which I did. And it was some time
25 later wrote -- Mr. Rosenblum told me that he had instructions

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- 1 to Appeal. I had not been consulted on that Appeal.
- 2 Q. And so your role ended because you just didn't receive any
- 3 further instructions?
- 4 A. Maybe they didn't like my conduct at the case. I don't know.
- 5 Q. No, I wasn't suggesting that, Mr. Khattar.
- 6 A. No, I know you weren't suggesting that but they may not
- 7 have liked it. I don't know.
- 8 Q. And you say that you did have some brief discussions with Mr.
- 9 Rosenblum further about the case, is that correct?
- 10 A. Yes, that's correct.
- 11 Q. Did you know that Mr. Marshall continued to protest his
- 12 innocence?
- 13 A. No.
- 14 Q. So did anyone contact you about the case any further until
- 15 you say Mr. Aronson?
- 16 A. No, in fact, I had no further knowledge until many, many
- 17 years and I indicated at the time I gave evidence last
- 18 week, that I spoke with the Prosecuting -- the present
- 19 Prosecuting officer, Mr. Edwards, and I'm surprised to learn
- 20 that there was a re-investigation going on --
- 21 Q. So you really --
- 22 A. -- since you brought it up.
- 23 Q. -- you had no knowledge concerning the case --
- 24 A. No knowledge.
- 25 Q. -- of any kind other than brief discussions with Mr. Roseblum

1 between the time your retainer ended and when you spoke with
2 Mr. Edwards?

3 A. That's right.

4 Q. Is that correct?

5 A. That's correct.

6 Q. Now with respect to Mr. Marshall's files, just a few questions,
7 Mr. Khattar, you say that some of your criminal files which
8 you felt were of no value were destroyed --

9 A. Yes.

10 Q. -- a few years ago?

11 A. Yes.

12 Q. Do you know that Mr. Marshall's files were amongst those
13 or are you just assuming that they were?

14 A. I'm assuming that -- that a great number -- I, for example,
15 I would defend a fellow on a common assault. I make notes.
16 Go down to the trial and he's acquitted or convicted. I got
17 paid. The file is torn up. There's no value at all. And
18 that's with many of these petty criminal charges. In the
19 Marshall case, I'm sure I kept that for some time because
20 there would have been considerable notes. I would think there
21 would be. And as I indicated last week in the course
22 of renovations, it must have been destroyed. I assumed it
23 was destroyed. Well, it got -- it got out of the office
24 anyhow. It's not there any more. And I don't recall giving
25 it to anybody. May have given it to Mr. Rosenblum. I don't
 recall now.

1 Q. And is your recollection that what the file would have
2 contained would have been your notes of meetings with Mr.
3 Marshall?

4 A. Merely my notes of my interview with Mr. Marshall and my
5 notes taken at the Preliminary. My notes taken at the trial.
6 Now there wouldn't be anything other than that.

7 Q. So there wasn't much in the file anyway?

8 A. Yeh.

9 Q. What about Mr. Rosenblum's file; did that ever become part
10 of your file --

11 A. No.

12 Q. -- or were they always kept separate?

13 A. I spoke with Mr. Rosenblum when they were looking for -- I don't
14 know if they were looking for files. Someone was looking
15 for files --

16 Q. I was looking for the file.

17 A. I was looking for my file -- yeh, I went looking for the
18 file when Mr. Aronson came in because --

19 Q. I see.

20 A. -- I wanted to see what my notes was -- I couldn't find it
21 then. And then somebody else asked for it; you said you
22 were looking for it. And then I called Mr. Rosenblum and
23 I asked him if he had a file and he said he had no file.

24 Q. I see. I just have a few final questions, Mr. Khattar.
25 You've testified about the practice back in 1971 concerning

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1 the provision of statements to defense counsel?

2 A. Yes.

3 Q. What was considered fair; that was the practice, but what
4 was the ethic? What was considered fair?

5 COMMISSIONER EVANS:

6 By whom?

7 MS. DERRICK:

8 By the practicing community. Was there any difference between
9 the practice --

10 MR. CHAIRMAN:

11 What community -- the legal community?

12 MS. DERRICK:

13 The legal community.

14 BY THE WITNESS:

15 A. I'm sorry, I don't understand the question.

16 BY MS. DERRICK:

17 Q. Was there any difference between what was the practice that
18 is not to give statements to defense counsel and what was
19 considered fair? Was that what was considered fair?

20 A. We didn't consider it in the category of fairness or unfairness.
21 We knew it was the practice. We never asked for it.

22 Q. I see, okay, thank you.

23 A. If a Prosecutor wanted to on his own give it, that's another
24 matter.

25 Q. That's -- that's the answer to my question. Thank you. Now

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1 I'm going to ask you whether you agree with this statement;
2 in 1971, is it accurate to say that the ethic governing
3 Crown Prosecutors, was it a Crown Prosecutors prime duty was
4 not to seek to convict but to see that justice was done
5 through a fair trial on the merits?

6 A. The theory is that the Prosecutor was to submit the facts
7 and to see that justice is done. Now you're dealing with
8 personalities and I can't speak for the personalities of
9 every person, the Prosecutors.

10 Q. Can you speak for the personality of Mr. MacNeil?

11 A. I know you were going to ask that. It's difficulty to say.
12 I think Mr. MacNeil was a fair Prosecutor.

13 Q. And would that be how he would have conceived his role?

14 COMMISSIONER EVANS:

15 How could he know?

16 MS. DERRICK:

17 Well, I'm -- I'm assuming from his experience in dealing with
18 him.

19 BY THE WITNESS:

20 A. I've been --

21 COMMISSIONER EVANS:

22 He may have dealt one way with "A" and other way with "B".

23 MS. DERRICK:

24 And I recognize that Mr. Khattar could only comment with respect
25 to his own experience in dealing with him.

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1 COMMISSIONER EVANS:

2 He said that he was --

3 BY THE WITNESS:

4 A.. A fair Prosecutor.

5 COMMISSIONER EVANS:

6 -- a fair Prosecutor.

7 BY MS. DERRICK:

8 Q. Mr. Khattar, I have -- I have a letter here that was written
9 by Mr. Rosenblum in February of 1973, concerning Sergeant
10 John MacIntyre and his application for Chief of Police and
11 it's a letter of recommendation stating that Mr. Rosenblum
12 "felt he was most qualified for such a position". Do you
13 know any knowledge of this letter?

14 A. That letter.

15 Q. Yes.

16 A. Haven't seen it. I don't know what the contents of it are
17 other than what you've just said.

18 Q. So you know nothing about it?

19 A. I knew nothing about it.

20 Q. Can you make any comment about Mr. Rosenblum's relationship
21 with Mr. -- Sergeant MacIntyre?

22 A. Both Mr. Rosenblum and I thought that Detective Sergeant
23 John MacIntyre was a good officer and a tough prosecuting
24 officer. That was my feeling and I took that to be that
25 of Mr. Rosenblum. We both thought he was an honest officer.

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1 Q. Okay, thank you very much.

2 MR. CHAIRMAN:

3 Maybe Mr. Murray, it would be an appropriate time to take a short
4 break.

5 MR. MURRAY:

6 I didn't anticipate being long, but certainly we could take a
7 break.

8 MR. CHAIRMAN:

9 I should have asked you first, but anyway, the deed is done.

10 INQUIRY ADJOURNED: 10:58 a.m.

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MS

SIMON J. KHATTAR, Q.C., by Mr. Murray

1 INQUIRY RECONVENED AT 11:19 a.m.

2 BY MR. MURRAY:

3 Q. Mr. Khattar, my name is Donald Murray. I'm here on behalf
4 of Ron Pugsley today representing John MacIntyre. Before
5 the break you were making some comments about John MacIntyre
6 and last day you also made some comments about John MacIntyre
7 and William Urquhart. Would you agree that John MacIntyre
8 was a -- a thorough officer?

9 A. Yes, sir.

10 Q. And would you also agree that in your experience both as
11 a Crown and a defense that when John MacIntyre was involved
12 there was a complete investigation done?

13 A. I don't understand. That it was a complete investigation?

14 Q. Yes.

15 A. Only in the matters in which I was associated with him would
16 I be able to give you that answer and I don't recall any
17 particular cases in which I as a Prosecutor was involved
18 with Detective Sergeant MacIntyre from my personal
19 knowledge.

20 Q. Oh, I see. All right. You also described John MacIntyre on Friday
21 as a belligerent man. A belligerent man that took statements.

22 A. Yes.

23 Q. And did you mean by that that he was a big man with a loud
24 voice?

25 A. He was a big man with a loud voice. When he asked you questions

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1 he'd scare you.

2 Q. You knew you were in --

3 A. I was going to say, "scare the hell out of you", but that's
4 what I mean anyhow.

5 Q. You knew you were in the presence of an authority?

6 A. Yes, sir.

7 Q. We've already gone over this ground a number of times and I don't
8 wish to tire you with it but I take it from your extensive
9 experience with the criminal law in Cape Breton, that in
10 your experience both as a Crown and as a defense, there was
11 no disclosure between the two sides in a criminal case.

12 A. At -- during the 1971 period, right.

13 Q. And as the Commissioners brought to your attention this
14 morning, there was certainly no discussion -- direct discussion
15 between defense counsel and police officers.

16 A. That's correct.

17 Q. They didn't come to you and you didn't go to them.

18 A. That's correct.

19 I wasn't involved in any plea bargaining. I take it you may
20 have intended that to -- in your question or not. I don't
21 know.

22 Q. No, I was not referring to that. Any access you had to the
23 police or any information in the file would be through Donald
24 MacNeil, in 1971?

25 A. Any?

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- 1 Q. Any access that you had to information was through Donald
2 MacNeil?
- 3 A. That would be the only source, yes. I don't recall getting
4 any information period. But you asked any information that
5 I would obtain would be through Donald MacNeil, I --
- 6 Q. He was in charge.
- 7 A. -- wanted to qualify it by stating that I don't recall getting
8 any information.
- 9 Q. Yes, and he was in charge? He was the one in charge.
- 10 A. Yes. We didn't go to the police.
- 11 Q. When you were working as a Crown in the -- in the 1960's, was
12 your experience -- You said on Friday you got the full -- all
13 the statements when you were working as a Crown?
- 14 A. The police provided me as the Prosecuting officer with all
15 of their information, all their statements.
- 16 Q. Now when you say "all their information", what else did they
17 give you? Was it occurrence reports?
- 18 A. Yes.
- 19 Q. And would they give you oral briefings?
- 20 A. In addition to their statements, they'd say, "We've talked
21 with them, and over and above what you have here, this is
22 what took place."
- 23 Q. There were no formal Crown sheets in those days, I take it.
- 24 A. No.
- 25 Q. At no time in 1971 were you aware of any mental difficulties

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1 on the part of John Pratico?

