

D. LEWIS MATHESON, by Mr. Orsborn

1 INQUIRY RECONVENED: 2:22 p.m.

2 MR. ORSBORN:

3 Next witness, Mr. Chairman, is Judge Lewis Matheson.

4 D. LEWIS MATHESON, being called and duly sworn, testified as  
5 follows:

6 BY MR. ORSBORN:

7 Q. And may we have your full name please, sir?

8 A. Donald Lewis Matheson.

9 Q. And I might have to ask you to speak up, sir, because it's  
10 sometimes a little difficult to hear --

11 A. Donald Lewis Matheson.

12 Q. Thank you, and you're presently a Judge in the Provincial  
13 Court of Nova Scotia, is that correct?

14 A. I am.

15 Q. When were you appointed as a judge, sir?

16 A. In April of 1980.

17 Q. And what position did you hold prior to your appointment to  
18 the bench?

19 A. I was an assistant Crown Prosecutor that -- that was my  
20 position prior to that immediate time.

21 Q. Yes, and how long did you hold that position?

22 A. I was appointed as Prosecutor in January of 1964.

23 Q. So you were Prosecutor from 1964 until 1980?

24 A. That's correct. Well, there was a brief period --

25 Q. Yes.

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1 | A. -- when I wasn't -- it was a matter -- about a month.

2 | Q. Yes, and what geographic area did you have responsibility for  
3 | in those sixteen years?

4 | A. At one time or another I discharged the responsibilities in  
5 | every part of Cape Breton County, I think, where courts were  
6 | held, in the County.

7 | Q. Yes, and I believe I neglected to ask you this, you're  
8 | presently based in Sydney, are you as a Provincial Court  
9 | Judge?

10 | A. My official office is in Port Hawkesbury but I -- I live in  
11 | Sydney and I travel Richmond - Inverness Counties and I conduct  
12 | court in New Waterford once a week.

13 | Q. Prior to 1964, sir, were you in private practice?

14 | A. I was.

15 | Q. How long were you in private practice?

16 | A. From 1959 until 1964 and from 1964 until 1969, I continued  
17 | to carry on my practice in conjunction with the duties as  
18 | assistant Crown Prosecutor.

19 | Q. In those years, from '64 to '69, could you indicate what  
20 | relative percentage of your time would be devoted to your  
21 | practice as opposed to Prosecuting?

22 | A. Well, I think we were officially hired for three and a half  
23 | days a week. We always complained to the Department that  
24 | it took -- took more time than that to fulfill the duties  
25 | but officially three and a half days a week.

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1 Q. As a Prosecutor?

2 A. As a Prosecutor and that's right.

3 Q. And am I correct that you were admitted to the Bar in 1959?

4 A. I was, in December, sir.

5 Q. And could you give the Commission an indication of what your  
6 practice consisted of from '59 to '64 and then from part-time  
7 from '64 to '69?

8 A. Shortly after my admission to the Bar I expected it was in  
9 the new year of 1960 -- well, it was in the new year of 1960,  
10 I just don't remember the date. I opened an office in North  
11 Sydney and conducted a practice on my own until some time  
12 early in 1960 the late Donald Nicholson died. He was a member  
13 of the firm of Nicholson, MacLellan, Burchell and Sullivan.  
14 And Mr. MacLellan was away out of the office as a Member of  
15 Parliament. At the time they needed a man and I went in there  
16 as an associate with them. And I remained there until 1962  
17 when I opened a practice with now Judge Robert Ferguson and  
18 he and I practiced together, I think, until some time in  
19 the year 1964 when he left our office and went with MacIntyre  
20 and Gillis. I continued in practice after that. I was  
21 associated with Russell MacLellan until he went into  
22 politics.

23 Q. And the type of practice, sir, that you were engaged in, did  
24 that include any criminal law?

25 A. Yes, it did.

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1 Q. Could you give an indication as to what extent your practice  
2 consisted of criminal law?

3 A. Well, we -- we were available to defend anybody who would  
4 seek our advice. Most of my experience I -- I would say came  
5 from the practice at that time by way of Legal Aid. The  
6 system was that if a person appeared before the Court who  
7 was without counsel and needed assistance, the Judge would  
8 call upon the Bar Society and it usually turned out that the  
9 junior member of the Bar was assigned the duty of defending  
10 the individual.