2 A. That's correct.

3 Q. When you were called out to the hallway to see John Pratico,
4 was it Donald Marshall, Senior, that called you out?

5 A. I'm sorry, I didn't -- When I was called to the hallway?

6 Q. Yes. To see John Pratico, who was it that called you out?

7 A. One of the court attendants.

8 Q. Not Donald Marshall, Senior?

9 A. No.

10 Q. Commission Counsel spent some time with you on your under-
11 standing of His Lordship's ruling about Mr. Pratico's
12 previous inconsistent statement and just to clarify for my
13 own mind, your understanding of that was that the Judge would
14 not allow you to pursue why John Pratico had given a different
15 statement.

16 A. My recollection and understanding of the Judge's ruling is this:
17 First of all, the basic basis was that I was examining Pratico
18 on a conversation he had with me in the presence of others
19 in the hall which was very material to the case.

20 Q. Certainly.

21 A. And I wanted to go through the entire conversation that took
22 place. Mr. Justice Dubinsky took the view that I could only
23 be permitted to cross-examine this particular witness or
24 introduce the evidence on the basis that I was shown that he
25 had made an inconsistent statement prior to my examination

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1 -- that cross-examination. And I got permitted to ask the
2 question if he had made a certain statement in the presence
3 of the Sheriff, the Crown Prosecutor, and Detective Sergeant
4 MacIntyre. He felt that that was as far as I could go and
5 that was his -- as I understand his ruling, that's as far
6 as I could go.

7 Q. I see. Do you have any independent recollection today of
8 the Preliminary Inquiry?

9 A. No, not -- nothing other than what I've been -- I asked to see
10 the evidence and I had an opportunity of reading it about
11 two months ago, portions of it. I wanted to check and see
12 what -- whether I had examined -- what took place with Pratico
13 and some of the witnesses. I don't have a firm recollection.
14 All throughout this Hearing, I'm giving you my best recollection
15 -- all the counsel my best recollection of the events as to --

16 Q. I'd like you to turn to page 57 in Volume 1 if you would.
17 This is during the cross-examination of Doctor Virick who
18 is testifying as to putting some stitches in Donald Marshall,
19 Junior's arm. At about line 15 on page 57:

20 Q. Doctor, was there anything at all about
21 this wound that would interest you, that
would not be self-inflicted?

22 Where did that first -- Where did the idea of self-inflicted
23 wound first come from?

24 A. I'm not clear now in my mind from where the origin of it,
25 whether it arose out of examination of a previous witness or

1 not. I can't tell you now.

2 Q. But my concern and --

3 A. I'm not the cross-examiner. It's Mr. Rosenblum as I recall
4 it.

5 Q. That is correct.

6 A. However, notwithstanding that, I don't have any good recollec-
7 tion of the basis of it.

8 Q. It is my understanding from perusing the transcript of the
9 Preliminary and the trial that this is the first time that
10 that is mentioned, and it's mentioned by Mr. Rosenblum, but
11 I take it you have no further recollection.

12 A. Of why he asked the question but I can see it. It's going to
13 be brought up anyhow. I would think it'd be brought up because
14 that was our -- one of the things that we hoped to introduce
15 that Marshall himself attempted to thwart the stabbing of
16 himself and he was -- his arm was cut and as a result of it
17 being cut, this was supporting Marshall's statement to Chant
18 when he met him: "Look, look, my buddy's laying there badly
19 stabbed and I -- I was -- they stabbed me, too."

20 Q. Something of a self-defense argument or defense of others?
21 Defense of others or self-defense, is that --

22 A. Yes.

23 Q. In light of the two eyewitnesses that testified at trial, I
24 take it you and Mr. Rosenblum felt you had no choice but to
25 put Donald Marshall on the stand?

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- 1 A. It took some time. It was a difficult decision to make but
2 we felt that it would be in his best interests if he were
3 called to explain what took place.
- 4 Q. Now other than being a bad witness as you've described Friday,
5 did you and Mr. Rosenblum have any other difficulties with
6 Donald Marshall during the course of representing him?
- 7 A. No. None whatever that I can recall.
- 8 Q. Are you aware of whether you asked him to dress in a certain
9 way at the trial?
- 10 A. I'm sorry, I didn't get that.
- 11 Q. Are you aware -- Do you recall whether you asked him to dress
12 in a certain way at the trial?
- 13 A. I don't understand that either. I'm sorry. Maybe I'm having
14 difficulty --
- 15 Q. Did you suggest that he show up in a shirt and tie?
- 16 A. Oh, about a shirt and tie. Well, I didn't. I didn't talk to
17 him that way. Maybe Rosenblum did. I don't --
- 18 Q. Would you meet with Donald Marshall regularly during the trial
19 to discuss how it was going and what points might be brought
20 up on cross-examination?
- 21 A. Yes. Yes, we would.
- 22 Q. When was that? At the end of the day? At lunch break?
- 23 A. At the courtroom before he would leave, when he'd come in,
24 during the recesses, different times.
- 25 Q. Did he provide you any assistance during the actual conduct of

1 the trial by passing you notes?

2 A. Not during the trial. No. No, there were no notes passed from
3 him to us. To me anyhow --

4 Q. Would he lean --

5 A. -- and I don't recall --

6 Q. Would he lean forward with oral comments? Would he lean forward
7 and give oral comments to you?

8 A. No. No, sir.

9 MR. MURRAY:

10 I have nothing further. Thank you, Mr. Khattar.

11 BY MR. BARRETT:

12 Q. Yes, Mr. Khattar, my name is David Barrett and I represent the
13 Estate of Donald C. MacNeil. I've just several questions for
14 you. You've testified to some length as to the Crown
15 procedure involving defense requesting information from the
16 Crown. Just to clarify it, you never expressly were advised
17 by Mr. MacNeil not to go near those witnesses?

18 A. That's correct.

19 Q. And --

20 A. In fact, I did go to one of the witnesses. I mentioned I did
21 interview one of the witnesses. You may not recall it. I
22 said I had a subpoena --

23 Q. Oh, that's correct but in this particular case, you were
24 never --

25 A. Yes, that's right.

SIMON J. KHATTAR, Q.C., by Mr. Barrett

- 1 Q. And just one other, during the course of the trial, perusing
2 both the preliminary and the trial transcripts, the issue
3 of threats to both Pratico and Chant arose during the course
4 of the trial.
- 5 A. Not during the preliminary of which I'm aware. There -- It
6 may have happened but I don't recall any in the preliminary.
- 7 Q. In the course of the trial though?
- 8 A. In the trial, yes, but not at the preliminary.
- 9 Q. And during the trial both you and Mr. Rosenblum appeared
10 hampered in questioning both Chant and Pratico about these
11 previous inconsistent statements due to threats that may
12 have been made to these witnesses?
- 13 A. In the course -- No, in the course of cross-examination they
14 were asked about threats, not by me. I think Mr. Rosenblum
15 asked those questions. I don't recall asking Pratico whether
16 he was threatened by me -- by anybody.
- 17 Q. The course though -- In the course of the cross-examination
18 and direct examination of Mr. Pratico particularly when
19 his story changed, the issue of threats against him arose
20 at that time.
- 21 A. That came in somebody's examination. In fact it came from
22 Mr. MacNeil.
- 23 Q. But what I'm suggesting to you, if you refer then to volume
24 one, page 151. I believe Ms. Derrick has indicated this
25 evidence to you and what this is is Mr. Rosenblum's cross-

1 examination of Maynard Chant. If you refer to the bottom
2 of that page he says:

3 See, I told them a story that wasn't true.

4 A. Yes.

5 Q. And on the next page in cross-examination Mr. Rosenblum says:

6 Oh, I'm coming to that. When did you tell this
7 untruthful story? When did you tell them that?

8 The court then interjects and Mr. Rosenblum appears to go
9 on to find out when they had given -- when Mr. Chant had
10 given that previous inconsistent statement and if you refer
11 then to 152 over to 153 -- perhaps if you want a moment to read
12 it but my question is: Mr. Rosenblum at no time asked
13 specifically Mr. Chant why he gave an untrue statement to
14 the police.

15 A. Yes.

16 Q. Mr. MacNeil at line 20 in redirect says:

17 You told my learned friend in your evidence that
18 you told the police an untrue story. Why did
19 you tell them an untrue story?

20 The answer to that is:

21 Because I was scared.

22 At that point Mr. Rosenblum interjects and says that he
23 doesn't agree with the fact that Crown at that point can
24 go into why he was scared.

25 A. Let me remind you, you asked me if we had, in the evidence,
whether we made reference to being threatened and I said to

1 you that "I don't recall." I didn't. And then you gave me
2 this evidence. Obviously it was not Mr. Rosenblum either.
3 It was Mr. MacNeil who talks about threatening.

4 A. No, but obviously when he said he was scared, at that point
5 he could very well have been scared of the police in taking
6 the statement from him. That's why he gave the false
7 statement. And my question is that Mr. Rosenblum didn't
8 pursue that any further?

9 A. That is right, yes. It appears that Mr. Rosenblum took
10 the ruling that the Judge will not permit you to question
11 what's in the man's mind.

12 Q. Yes, and I understand that the Court, just to clarify that,
13 the Court would not allow Mr. MacNeil either to pursue why --

14 A. That's right. Yes, both.

15 Q. -- why Chant was scared the day that he gave this statement,
16 the first statement to the police. Did you or Mr. Rosenblum
17 ever consider calling as witnesses either Tom Christmas,
18 Artie Paul or Donald Marshall Senior to refute any allegations
19 as to threats against Chant or Pratico?

20 A. I answered that earlier when I indicated that I took Judge
21 Dubinsky's ruling as such that I was not to be permitted
22 any further examination with respect to what Pratico told
23 me in the corridor. I took his ruling that the questions
24 I had put was the end of it.

25 Q. Now, you've also indicated that you did not or you weren't

1 aware that Mr. Christmas had been charged or an Information
2 had been laid against him for threatening Pratico.

3 A. Yes.

4 Q. Had you been aware that Mr. Christmas was in Dorchester
5 Penitentiary and you wished him as a witness, would you be
6 hampered in any way in having him testify in the Marshall
7 trial?

8 A. I would have talked with -- I didn't talk with Christmas
9 incidentally although I used his name in cross-examination
10 of Pratico. And as I recall the information that Christmas
11 had talked to Pratico was given to me by someone else.

12 Q. I understand that.

13 A. Now, I did not consider -- I only kept Christmas in the
14 back of my mind in the event that Pratico should deny that
15 he talked with Christmas. Then I would consider having
16 him. Well, it didn't materialize. Pratico gave him the
17 proper answers with respect to Christmas so there was no
18 thought of calling Christmas for that purpose.

19 Q. But had you wished to call him you would not have been
20 hampered by the fact that he was in Dorchester Penitentiary?

21 A. No, there's -- That should have been no impediment at all.
22 In fact I don't understand why Mr. MacNeil didn't call him
23 when the Judge talked to him. It's a normal -- It's a very
24 common thing to bring them in from the Penitentiary and get
25 them to testify. No difficulty whatsoever in this jurisdiction.

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1 Used very frequently. You bring them back to testify.

2 Q. Now, you've also testified you weren't retained after the
3 conviction of Mr. Marshall? Is that correct?

4 A. That's correct. I was not retained further.

5 Q. And you'd advised that had you been approached about a
6 polygraph examination of Mr. Marshall you would not have
7 allowed him to submit to that?

8 A. That's the view I-- opinion I have.

9 Q. Did you and Mr. Rosenblum together ever discuss the use
10 of the polygraph on Mr. Marshall?

11 A. No. No, sir.

12 Q. So -- And did Mr. Rosenblum express to you his views and
13 concern in respect to the polygraph?

14 A. I don't recall particularly.

15 Q. Just one other area. You've testified as to the conference
16 that occurred between MacNeil, Pratico and others in the
17 Barristers room?

18 A. Yes.

19 Q. Now, like everyone else Donald C. MacNeil must have appeared
20 surprised when -- at this turn of events?

21 A. I'm sorry. Donald?

22 Q. Did Donald C. MacNeil appear surprised when he was called in to
23 the --

24 A. I don't know.

25 Q. -- to the conference room?

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1 A. I don't know. All I know that he has a big frame. He was
2 a big man and after hearing Pratico make these statements
3 that he did to me in the presence of the others --
4 Apparently it was in the back of -- He was thinking of it
5 because he said to him, when he got up, he said: "Did I threaten
6 you? Did I scare you?"

7 Q. Well, obviously --

8 A. That's all I recall about it.

9 Q. But my question then is, and you've answered it partially,
10 is you've described the mannerisms of Mr. MacNeil as being
11 a brisk and being a big man?

12 A. Yes.

13 Q. And would you suggest that this was his normal disposition?
14 Donald C. MacNeil?

15 A. It depends on what the occasion is. I've talked -- He was a
16 very sociable gentleman, Mr. MacNeil, but he was a Jekyll and
17 Hyde insofar as sociability and court-- a court man.

18 COMMISSIONER EVANS:

19 Did you get an answer to your question?

20 MR. BARRETT:

21 Beg your pardon?

22 COMMISSIONER EVANS:

23 Did you get an answer to the question you posed?

24 MR. BARRETT:

25 Well, I'm not certain if I did. I --

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1 BY MR. BARRETT:

2 Q. Actually my question is or I'm suggesting to you that he
3 purposely didn't attempt to intimidate Mr. Pratico. He
4 stood up and asked him, "Did I threaten you?".

5 A. I don't know what was in Mr. Pratico's mind but I had the
6 impression that he scared him when he got up and asked
7 him that question. I don't know what was in Pratico's mind
8 but that's the impression that was on my mind as a result
9 of it.

10 COMMISSIONER EVANS:

11 I thought your question was directed as to whether or not MacNeil
12 appeared surprised at the turn of events of Pratico giving a
13 statement out in the corridor.

14 MR. BARRETT:

15 Yes, I did ask that question. I'm not satisfied --

16 BY MR. BARRETT:

17 Q. Did you answer that question? You're satis --

18 A. There's nothing to indicate that to me and I just -- I don't
19 know what information -- what his facial expression showed.
20 There's nothing I could tell. I couldn't tell if it was -- what
21 his reaction was. He didn't make any comment to indicate that
22 he was surprised.

23 Q. But at that point in time Mr. Pratico then told his story
24 as to that Donald Marshall didn't do it?

25 A. Yes.

1 Q. And at that point in answer to his question, "Did I threaten
2 you?" Mr. Pratico must have indicated --

3 A. He said no.

4 Q. He must have indicated though that he felt threatened in some
5 way. How did that question come up?

6 A. Well, my impression was that he was -- Pratico was saying
7 that he had changed his story and apparently -- I haven't
8 got the exactly recollection but it was something that
9 somebody said to him.

10 Q. Well, he must have said that --

11 A. Well --

12 Q. -- in answer to, "Did I threaten you?" is it save to
13 assume then that Pratico had indicated that he was threatened
14 in some manner?

15 A. Well, it had to either come from Pratico's comments. If
16 it didn't come from Pratico's comments it must have been
17 MacNeil who introduced the word "threatened".

18 Q. But you're not certain where it came from?

19 A. Yes.

20 MR. BARRETT:

21 Those are all my questions.

22 MR. SAUNDERS:

23 Thank you, My Lord.

24 BY MR. SAUNDERS:

25 Q. Mr. Khattar, we know each other?

SIMON J. KHATTAR, Q.C., by Mr. Saunders

- 1 A. We do.
- 2 Q. But for the record my name is Saunders and I'm here on
3 behalf of the Attorney General. Mr. Khattar, I'd like to
4 begin with this area. You knew Mr. Rosenblum for several
5 years as a skilled advocate in all courts, both criminal
6 and civil?
- 7 A. That's right.
- 8 Q. And you described him this morning as having a reputation
9 as being one of the best criminal lawyers in the City of
10 Sydney?
- 11 A. That correct, sir.
- 12 Q. And as I recall the evidence of others, perhaps yourself,
13 Mr. Rosenblum was in practise in Sydney from 1927 until this
14 year?
- 15 A. That's correct, sir.
- 16 Q. And would you agree with me, sir, that he enjoyed a reputation
17 as a vigorous examiner and cross-examiner in court?
- 18 A. He certainly did.
- 19 Q. And --
- 20 A. And merited it.
- 21 Q. And merited it. And tell me, Mr. Khattar, did you have
22 occasion to see Mr. Rosenblum in court representing minority
23 groups in both criminal and civil actions?
- 24 A. Yes, sir.
- 25 Q. And you described him as a friend of yours as well this

1 morning and that it was a privilege for you to serve with
2 him as colleagues on the Marshall case? Correct?

3 A. That's correct.

4 Q. Now, Mr. Khattar there's been some suggestion by a witness
5 name Bernie Francis that Mr. Rosenblum treated Whites differently
6 from Indians, that he was lax when he acted on behalf of
7 Indians and that he just sort of when through the motion
8 when he represented Native people and I wish to refer you
9 to a portion of evidence given last week. And I'm reading
10 from the daily transcript at page 3924. And I quote:

11 Q. Did you have over the course of your time with
12 the Court Worker program experience with Junior
13 Marshall's lawyers, Mr. Khattar and Mr. Rosenblum?

14 A. Yes, during the time that they were defending him.

15 Q. Apart from that?

16 A. Yes, I've had occasion to observe Mr. Rosenblum
17 many times in Court.

18 Q. And did you form any opinion based on seeing
19 Mr. Rosenblum and speaking with him as to whether
20 or not he -- he treated White people any differently
21 than Natives?

22 A. Well, yes, I would say that he was a bit more
23 aggressive when he was defending non-native
24 people. I noticed him to be very lapse --
25 according to the transcript. I suspect the word was lax.

-- when he defended Native people.

Q. And why is that, sir?

A. Well, his tone of voice, his aggressiveness, let's
say, towards witnesses who were against his client,
none of those characteristics appeared when he was
defending Native people. He would ask questions
as if to say, "I'm doing my job sort of thing".

SIMON J. KHATTAR, Q.C., by Mr. Saunders

1 Now, having been referred to that extract of evidence given
2 in this hearing by Mr. Francis, Mr. Khattar, I ask you knowing
3 Mr. Rosenblum as professionally as you did over the years
4 what credence do you place in that comment by Mr. Francis?

5 A. Absolutely none.

6 Q. Thank you.

7 A. Mr. Rosenblum like most lawyers wanted to win. In every
8 case of which I have knowledge in which Rosenblum was involved
9 he wanted to win those cases. It mattered not what the
10 ethnic origin of any of the accused. He did as strongly for
11 them as he did for anyone else.

12 Q. Thank you, Mr. Khattar. You are a person of Lebanese origin
13 sir?

14 A. I am, sir.

15 Q. Are you sensitive to racial slurs?

16 A. I am very thick-skinned. I hadn't been through the law
17 school when one of the most -- well, as you say, most able
18 lawyers in Halifax put -- put first question in cross-examination
19 to me was: "Are you a Canadian?" And I told him I was. He
20 pursued his examination when he says, "You weren't born here."
21 I knew what he was getting at. I'm dark-complexioned. He
22 figured that I was of foreign extraction. And I said, "Yes,
23 sir, I was born here." "You weren't educated here?" "Oh, yes sir.
24 I was educated here and in the United States." "And well, you're
25 not.." "You mean my extraction?" And I said yes. And he said,

SIMON J. KHATTAR, Q.C., by Mr. Saunders.

1 "What is your extraction?" I said: "I'm of Lebanese extraction."

2 Quite candidly I don't think he knew what Lebanese meant at
3 the time. He -- There was no further examination on that
4 point. So I -- as I say, I'm very thick-skinned. I think
5 it doesn't affect me at all that I am of Lebanese extraction.

6 Q. Thank you. Were there any improprieties, sir, taken during
7 the Marshall trial either by Crown or by the Court on racial
8 grounds?

9 A. Not during the trial at all.

10 Q. Thank you kindly. Tell me, Mr. Khattar, did Mr. Marshall
11 Junior ever ask you for an interpreter in his case?

12 A. No, sir.

13 Q. Did you consider that Junior Marshall needed one?

14 A. No, sir.

15 Q. Did the people who engaged you and retained Mr. Rosenblum
16 ever suggest that Junior Marshall have a translator?

17 A. No, sir.

18
19
20
21
22 JMR
23
24
25

1 Q. So the Band Council and the Union of Nova Scotia Indians never
2 said to you, "Look, Mr. Khattar, we think Junior Marshall needs
3 a translator, and we do not want you going ahead with the case
4 without one."?

5 A. That's correct. We had no indication that Mr. Marshall had
6 any difficulty with the current -- the English language.

7 Q. Mr. Khattar, did you have any difficulty making yourself under-
8 stood to Junior Marshall?

9 A. No, sir. And I wasn't aware of any difficulty that
10 Mr. Rosenblum had.

11 Q. I want to turn to a third area now, Mr. Khattar, and that is
12 the jury that sat in deliberation of Junior Marshall's case.
13 You described Thursday last when you were first on the stand
14 Junior Marshall was a bad -- a terrible witness. And you
15 said that he had a habit, and you demonstrated it, of putting
16 his fingers and his hands over his mouth as he was testifying.

17 A. Yes.

18 Q. And that demeanor on the part of Junior Marshall caused you
19 and Mr. Rosenblum to give serious reflection and consideration
20 as to whether indeed you would put Mr. Marshall on the stand.
21 Correct?

22 A. Yes, and that -- You could add Mr. MacNeil to that list of
23 people who told him take his hand down from his mouth.