11 Q. Okay.

12 A. And it happened in my case that there was -- once I was  
13 admitted to the Bar there was a considerable lapse of time  
14 before the next fellow came along and with the result I  
15 did considerable work in -- in Magistrates Court as it then  
16 was and the Supreme Court.

17 Q. And that's including jury trials?

18 A. Yes.

19 Q. I'm interested, your Honour, in some general information on  
20 the Crown Office and the organization of the Crown Office  
21 as you remember it and as I understand you, you were employed  
22 as an assistant Crown from '64 to '69 following which you were  
23 full-time until 1980?

24 A. That's correct.

25 Q. With the exception of about a month or so?

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- 1 A. Yes.
- 2 Q. How many Prosecutors were there attached to the Crown Office  
3 at any given time and perhaps we can look at, say, 1970, 1971?
- 4 A. Well, let me think. In 1964 there were three, there was the  
5 Crown Prosecutor and two assistants.
- 6 Q. The Crown Prosecutor would be full-time?
- 7 A. No, he -- he was the Chief Prosecutor but no, he maintained a  
8 practice of his own also.
- 9 Q. Yes.
- 10 A. And on reflection I believe, up until -- was it 1969 you  
11 asked me or 1964 or 1971?
- 12 Q. I was thinking particularly the period around '70 to '71?
- 13 A. '70 to '71 -- I think -- I think at that time there were --  
14 there was the Crown Prosecutor and two of us as assistants.
- 15 Q. I see, and during your entire time you were an assistant  
16 Crown Prosecutor?
- 17 A. That's correct.
- 18 Q. And in your experience were there at any given time any more  
19 than three, like the Chief Crown and then two assistants?
- 20 A. Well, around 1971, there were some appointments made and I  
21 believe that there may have been three assistants around  
22 about the time of the Marshall incident. I think there  
23 were three of us, that's three assistants then, plus the  
24 Crown Prosecutor.
- 25 Q. At the time of the Marshall trial, do you know who the other

1 assistants were, do you remember?

2 A. At the time of the Marshall trial, my recollection is that  
3 there would have been myself, Simon MacDonald, now Judge  
4 Simon MacDonald, and David Ryan from the Northside.

5 Q. And at that time in 1971, would you all have been full-time?

6 A. No, 1971 I was a full-time employee of the Department but in  
7 the end of the -- 1969 is mentioned because in 1969 I was  
8 appointed in conjunction with the Prosecution duties, the  
9 responsibility of discharging the Office of Registrar of  
10 Probate so that -- that I was a part-time Prosecutor and  
11 Registrar of Probate.

12 Q. I see, what Crown Prosecutors did you have the opportunity  
13 to work with?

14 A. When I was first appointed it was the late Neil Ferguson.  
15 Following Mr. Ferguson's death, I believe, it was 1966, Mr.  
16 A. O. Gunn was made Chief Prosecutor and I think he continued  
17 in the job for about six months and after Mr. Gunn left the  
18 job the late Donald C. MacNeil was the Crown Prosecutor.

19 Q. Do you know when he took over as Crown Prosecutor?

20 A. It would have been '66 or '67, I'm not exactly sure.

21 Q. And do you know how long he stayed in that position?

22 A. It might have been '70 -- '74 or '75, I don't recall.

23 Q. I see, so would I be correct in saying that from 1966 to  
24 around 1975 you worked with Mr. MacNeil and that you were  
25 part-time for the early years and then full-time for the later  
years?

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- 1 A. Yes, full-time in the sense that I also discharged the Probate  
2 duties.
- 3 Q. Yes. In 1971, sir, where was the Prosecutor's office located?
- 4 A. In the -- in the courthouse building as it now stands.
- 5 Q. I see.
- 6 A. It was the office to the left of the main entrance to the  
7 building; although that's not the front door. The office that  
8 the public uses is what I call the back door and going in  
9 by that door it would be the office on your immediate left.
- 10 Q. Would there be a close working relationship between the  
11 Crown Prosecutor and the assistant Crown Prosecutors to the  
12 extent that each would be aware of at least the major cases  
13 that the others were working on?
- 14 A. Well, those of us that were working as assistants were given  
15 clearly to understand that we were under the direction of  
16 the Chief Prosecutor. And I remember it being explained to  
17 me one time that he was the first among equals.
- 18 Q. Was there any -- I'm sorry.
- 19 A. No, I'm sorry, I had nothing further to say.
- 20 Q. Was there any program in place, again thinking of the 1970-  
21 1971 years, by which Prosecutors were assessed by the  
22 Department of Attorney General?
- 23 A. If there was, I was not aware of it. I hope I did all right  
24 if there was.
- 25 Q. How were the cases assigned to the Prosecutors?