24 Q. And indeed --

25 A. Prosecutor.

- 1 Q. And indeed Mr. Justice Dubinsky.
- 2 A. And Mr. Justice Dubinsky.
- 3 Q. Yes? The record will stand for itself, but in Volume 2 --
- 4 Volumes 1 and 2 at this hearing, Mr. Khattar, the transcript
- 5 of the evidence given in the Marshall matter. And you can see
- 6 that on page 6 of Volume 2 the direct examination begins of
- 7 Mr. Marshall at the top of the page and only in the second
- 8 question, Mr. Rosenblum, who's doing the direct examination
- 9 of Junior Marshall, is telling his client to speak out loud.
- 10 A. On the next --
- 11 Q. Can you see that?
- 12 A. Yes.
- 13 Q. You can see that on line 9?
- 14 A. ...take your hand down.
- 15 Q. Yes. And do you see this at the bottom of the page? He gets
- 16 into it again.
- 17 Take your hand down...
- 18 A. Take your hand down Donnie.
- 19 Q. Yes. The record will show, Mr. Khattar, how many times such
- 20 admonishments were given both by defence counsel and the
- 21 Crown Prosecutor and the Court. Just in a random review of
- 22 the record, I counted no less than fifteen such admonishments.
- 23 You recall such admonishments both by Justice Dubinsky --
- 24 A. Yes.
- 25 Q. -- your colleague, Mr. Rosenblum, and also by Crown Prosecutor

1 MacNeil on crossexamination, sir?

2 A. Yes.

3 Q. All right. And did you consider, sir, that the demeanor of
4 your client on the stand, both on direct and on cross-examina-
5 tion, might well have been a major factor in the determination
6 made by the jury?

7 A. I agree.

8 Q. Thank you. As I understand, the law of this country,
9 Mr. Khattar, it's improper and unlawful to communicate with
10 a member of a jury to find out what went on in that person's
11 mind or those twelve persons' minds during their deliberation,
12 do you agree?

13 A. I know -- It's correct. I know nothing about what views the
14 jurors had. I had no opportunity -- And even if I had the
15 opportunity, I wouldn't talk to them.

16 Q. Yes, sir.

17 A. No one volunteered to give me any information. I've heard
18 no one -- I heard nothing on the jurors attitude at all.

19 Q. And is it not the case, in your experience as a criminal
20 lawyer, sir, that members of the Petit Jury are sworn in by
21 a court official or by the Sheriff to be indifferent between
22 Her Majesty the Sovereign and the accused --

23 A. Yes.

24 Q. -- and to try the case on the evidence therefore presented and
25 render a true verdict --

- 1 A. That's correct.
- 2 Q. -- on the evidence presented?
- 3 A. That's put to them every time.
- 4 Q. Yes, sir. And you're not suggesting that there's any basis
5 for thinking that this decision by this jury was in any way
6 racially oriented?
- 7 A. No, excepting I might use the expression as I was going to
8 school. The intellect is only a speck in the sea of emotions.
9 So we can't control our emotions, and I have that feeling
10 that --
- 11 Q. Indeed --
- 12 A. -- the jurors may be emotionally effected.
- 13 Q. And indeed to wonder is --
- 14 A. Although I have nothing to support it.
- 15 Q. And so to wonder about it today, some seventeen years later,
16 is conjecture only?
- 17 A. That's correct, sir.
- 18 Q. The same sort of conjecture that one might enter into if one
19 were to ask, "Well, did the tattoo on Junior Marshall's arm
20 have some effect on those people who saw it?" That's again
21 speculative, isn't it?
- 22 A. Yes.
- 23 Q. Correct?
- 24 A. Yes, and using hindsight, "Why didn't you call Marshall to the
25 stand? Maybe he would've got acquitted, but you didn't call

1 him."

2 Q. Indeed.

3 A. Judgment --

4 Q. Mr. Khattar, I've heard it suggested that Mr. Rosenblum some
5 years ago was interviewed on a television program with respect
6 to the Marshall case. Do you have any knowledge of that, sir?
7 An interview given by Mr. Rosenblum to a television network
8 on the conduct of the case?

9 A. No, I'm not aware of it.

10 Q. All right.

11 A. I might've been away. I must've been away. I don't recall it.

12 Q. Had you ever heard that suggested before I mentioned it to you
13 this morning? Have you heard anybody suggest that?

14 A. No, that's the first I've heard of it.

15 Q. Thank you. I turn now, Mr. Khattar, to the area of the obliga-
16 tion to seek information from the Crown on the one hand and
17 dealing with so-called Crown witnesses on the other. Did you
18 understand the law to be at the time of the Junior Marshall
19 trial that there was no obligation upon the part of Crown
20 counsel to turn over witness statements to defence counsel
21 prior to a Preliminary hearing?

22 A. That was my impression.

23 Q. Yes. And that it was the discretion of the Crown to decide
24 whether, at that stage; that is, prior to a Preliminary
25 hearing, whether he or she would in fact turn over Crown witness

1 statements to defence counsel.

2 A. That's correct.

3 Q. Was it also your understanding of the law, sir, at the time
4 of the Marshall trial, that at the time of the trial, it was
5 no longer a discretion of Crown counsel but rather discretion
6 of the Trial Judge whether he would order production of
7 witness statements to defence counsel?

8 A. I wasn't aware of that.

9 Q. You were not aware of that? There was a decision of the
10 Supreme Court of Canada called, "Patterson vs. The Queen,"
11 decided in 1970 on point, and I ask: whether you were aware
12 of that decision during the Junior Marshall trial?

13 A. I was not aware of it, sir.

14 Q. Thank you. I suppose, Mr. Khattar, that there would be three
15 ways to seek production of information from Crown counsel.
16 One way would be to merely ask the Crown by phone or in person,
17 "What can you tell me about the Crown's case?" That would
18 be one way, sir?

19 A. Certainly.

20 Q. All right. A second way would be to solicit production of the
21 files so that you could at least read it to see what was in it.
22 That would be a second alternative?

23 A. Correct.

24 Q. And the third and perhaps the most productive would be to ask
25 the Crown Prosecutor to actually deliver to you copies of

- 1 | whatever statements were in the file. Correct?
- 2 | A. That's correct.
- 3 | Q. And as I understand your evidence, neither you nor Mr. Rosenblum
- 4 | made any of those three alternative approaches to the Crown.
- 5 | A. That's correct.
- 6 | Q. Correct?
- 7 | A. I can speak for myself. I'm not aware of Mr. Rosenblum --
- 8 | Q. Yes.
- 9 | A. -- making any approaches.
- 10 | Q. Yes. Now, I understand that you have been Secretary of the
- 11 | Cape Breton Bar Association for, what is it, forty years now?
- 12 | A. Forty years.
- 13 | Q. Yes. Are there meetings throughout the year of the Cape Breton
- 14 | Bar Association?
- 15 | A. There are.
- 16 | Q. Do you know whether there were ever meetings in or about 1970
- 17 | and '71 on issues like production by Crown Prosecutors of
- 18 | information in files or obligations on the part of defence
- 19 | counsel to seek information?
- 20 | A. No, sir, I'm not aware of any.
- 21 | Q. And I take it, sir, you do not purport to speak on behalf of
- 22 | the bar of the City of Sydney but rather just what your own
- 23 | personal experience is?
- 24 | A. That is -- I only speak of my own personal experiences.
- 25 | Q. There may well have been other practitioners in the City of

1 Sydney in 1970 and '71 who would make such overtures of the
2 Crown Prosecutor, Mr. MacNeil?

3 A. Yes, that's correct, and let me qualify my answer as well to
4 indicate that when this matter came up, and we were aware of
5 the Inquiry --

6 Q. Yes.

7 A. -- I discussed that practice again to check my own recollection
8 with Mr. Rosenblum, and he confirmed what I've testified that
9 the practice was not to get these information from the Crown,
10 the prosecutors, or for them to supply the information to us.

11 Q. But there was no legal impediment, to your knowledge --

12 A. I'm not questioning that. I merely wanted to --

13 Q. No. No. My question. There was no legal impediment in your
14 way --

15 A. Only things that you did. Your --

16 Q. -- to stop you from at least asking Mr. MacNeil --

17 A. That's right.

18 Q. -- what was in his file and what was the Crown's case all
19 about. Correct?

20 A. Well, Mr. Rosenblum and my practice was not to ask them.

21 Q. Thank you. And you said last day, I recall, sir, that even as
22 a Crown, you did not take umbrage with someone contacting
23 witnesses who might be described as Crown witnesses. You were
24 not offended by defence counsel --

25 A. That's right.

1 -- approaching people who might be described as Crown witnesses.

2 You did not?

3 A. That's right.

4 Q. All right. And you agreed with his Lordship, Mr. Justice
5 Evans, that there's no property in a witness.

6 A. That's right, I --

7 Q. And you had that understanding in 1971 at the time of this
8 case?

9 A. That is correct.

10 Q. Yes? And you knew where Pratico lived, did you?

11 A. No.

12 Q. Well, when you gave evidence --

13 A. Other than what he had testified. I don't --

14 Q. Sorry?

15 A. I don't recall now that I knew where Pratico lives. I knew
16 he lived in Sydney, and I think other than the reference that
17 he may have made at the Preliminary of it, I would not have
18 any knowledge --

19 Q. Yes.

20 A. -- his residence.

21 Q. My recollection of the evidence given at the Preliminary hear-
22 ing is that he was asked by the Crown on direct what his
23 address was in Sydney, and he gave specific address so --

24 A. Yes.

25 Q. If that is so, then you certainly knew it from that point.

- 1 | A. Certainly.
- 2 | Q. Yes. And you would also know where Patricia Harriss resided
3 | at the time?
- 4 | A. Yes.
- 5 | Q. And you would know where Maynard Chant resided at the time?
- 6 | A. Yes. Louisbourg, yes.
- 7 | Q. Did you ever give consideration, sir, to contacting Maynard
8 | Chant or his parents to see whether you could speak to him
9 | between the Preliminary hearing and the trial?
- 10 | A. No, sir.
- 11 | Q. Did you ever give consideration to contacting Patricia Harriss
12 | or her mother to see if you could talk to her between Preliminary
13 | and trial?
- 14 | A. No, I'm not sure whether Mr. Rosenblum and I discussed those
15 | questions that you put. But I did not give any consideration
16 | to contacting them.
- 17 | Q. Yes.
- 18 | A. You're correct there.
- 19 | Q. Is it a correct summary to say that you were relying completely
20 | upon Mr. Marshall or his friends to supply you with information
21 | with which you could conduct his defence?
- 22 | A. That is correct.
- 23 | Q. And you embarked on no independent investigation yourself?
- 24 | A. That's correct. There was no independent investigation.
- 25 | Q. Did you know, sir, that Tom Christmas was trying to juggle his

1 offences; that is to say, whatever sentence he might get on
2 a break and enter as compared to whatever sentence he might on
3 an obstruction of justice charge, so that he could be present,
4 so he thought, to be a witness on behalf of Junior Marshall?

5 A. I was not aware of Christmas's problems with the law at all.

6 Q. And you didn't know --

7 A. Other than the reference that I made earlier that he would be
8 a witness to confirm that he spoke with Pratico.

9 Q. Yes.

10 A. That's it.

11 Q. Yes. But did you know that he expected to be called as a
12 witness on behalf of the accused, Junior Marshall?

13 A. No, I did not know that.

14 Q. Thank you. Would you agree with me, sir, given your experience
15 as defence counsel, that at times a defence counsel's approach
16 will be different in terms of organizing witnesses, cross-
17 examining witnesses, calling witnesses, dealing with your own
18 client, if your perception is that the client is innocent as
19 opposed to the perception being that the client may have done
20 it?

21 A. That's -- I find that difficult to answer.

22 Q. Let me be more specific.

23 A. I think every case and my -- arrange my strategy not on the
24 basis, "I'm going in now. I've got a guilty client here; so
25 I'll have to go it differently." I don't proceed on that basis

1 at all.

2 Q. Yes. I quite understand that, that --

3 A. And I don't govern my --

4 Q. -- the guilt or innocence --

5 A. -- treatment of witnesses on that basis.

6 Q. Sorry, I didn't mean to interrupt. I quite understand that,
7 that the decision as to guilt or innocence is for another --

8 A. The Court, yeh.

9 Q. -- tribunal and not yourself to decide as defence counsel. But
10 I put it to you, sir, as a question, Does not that perception
11 of defence counsel, whether the client may be guilty or not
12 guilty -- Could that have an effect on the way you explore
13 on cross-examination the witnesses' stories? For example,
14 because it may then permit you when you put your own accused on
15 the stand to have whatever he says verified because of the
16 evidence you've adduced from the previous witnesses?

17 A. No, I'm afraid I don't agree with that.

18 Q. All right.

19 A. I don't proceed on that basis at all. I take the case and I
20 consider what is the best sequence to establish my client's
21 innocence, and I -- The factor of whether I feel that he's
22 guilty or not guilty is not -- does not enter into the picture.

23 Q. Fine.

24 A. That's my personal method of doing it.

25 Q. So my final question to you on that area was whether or not your

1 strategy, adopted between yourself and Mr. Rosenblum in defend-
2 ing this case, was affected in any way by your perception as
3 to guilt or innocence?

4 A. No.

5 Q. All right.

6 A. I don't think it was.

7 Q. You indicated, I believe, in answer to a question put to you by
8 either the Chief Justice or Mr. Justice Evans this morning about
9 Maynard Chant and the conflicting stories, and you said that
10 there were two tips to you and Mr. Rosenblum that this guy,
11 Chant, had told two different stories. The first one came
12 with the Statement of Facts and the second one came during some
13 direct examination of Maynard Chant, and it was those two things
14 that tipped you to the fact that Maynard Chant had given two
15 distinct stories.

16 A. Yes.

17 Q. Correct?

18 A. Yes.

19 Q. Yes? Now, I'd like to question you on the Statement of Facts
20 and how in Sydney in 1971 such things were done. How did the
21 Statement of Facts get prepared?

22 A. The prosecuting officer in the practice at that time would pre-
23 pare a Statement of the Facts and present them to the -- pre-
24 sent it to the judge. That -- With that Statement of Facts,
25 the judge would have the basis upon which he can make the Charge

- 1 to the Grand Jury.
- 2 Q. Yes. And you as defence counsel --
- 3 A. As defence counsel, would be present during that period.
- 4 Q. Yes.
- 5 A. During that time.
- 6 Q. You'd want to make a point of being there as the judge gave
7 his direction and instruction to the members of the Grand Jury?
- 8 A. Yes.
- 9 Q. And answer yes?
- 10 A. No, we don't -- We can't -- We don't participate in that part.
- 11 Q. Oh, no. No. No. You misunderstood me. You'd want to be
12 present in the courtroom --
- 13 A. Oh, yes.
- 14 Q. -- when the judge gave his direction and instruction to the
15 members of the Grand Jury?
- 16 A. That's correct.
- 17 Q. And the judge would have before him or her the Statement of
18 Facts as drafted by the Crown.
- 19 A. That's correct.
- 20 Q. Correct? Now, I'm troubled as to whether or not defence counsel
21 would actually get a copy of that. If defence counsel didn't
22 get a --
- 23 A. No, sorry.
- 24 Q. --copy, isn't that a -- Excuse me.
- 25 A. The practice was not to get a copy of it.

1 Q. Wasn't that a unilateral communication between the Crown and
2 the Bench?

3 A. It is.

4 Q. In Truro from whence I come and also in Pictou County, there
5 has always been the practice, at least for the last fifteen or
6 sixteen years, that Crown would give an extra copy of the
7 Statement of Facts to defence counsel who could then weed it
8 as the judge read it to the Grand Jury. Do you have any
9 experience with that process in Sydney, sir?

10 A. I have never had such an experience.

11 Q. Never had that?

12 A. No.

13 Q. All right. There is a significant point made in the --

14 A. Changes.

15 Q. -- Statement of Facts. Yes. And I'll find that if you just
16 bear with me for a moment, please. Do you have Volume 16 on
17 the table, Mr. Khattar? There are two copies of the Statement
18 of Facts --

19 A. No.

20 Q. -- and the one in Volume 1 is illegible at least the place that --

21 A. One, two, and --

22 Q. So I'd like you to have --

23 A. Eight.

24 Q. Volume 16, please, and the clerk will get it for you.

25 A. I have Volume 16.

- 1 Q. Yes, sir. Page 167.
- 2 A. 167?
- 3 Q. Yes.
- 4 A. I have it.
- 5 Q. The Statement of Facts actually begins at the previous page, 166,
6 but I would ask you to turn your attention to the middle portion
7 of page 167, and you'll see the sentence halfway down the page:
- 8 Mr. Chant at first related to the
9 police the story the accused gave
10 him but later advised that he related
the false story because of fear of
the accused.
- 11 You see that, sir?
- 12 A. Yes, I do.
- 13 Q. Yes? That's a pretty significant comment, I suggest, to find
14 its way in a Statement of Facts.
- 15 A. Yes, but bear in mind that the Statement of Facts is a general
16 statement that the Trial Judge is charging the jury with
17 respect to whether a Bill or No Bill is brought forward, and
18 he indicates to them that they'll have an opportunity of
19 calling these witnesses.
- 20 Q. Yes, sir.
- 21 A. And so on. So even though he makes these statements -- I don't
22 know if they'd qualify it so as saying well, "You would hear
23 them yourself, and you know what they're going to establish."
- 24 Q. Well, I'm going to take you there, Mr. Khattar.
- 25 A. Maybe inconsistencies or inaccurate facts.

1 Q. Yeh. I'm going to take you there to the day when you and
2 Mr. Rosenblum were sitting listening to Mr. Justice Dubinsky
3 give his instructions to the members of the Grand Jury.

4 A. Yes.

5 Q. Do you have any recollection, Mr. Khattar, as to whether or not
6 Justice Dubinsky merely used the Statement of Facts as a guide
7 or whether he in fact read it verbatim?

8 A. Well, at that time, not having the Statement of Facts before
9 me, I wouldn't know to from what Mr. Dubinsky was -- or Justice
10 Dubinsky was addressing the Grand Jury.

11 Q. And I --

12 A. I wouldn't know whether he was referring to a document of the
13 type that -- of the Statement of Facts as you referred to on
14 page 166 --

15 Q. Of course. You can't, sir.

16 A. -- or some of his own notes. I wouldn't know.

17 Q. All right. Would you agree that had that statement been read
18 by Mr. Justice Dubinsky, it would've been --

19 A. Yes.

20 Q. -- significant enough for you and Mr. Rosenblum to have noted
21 it?

22 A. It might've been, and if we did, I'm not aware of any situation
23 where counsel for --

24 Q. Yes.

25 A. -- an accused gets up and says, "Look, I don't think the facts

1 are -- I don't think that's correct, My Lord." That's a
2 statement which I don't think would be borne out in --

3 Q. Yes.

4 A. We wouldn't know whether it would be borne out from the Grand --
5 from the witnesses.

6 Q. You see --

7 A. We haven't heard them yet.

8 Q. Yes. There was a page that was referred you to by my previous
9 colleague, Mr. Barrett, and I'll ask you to turn to Volume 1,
10 page 152.

11 A. I have it.

12 Q. Yes. And you'll see just at the bottom of the previous page,
13 Mr. Khattar, Chant's first answer is:

14 A. See, I told them a story that
15 wasn't true.

16 A. Correct.

17 Q. And then you have the answer recorded -- and the question
18 recorded of Mr. Rosenblum's:

19 Q. Oh! I'm coming to that.

20 He doesn't respond, at least to me -- I take it he doesn't
21 respond in a --

22 A. Yes.

23 Q. -- surprised way. He doesn't say, "Pardon me," or "What are
24 you talking about?" He says:

25 ...I'm coming to that.

1 A. Yes.

2 Q. And so when I read that and re-read it, I inferred that there
3 were other things that tipped you and Mr. Rosenblum off, and
4 you indicated today that there was the Statement of Facts and
5 something else that Chant had said on direct --

6 A. Yes.

7 Q. -- which indicated those differences to you.

8 A. Yes.

9 Q. All right. Now, why didn't you, at the trial of Junior Marshall,
10 ask Mr. Justice Dubinsky leave to have produced the different
11 statements of Maynard Chant?

12 A. Number one, I was not quesitoning Maynard Chant; so that
13 question should properly be directed to Mr. Rosenblum, but
14 your're asking me as associate counsellor or co-defence counsel
15 why I didn't. I left Chant entirely in the hands of
16 Mr. Rosenblum, and I must have had the opinion that we couldn't
17 go any further than Rosenblum had gone. That he would not be
18 able to get anything further than he had already. You're
19 asking why we didn't ask him for a statement -- a copy of the
20 statement?

21 Q. Yes.

22 A. First of all, I wasn't aware of that case to which you referred --

23 Q. You were not?

24 A. -- for one.

25 Q. All right.

SIMON J. KHATTAR, Q.C., by Mr. Saunders

- 1 A. Number two, it was not my problem at that time. Mr. Rosenblum
2 was handling Mr. Chant.
- 3 Q. All right. Do you recall any discussions with Mr. Rosenblum
4 during the course of the trial as to whether you would make
5 application to the Court for production of these Crown witness
6 statements?
- 7 A. No, I don't recall any such thing.
- 8 Q. Did you make any efforts, sir, to ascertain the whereabouts of
9 John Pratico from June, 1971, until November?
- 10 A. I can only repeat what I told you before. The information we
11 got on the witnesses came to us from the Indian community and
12 anyone to which -- to whom Mr. Marshall had referred. Actually,
13 Marshall gave us very little information. He had the others
14 give it to us.
- 15 Q. Yes. Did you though give any instructions to Junior Marshall's
16 friends to find for you everything they could about John
17 Pratico and his whereabouts?
- 18 A. No, we were merely concerned about the events of that evening.
- 19 Q. Did you give --
- 20 A. Only.
- 21 Q. And so you gave no instruction to other individuals to find
22 out what they could?
- 23 A. To find out what did this fellow do for a living and where
24 does work and so -- none of those questions.
- 25 Q. Or the fact that he had been in a psychiatric institute --

1 | A. No knowledge.

2 | Q. -- for some months?

3 | A. No knowledge of that.

4 | Q. You had no knowledge of that?

5 | A. None whatsoever.

6 | Q. And made no inquiries or directed inquiries about that?

7 | A. On that basis at all.

8 | Q. And did you give any --

9 | A. Nothing to lead us to indicate -- nothing that we had received
10 | in the information given to us which would warrant further
11 | investigation as to what this fellow was doing.

12 | Q. Yes.

13 | A. Whether he had been a patient or whether he had been receiving
14 | psychiatric help. Nothing of that nature was given to us.
15 | We were concerned in directing out attention to the events of
16 | May, 28th of 1971, when this fatality took place.

17 | Q. Yes. And no one came forward that summer or fall --

18 | A. No one came.

19 | Q. -- to say to you, "Look, do you know where John Pratico's been
20 | these last few months?"?

21 | A. No one came forward prior to the Inquiry, subsequent to the
22 | Preliminary Inquiry, not at the trial or after the trial.

23 | Q. Yes. And similarly, did you give any instructions to any of
24 | Junior Marshall's friends to determine anything about Maynard
25 | Chant from June, '71 to November?

1 A. No.

2 Q. All right. Would you agree with me, Mr. Khattar, that once you
3 and Mr. Rosenblum were appraised of the fact that John Pratico
4 was telling two different stories, you tried to make the most
5 of it you could?

6 A. Right.

7 Q. And I would like you to turn to Volume 2 page 45, please. Do
8 you have that before you, sir?

9 A. Is that Mr. Rosenblum's Charge to the jury?

10 Q. No, this is page -- Rosenblum's Summation to the jury, yes.
11 Mr. Rosenblum's --

12 A. This.

13 Q. Yes. I thought you said Charge, but I think we're saying the
14 same thing. Okay, page 45, Volume 2, and you'll see in the first
15 paragraph where the sentence begins:

16 Now we're going to be asked here
17 today - you're going to be asked
18 here today to take the word of
this drunken man - take his
word!

19 And on it goes. And perhaps if you'd just take a moment, sir,
20 to read the first half of that page where Mr. Rosenblum is
21 giving his address to the jury about John Pratico. And you'll
22 see that, among other things, Mr. Rosenblum addresses the --

23 A. Yes.

24 Q. -- jury on Pratico's turn-around the day before --

25 A. Yes.

1 Q. -- in the court house, telling one story one day, another
2 story another day.

3 A. Yes.

4 Q. And would you agree with me, Mr. Khattar, that the text as
5 recorded at page 45 captures the spirit, the aggressiveness with
6 which Mr. Rosenblum made those assertions to the jury?

7 A. Yes, I do.

8 Q. Thank you. And was it a very spirited attack on the credit of
9 John Pratico?

10 A. It was.

11 Q. And if we turn to page 107 of Volume 2, you'll see that the
12 Court has just concluded its own Charge to the jury, and the
13 jury has withdrawn, and now the Court is asking counsel, both
14 for the Crown and the defence, whether there are any comments
15 on the Charge.

16 A. Yes.

17 Q. Yes. And do you see, according to the record, that Mr. Rosenblum
18 had no suggestions to offer, no criticisms or objections to
19 the Charge of Mr. Justice Dubinsky?

20 A. Correct.

21 Q. Yes. And --

22 A. You realize that --

23 Q. Pardon me?

24 A. We all run into that experience where you're at the court and
25 the judge is finished his Charge, we'll make notes and we're

1 not quite sure -- "Do you have anything to say?" and we may
2 not raise any objections to the Judge's Charge, but you'll
3 agree that we have not deprived our opportunity to do it in
4 the appeal court to find out many things about the Judge's
5 Charge --

6 Q. Yes?

7 A. -- to which we object.

8 Q. Well --

9 A. I merely want to point that out.

10 Q. Well, I -- and I quite agree with that that's a quandary of
11 defence counsel, but we'll get to the Judge's Charge. I'll
12 turn --

13 A. Yes.

14 Q. -- you to it now. It's at page 98, dealing specifically with
15 Pratico. If you would --

16 A. Yes.

17 Q. -- turn back, sir, to page 98.

18 A. Page?

19 Q. Ninety-eight.

20 A. Yes.

21 Q. Do you have that?

22 A. Yes.

23 Q. And about line 14 you see this:

24 ...You saw John L. Pratico on the
25 stand. You heard his testimony
and you saw his demeanor. And as

1 I said before and repeat, it is
2 up to you, you are the judges
3 of the fact and you along must
4 decide the credibility of the
5 witnesses.

6 And Judge Dubinsky says:

7 I may say that he was a nervous
8 witness. That's my opinion. You
9 don't have to accept that he was
10 a nervous witness.

11 So there's no doubt from the record, is there, Mr. Khattar, that
12 his Lordship in his Charge to the jury directed them that they
13 were the sole deciders of credibility as far as witnesses were
14 concerned. Correct?

15 A. Yes.

16 Q. Now, I would ask you to turn to page 131 of the same volume
17 you're in, sir, and the lines are not numbered, but the third
18 paragraph begins:

19 This issue of the conflicting
20 statements...

21 You have that?

22 A. Yes.

23 Q. And it says:

24 This issue of the conflicting
25 statements by Pratico was also
placed fully before the jury
by the trial Judge and the
determination of credibility in
view of this evidence was
expressly left to them.

26 A. Yes.

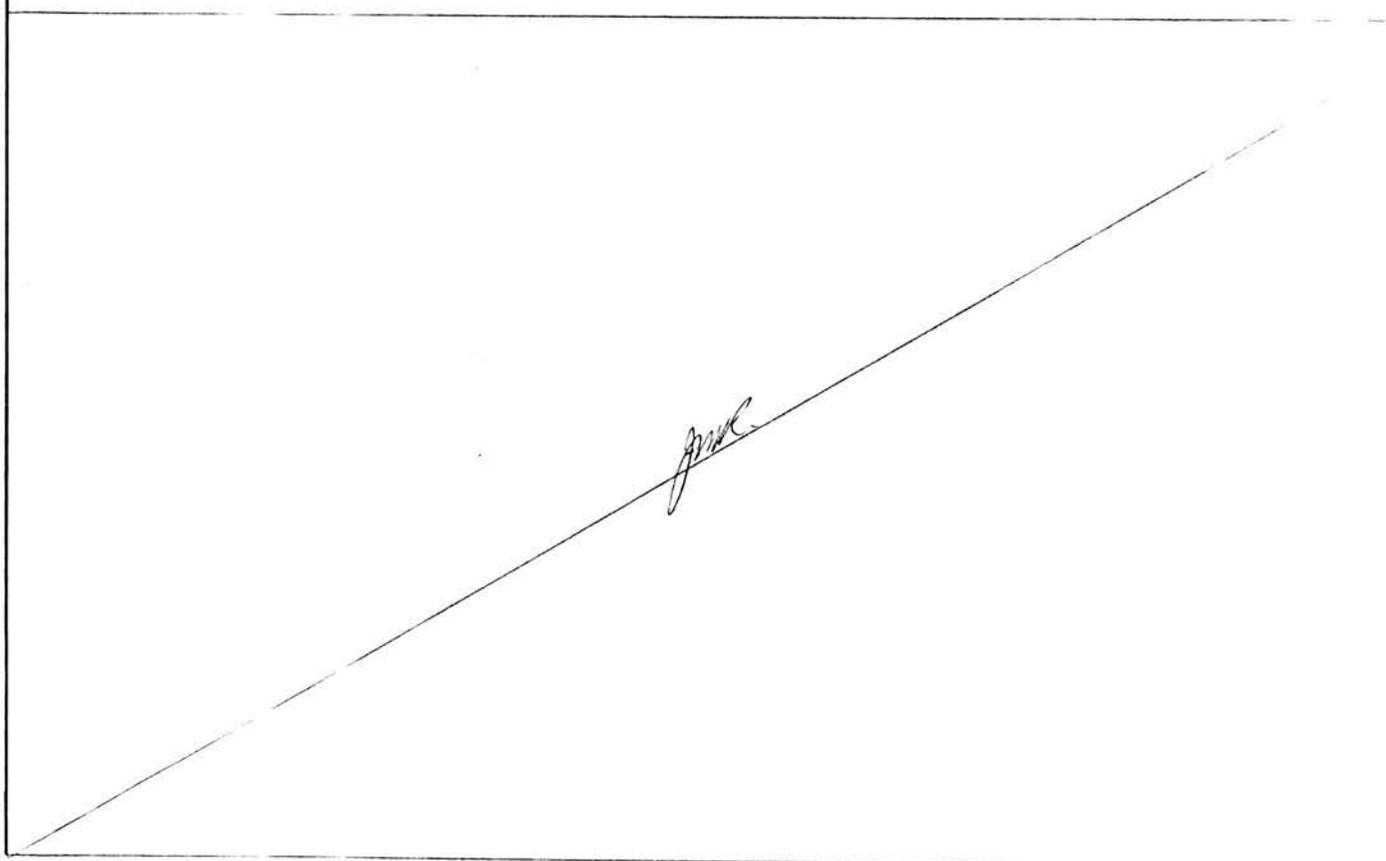
1 Q. Do you see that, sir? All right. So certainly the Court of
2 Appeal, according to their decision, address the issue of
3 credibility, and John Pratico specifically, did they not?

4 A. That's right.

5 Q. Now, finally, sir, I would ask you to turn to page 155 of the
6 same volume, and the third paragraph of that page is a portion
7 of the Crown's Factum, and you'll see that the Crown, who
8 argued the appeal, again dealt in detail with the witness
9 Pratico and the issue of credibility and the fact that that
10 determination was left to the jury to decide. Correct?

11 A. Yes, correct.

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SIMON J. KHATTAR, Q.C., by Mr. Saunders

1 Q. Thank you. I'll just be one moment, Mr. Khattar, please.
2 Had Junior Marshall told you about the accosting in the
3 park and what he and allegedly Mr. Seale were about, you
4 would have given instructions to Mr. Marshall's Indian friends
5 to do everything they could to find out who was in the park,
6 whether anybody matched the description given to you by
7 Junior Marshall of the so called assailants?

8 A. Certainly.

9 Q. And you were deprived of that ability --

10 A. I would have gone further that and even told the police that --
11 for them to investigate that possibility.

12 Q. Indeed, and you were deprived of that ability, sir, because
13 you were never told, correct?

14 A. Correct.

15 MR. SAUNDERS:

16 Thanks, Mr. Khattar.

17 BY COMMISSIONER EVANS:

18 Q. Now I have one question for you. I understood you to say that
19 in 1971 the law in Nova Scotia was that there could be no
20 contact with a juror subsequent to the trial?

21 MR. SAUNDERS:

22 I didn't mean to restrict that, My Lord, to 1970. I understand that
23 that has always been and still is the law that one cannot speak
24 to -- I think there's an offense under the criminal code on that
25 point.

SIMON J. KHATTAR, Q.C., by Mr. Saunders, by Mr. Bissell

1 COMMISSIONER EVANS:

2 It is now, but it certainly was not always so.

3 MR. SAUNDERS:

4 I see. I stand to be corrected.

5 COMMISSIONER EVANS:

6 And I didn't know whether -- I can't recall when it came in but
7 I spent a good part of my early career conversing with jurors to
8 find out what I did wrong after the case. It was a big help by
9 the way.

10 MR. SAUNDERS:

11 Yes. I --

12 COMMISSIONER EVANS:

13 I can't recall when it came in.

14 MR. SAUNDERS:

15 No, I do not, My Lord.

16 THE WITNESS:

17 It's like viewing the -- It's like in -- approaching Crown witnesses.
18 At the stand I took -- I never went near a juror and I never went
19 near the Crown witnesses without them being subpoenaed first.
20 And it's a common thing to do it.

21 COMMISSIONER EVANS:

22 For everybody but the Judge.

23 THE WITNESS:

24 I've learned.

25 BY MR. BISSELL:

Q. Mr. Khattar, sir, my name is Jim Bissell, and I represent the

1 R.C.M.P., and I just have a couple of very brief questions for
2 you. I've heard considerable evidence that Mr. Rosenblum enjoyed
3 a reputation as a skilled and thorough cross-examiner and a
4 skilled and thorough Defence Counsel. Is that correct?

5 A. That is, sir, correct, sir.

6 Q. And that's a reputation that you feel that was a deserved
7 reputation. Is that correct?

8 A. Well merited.

9 Q. And is it also fair to say that that is a reputation that he
10 enjoyed among the police community in the Sydney and Cape
11 Breton area?

12 A. I can't speak for the police but I would expect that to
13 be so, but I -- as I said I can't speak for the police.

14 Q. Well, you worked with the police closely as a Crown Prosecutor
15 for a number of years?

16 A. Those with whom I had made contact thought highly of him.

17 Q. Yes, and it's also fair to say that in 1971 you too were a
18 senior member of the Criminal Bar in Cape Breton as well?

19 A. That is correct.

20 Q. And you had developed a rapport with -- with the police
21 community in your years prior to that as a prosecutor as well?

22 A. That's correct.

23 Q. And if I could just switch to the subject of the Grand Jury for
24 a moment. It was the practice that I understand before Grand
25 Juries that neither the Crown nor any police were present in the

SIMON J. KHATTAR, Q.C., by Mr. Bissell, by Commissioner Evans,
by Mr. Chairman

1 Grand Jury room when witnesses were giving evidence unless
2 they were called in to give evidence to the Grand Juries?

3 A. That's correct.

4 Q. Is that correct? Do you know whether or not Mr. Chant or
5 Mr. Pratico were called in by the Grand Jury to give evidence?

6 A. I believe they were called in. I don't have a firm recollection
7 but I would assume that these witnesses, they're ticked off by
8 the Crown Prosecutor's documents indicating which ones were
9 called and I believe their names were ticked off as being
10 called.

11 Q. And if they were called there would not have been a police
12 officer present or the Crown Prosecutor present at that
13 time?

14 A. No, only the Grand Jurors and themselves were there.

15 MR. BISSELL:

16 Thank you. Those are all the questions that I have.

17 BY COMMISSIONER EVANS:

18 Q. There would be no Crown Prosecutor at any time?

19 A. In the Grand Jury room.

20 MR. BISSELL:

21 Not in the Grand Jury room.

22 BY COMMISSIONER EVANS:

23 Q. Who directed the traffic in there, the foreman of the --

24 A. The foreman --

25 BY MR. CHAIRMAN:

Q. That'd be outside?

SIMON J. KHATTAR, Q.C., by Mr. Chairman, by Mr. Ross

1 A. Yeh, the Sheriff's not inside either.

2 Q. The practice in other jurisdictions I believe was that the
3 Crown Prosecutor would be in -- would attend before the
4 Crown -- the Grand Jury?

5 MR. BISSELL:

6 My understanding is that that was not the practice in Nova Scotia.

7 THE WITNESS:

8 I can only speak to the practice in Nova Scotia during my tenure
9 so to speak.

10 MR. CHAIRMAN:

11 Nova Scotia was the last province to abandon the Grand Jury concept,
12 wasn't it?

13 THE WITNESS:

14 Is that right?

15 BY MR. ROSS:

16 Q. Mr. Khattar, my name is Anthony Ross and I've got just one or
17 two questions for you. In discussing the circumstances of
18 the events of May the 28th, 1971, with Mr. Marshall I take it
19 that he gave you the impression that he, Junior Marshall, and
20 Sandy Seale were friends?

21 A. That Junior Marshall and I were friends?

22 Q. And Sandy Seale. That Junior --

23 A. Yes, I got that impression.

24 Q. I see, and this impression was based on information given to
25 you by Junior Marshall I take it?

SIMON J. KHATTAR, Q.C., by Mr. Ross

- 1 A. That's correct.
- 2 Q. Did you ever follow this up to find out whether, in fact,
3 these people were friends?
- 4 A. No.
- 5 Q. The information before this Commission to date has been that
6 there's been very little contact between Junior Marshall and
7 Sandy Seale -- and Sandy Seale, and nothing really to suggest
8 that they were friends. Would you find that surprising based
9 on the information given to you?
- 10 A. I don't know what effect it would have. I would have to find
11 out whether there was any differences between them even during
12 their period of friendship.
- 13 Q. I see. Now tell me, you didn't do any background work. You just
14 accepted as facts that they were friends and moved forward from there.
- 15 A. That is correct, sir.
- 16 Q. Yes, and in your discussions with Junior Marshall, did he ever
17 indicate to you that these people who had stabbed Sandy Seale
18 had taken -- got away in a Volkswagen automobile?
- 19 A. I don't think. No, I don't recall him telling me that.
- 20 Q. You don't recall that at all?
- 21 A. Not in the --
- 22 Q. Another thing is this robbery theory that they were in the
23 park intent on rolling somebody or for the purpose of a
24 robbery, was that brought to your attention in 1971?
- 25 A. No, sir. No, sir.

SIMON J. KHATTAR, Q.C., by Mr. Ross

1 Q. When was the first time that the robbery theory was brought to
2 your attention?

3 A. In the reinvestigation of the Marshall conviction that's when
4 that first came out.

5 Q. In the 1980's?

6 A. The first knowledge I ever had of it.

7 Q. And that would be in the 1980's?

8 A. I think in around 1981, '82.

9 Q. Precisely. And as far as Donald Marshall protesting all the
10 time his innocence as far as the criminal activity is concerned,
11 didn't you find it particularly surprising that your client
12 did not protest his innocence to you subsequent to conviction
13 until you heard about it in the 1980's?

14 A. That's right.

15 Q. Now I'll ask you just a few broad questions with respect to your
16 practice in the Sydney area as it addressed Black people,
17 Mr. Khattar. Now when you acted as a Prosecutor I take it you
18 never came across the name Sandy Seale, did you, as to the
19 best of your recollection?

20 A. No, sir.

21 Q. Not as an accused, not as a witness?

22 A. That's correct.

23 Q. And I take it that even as Defence Counsel you had at no time
24 defended Sandy Seale in any form of criminal activity?

25 A. That's correct.

SIMON J. KHATTAR, Q.C., by Mr. Ross, by Mr. Nicholas

1 Q. And tell me further is it fairly true that -- is it a true
2 statement that, in fact, you prosecuted very few Black people?

3 A. That is correct too.

4 Q. And is it also true that as a Defence Counsel you defended very
5 few Black people?

6 A. That is correct.

7 Q. And is it also fairly true to the best of your recollection,
8 having lived in the Sydney area, that there is no-- that for all
9 intents and purposes, Black people have very little involvement
10 with the criminal aspects of the law?

11 A. From my experience that's a correct statement.

12 MR. ROSS:

13 Thank you very much, Mr. Khattar.

14 MR. CHAIRMAN:

15 Mr. Nicholas.

16 BY MR. NICHOLAS:

17 Q. Yes, Mr. Khattar, my name is Graydon Nicholas and I'm
18 representing the Union of Nova Scotia Indians, their interest
19 in this Inquiry. And I wanted to ask you a few questions.
20 You have related to Lordships that you did represent Indians
21 on other cases and I'm wondering what -- what where the nature
22 of these charges that you defended Indians?

23 A. I represented one -- Did you say Black or Indians?

24 Q. Pardon?

25 A. What did you -- What was your question?

SIMON J. KHATTAR, Q.C., by Mr. Nicholas

1 Q. No, what were the nature of the charges when you defended the
2 Indians?

3 A. The Indians. I only defended one particular Indian of -- in
4 a major -- in a major crime or a major charge against him.
5 It involved a charge of murder when some White people, if I
6 may use the expression, went to the Reservation and were warned
7 to get off the Reservation and as a result of not obeying the
8 request to stay off, they came back and got involved in a fight
9 and one of the fellows died as a result of the fight. The
10 Indian was charged with murder. That's the only major case that
11 I can recall and the others were very minor matters.

12 Q. And on that occasion did you use the one that you were defending
13 as a witness in that particular trial?

14 A. Yes, I did.

15 Q. And how would you compare the characteristics of that witness
16 in comparison to what you've described in the case of Junior
17 Marshall as far as mannerisms or the method of speech or --

18 A. This gentleman who was charged didn't have any of the mannerisms
19 unfortunately Marshall had. He was a good witness and he was
20 obviously not too well informed in English but spoke well enough
21 to be understood and didn't need an -- didn't need an interpreter
22 and apparently he convinced the jury that he was not guilty of
23 murder.

24 Q. And what -- at what age was that accused in that first instance?
25 How old was the defendant?

SIMON J. KHATTAR, Q.C., by Mr. Nicholas

- 1 A. How was he as a defendant?
- 2 Q. No, how old was the defendant in this particular --
- 3 A. A young man I'd say in his twenties.
- 4 Q. Twenties. Now you said there might have been other minor
5 charges. Would those minor charges have related to either
6 liquor control or motor vehicle?
- 7 A. Minor, liquor, impaired driving.
- 8 Q. Now on other occasions when you were at court say with other
9 counsel, did you witness any other Indians being charged in
10 court and just pleading guilty to charges as they were read?
- 11 A. Not of -- The only -- The only occasions that I can recall are
12 on drunk charges, but other than that I don't recall any
13 particular one entering pleas of guilty to any particular
14 charges, other than as I said, drunkenness.
- 15 Q. And in any statements that would have been made in the courts
16 either by Crown concerning the type of sentence to be given,
17 on those occasions did you hear any references about Indians
18 coming into the City and causing trouble?
- 19 A. No, sir.
- 20 Q. Now I was wondering, you had said in your statement that you
21 did ask Mr. MacNeil or you had made a statement that Mr. MacNeil
22 did not like Indians in one of your statements and I'm wondering,
23 whom did you get that impression from?
- 24 A. Somebody in the family.
- 25 Q. Somebody in the family, yeh.

SIMON J. KHATTAR, Q.C., by Mr. Nicholas

- 1 | A. I'll go -- I can't go any further unless, of course, you press
2 | me. One of my confrere's told me that, "You'll rile up
3 | Donnie MacNeil if you get a chance to say that he doesn't
4 | like Indians, you know". "He doesn't like Indians; there's
5 | been some charge made against him". So I waited for the
6 | opportunity and the opportunity did arise and I said,
7 | "Well, I would expect that from you, you don't like Indians
8 | anyhow". So that was the story.
- 9 | Q. So there were no private comments you had made to Mr. MacNeil
10 | prior to that?
- 11 | A. Not in my presence.
- 12 | Q. Not in your presence. I see. And to your knowledge of the
13 | selection and qualifications of jurors at the time in the laws
14 | of Nova Scotia, was there a provision prohibiting Indians from
15 | being -- serving on a jury or the qualifications of jurors?
- 16 | A. At that time in order to qualify as a juror you had to be on
17 | the -- had to be a rate payer. And most of the Indians lived
18 | on the Reservation. They were not rate payers at all of the
19 | County. And that's my recollection and they were not on the
20 | lists.
- 21 | Q. Was there any concern raised by either Mr. Marshall or his
22 | family about the -- why Indians were not part of the jury?
- 23 | A. Not to me and I don't think any was made to Mr. Rosenblum
24 | to my knowledge.
- 25 | Q. If I may ask perhaps one more question, Mr. Khattar, and it

SIMON J. KHATTAR, Q.C., by Mr. Nicholas

1 relates to your statement you made last week. It's on page 4756.

2 I'm not sure if you have a copy of the --

3 A. No, well, then I wasn't provided with a copy of what I said
4 last week.

5 MR. NICHOLAS:

6 I'm wondering, My Lord, just perhaps --

7 THE WITNESS:

8 Put your question and maybe I can recall it.

9 BY MR. NICHOLAS:

10 Q. Well, the question that was put to you by Counsel was on line eight

11 A. Page?

12 Q. Page, I'm sorry, 4756.

13 A. Yes, sir.

14 Q. Line -- From line eight.

15 A. Eight, yes. "Did you ever have any suspicion during the trial...".

16 Q. Yes. And your response on line eleven, you said, "But I never...".

17 You had some reservation but you never made a comment on it?

18 A. That's right.

19 Q. Now did Mr. Rosenblum also have this same reservation that you
20 had or did you discuss it with him in any way?

21 A. I think he did. Nothing -- I think we both felt, look, we've
22 got a burden on us here. We have a difficult client who
23 can't -- who has these problems in expressing himself without
24 being told to take his hand down from his mouth and doesn't
25 seem to be very definite or clear, and I don't know -- Mr. Rosenblum

1 | didn't say, "I think he's guilty", nor did I ever say that I
2 | think he's guilty but I felt that he had a burden being an
3 | Indian.

4 | MR. NICHOLAS:

5 | I have no further questions, My Lord.

6 | BY MR. MacDONALD:

7 | Q. Just a couple of questions, Mr. Khattar. The final --

8 | A. Who's asking me? Oh, George. I thought it was somebody down
9 | there.

10 | Q. I was -- In response to the question from the Chief Justice,
11 | I think you said that you had checked with some other
12 | practitioners as to what the practice was, their practice in
13 | 1970, '71. Can you identify those people for me, who you would
14 | have checked with?

15 | A. Who? With whom?

16 | Q. Yes.

17 | A. I believe I may have discussed it with Frank Elman, he's here,
18 | is one, and I'm not sure who the others are. I did talk to
19 | someone else to and I can't place my -- I can't place who --

20 | Q. You were directed a couple of times to volume one, page 151.

21 | A. Page?

22 | Q. One five one.

23 | A. Yes.

24 | Q. And particular -- particularly to the question whether the
25 | police had put the story to Chant?

- 1 A. To Chant.
- 2 Q. And I understood you to say, "Well, based on our understanding
3 of the police that wouldn't surprise me". That's what I understood
4 you to say?
- 5 A. Yeh. Yeh.
- 6 Q. Could you elaborate on that for me? What did you mean, based
7 on your understanding of the police?
- 8 A. Well, what I meant was that the police in investigating would
9 say to a fellow now, "Look, weren't you with John Jones when
10 they were on Tupper Street and this fellow was assaulted or
11 somebody was taken", and the fellow would say, "No, I wasn't
12 near the place". "Mike Brown says you were with him that day".
13 "Don't tell me that isn't true". In their investigation these
14 things happened, it was my impression.
- 15 Q. Had you ever seen something like that happen yourself in
16 your practice as prosecutor?
- 17 A. Our clients tell us that.
- 18 Q. Your clients tell you that?
- 19 A. It's all hearsay.
- 20 Q. All right. So it wouldn't surprise you then if the police had
21 suggested to Chant, "Look, someone else saw you there, you must
22 have been there", and that's what you meant--
- 23 A. Yes, that's what I take Mr. Rosenblum was saying when he kept
24 saying to them, "Didn't they tell you it was Donald Marshall",
25 and so on.

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1 Q. Now you also said you were going to rely on questioning at
2 the trial to determine whether Chant and Pratico had given their
3 statements voluntarily and that was in response to the question
4 from Mr. Justice Evans pointing out that you were dealing with
5 juveniles here and the question of volunteering it would be
6 important?

7 A. Yes. Certainly.

8 Q. Do you understand that that was dealt with at the trial, you'd
9 try to determine if these people gave their statements
10 voluntarily?

11 A. Well, if you checked Moe's -- I take it -- that from Mr. Rosenblum's
12 cross-examination that he was attempting to bring out that
13 statements were made and that -- The jury didn't have any
14 knowledge of the statement.

15 Q. Well, let me just take you through Mr. Rosenblum's examination
16 of Chant on the question of those statements.

17 A. Yes.

18 Q. It's page 152, Mr. Khattar.

19 A. Yes.

20 MR. MacDONALD:

21 That's volume one, My Lord.

22 BY MR. MacDONALD:

23 Q. Let's just run through it quickly. Starting around line eleven.
24 Do you see that?

25 A. Yes.

- 1 Q. Q. When did you tell that untrue...
2 ...statement...
3 ...to the police, Maynard?
4 A. Sunday afternoon.
5 Q. When?
6 A. Sunday afternoon.
7 Q. That was in Louisbourg?
8 A. That was in Sydney.
9 That was the answer.
10 Q. Oh, I thought you met them in
11 Louisbourg Sunday?
12 A. I did, but they took me in -
13 ...into Sydney. He goes on to ask how long he was at the
14 police station.
15 A. Six o'clock.
16 Q. How long a period of time - a half
17 hour, ... or two hours?
18 A. Oh, approximately two...
19 Q. And who was questioning you at the
20 police station ...after you would
21 have been speaking to...
22 ...them?
23 A. I don't know...
24 ...his name. "Do you see him here?" "Yes". He ends up pointing out
25 MæIntyre.
Q. Was he one of them?

1 A. Yes.

2 Q. Was that your first contact...

3 A. Yes.

4 Q. Sunday afternoon...

5 A. Well, I met him earlier in the
6 morning but I didn't tell him
the story until the afternoon.

7 Q. It was in the afternoon you had
8 the long talk with him?

9 A. Yes.

10 Q. He was questioning you?

11 A. Yes.

12 Q. And another police officer was
13 questioning you. There was two
of them?

14 A. Yes.

15 Q. And for several hours?

16 A. Yes.

17 Q. That's all...

18 Now that's the only questioning that was put to Chant, I
19 believe dealing with the giving of the statements. Now was it
20 your view that you could tell from that type of questioning
21 whether those statements were given voluntarily or not?

22 A. I don't know.

23 Q. Okay. Thank you. And the last point, the Statement of Facts
24 that Mr. Saunders referred you to, and you said the practice
25 in Sydney was not -- the Defence didn't get a copy of those?

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1 A. That's correct.

2 Q. The evidence of -- of -- to come I believe from Judge Matheson
3 would be that copies -- extra copies of those Statements of
4 Fact, were, in fact, put in the Prothonotary's File. Now when
5 you were Crown Prosecutor did you used to put extra copies in
6 the Prothonotary's File?

7 A. Well, I have an excellent recollection of never providing
8 Counsel for the accused or the Defence with a copy of the
9 Statement of Facts.

10 Q. Okay. I understand.

11 A. I have a further recollection of never having received as
12 Defence Counsel a copy of the statement of facts.

13 Q. Now let me, in light of that, put the question to you: would you
14 put extra copies in the Prothonotary's File?

15 A. No, sir.

16 Q. And have you, yourself, ever gone to the Prothonotary's File
17 to determine if copies are in there?

18 A. No, sir.

19 Q. And for the benefit of those who may not understand, the
20 Prothonotary's File is a public file, is it not?

21 A. Yes.

22 Q. It's available to anyone?

23 A. Yes.

24 MR. MacDONALD:

25 Those are all the questions I have of Mr. Khattar, My Lord.

SIMON J. KHATTAR, Q.C., by Mr. MacDonald

1 MR. MURRAY:

2 Perhaps, My Lord, before Mr. MacDonald sits down he can direct the
3 witness's attention to the one answer that Mr. Chant did give on
4 page 151 of volume one that:

5 A. Police didn't tell me...Marshall
6 did it at all.

7 Here he was re-examining on that point.

8 MR. MacDONALD:

9 Mr. Khattar, My Lord, has been put -- The very question that my
10 friend wants to, has been put to him. He's been read all of 151.

11 MR. CHAIRMAN:

12 What is he talking about?

13 MR. MURRAY:

14 He's talking about the statement at line 31. I had understood that
15 Mr. MacDonald re-examined starting on page 152 and reading the
16 cross-examination commencing on page 152, and I think in fairness
17 to the witness --

18 MR. CHAIRMAN:

19 That line of questioning related to the voluntariness of the statement.

20 MR. MURRAY:

21 That is correct.

22 MR. CHAIRMAN:

23 I don't think that -- And this question was put to him before,
24 read to him.

25 MR. MacDONALD:

Exactly.

SIMON J. KHATTAR, Q.C., by Mr. MacDonald

1 MR. CHAIRMAN:

2 Fine.

3 MR. MacDONALD:

4 My Lord, if I could just -- That's all, Mr. Khattar.

5 THE WITNESS:

6 Thank you.

7 MR. CHAIRMAN:

8 Thank you very much, Mr. Khattar.

9 THE WITNESS:

10 Thank you.

11

12 (WITNESS WITHDREW)

13

14 MR. MacDONALD:

15 We do have a witness, My Lord, that we were asked to recall by

16 Mr. Ross and it was a Mr. Burke who's the probation officer.

17 Mr. Ross wasn't here.

18 MR. CHAIRMAN:

19 All right. Do you want to put him on?

20 MR. MacDONALD:

21 I understand he won't be long and I suggest that we put him on --

22 MR. CHAIRMAN:

23 All right. Good. Thank you.

24

25