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1 A. We were assigned districts rather than cases. At a given time  
2 I would be responsible to look after the prosecutions arriving  
3 -- arising in either particularly in my own case, the Waterford/  
4 Glace Bay -- it might have been any of these places varying  
5 from time to time. But we would go to court in Glace Bay,  
6 Dominion, New Waterford, Louisbourg, North Sydney, Sydney  
7 Mines and of course, the City of Sydney.

8 Q. In the time during which you were a Prosecutor, could you  
9 explain to the Commission what the -- the relative roles  
10 of the police and the Prosecutors were with respect to the  
11 original laying of charges, where the responsibility would lie for  
12 the laying of the charge?

13 A. I suppose the ultimate responsibility rested with the -- with  
14 the Crown Prosecutor but on -- on a morning that say I went  
15 to New Waterford, I might that morning be presented with  
16 several charges that related to disturbing the peace or  
17 impaired driving or -- and if I may, I would call in relatively  
18 minor charges and I might be confronted with them as a  
19 fait accompli and my job would be to get the facts from  
20 the arresting officer and to present them in court that  
21 was necessary to go ahead that morning. More serious  
22 charges, the police would discuss them with us and if need  
23 be, we would discuss them with the Crown Prosecutor.

24 Q. I see, do you recall any situations in which your opinion  
25 differed from the police as to whether or not a charge should



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1 be laid or should have been laid?

2 A. Oh, I suppose there were disagreements from time to time. I  
3 don't remember. Any time I ever disagreed with the police,  
4 I always gave them a reason and so far as I'm concerned, they  
5 -- they were satisfied with that. I never had -- I don't  
6 recall any particular incident where a charge wouldn't be  
7 followed through.

8 Q. Are you aware or do you remember any situation in which you  
9 had a difference of opinion with your superiors, either the  
10 Crown Prosecutor here or others in the Department of Attorney  
11 General as to whether or not a charge should be laid or should  
12 be proceeded with?

13 A. Not -- nothing serious. We would discuss them. If I thought  
14 the charge should go forward, I would express my views. I  
15 don't recall ever having the feeling that I was right and  
16 they're wrong and a charge going ahead on that basis. No,  
17 sir, I don't recall any -- any -- anything remarkable  
18 happening in that way.

19 Q. Were you ever instructed yourself to either withdraw a charge  
20 or to stay proceedings in any matter?

21 A. That may have happened. I can't recall a specific instance  
22 now unless you can suggest one to me --

23 Q. No, I wasn't there?

24 A. All right, I don't -- again, it's nothing remarkable comes  
25 into my mind in that regard either.

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1 Q. To discuss with you for a moment, Judge Matheson, the -- the  
2 files that would be created and maintained by the Prosecutors  
3 and I'm interested in the major criminal case.

4 A. Yes.

5 Q. Once you have a charge laid in a major case, could you indicate  
6 to the Commission what files, if any, would be created and  
7 maintained by the Prosecuting Officer, please?

8 A. Yes, we would probably have a duplicate of the Information.  
9 The police would come to us and I think, and yes, in all cases  
10 R. C. M. P. and Town Police also. The police officer in charge  
11 of the investigation would keep the -- would keep the main  
12 file. By that I mean, if there was a statement of the accused,  
13 if there was a statement of a witness, if there were pieces  
14 of evidence, he would bring them to the office and we would  
15 review them. Usually when he came, he came prepared with  
16 copies that he could leave with us. We would review them  
17 and when we had done so, the copies would be placed in our  
18 files and the originals and any exhibits would go back with  
19 the officer in charge of the file to the police station from  
20 which he had come.

21 Q. Do I take it from what you said, that you would, in fact,  
22 view the original statements in the police file?

23 A. Yes.

24 Q. And how many police forces would you be working with?

25 A. Well, there was Sydney City Police, the Glace Bay Town Police,

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1 the New Waterford Town Police, the Dominion Town Police, the  
2 Louisbourg Town Police. I believe in the old days and I think  
3 there is still today a detachment of the R. C. M. P. out in  
4 Glace Bay. And at that time there was one also in North  
5 Sydney. I'm not sure just when that went out -- for a while  
6 it was out of existence but we dealt with them. We dealt  
7 with the Town Police in Sydney Mines. We dealt with the  
8 Town Police in North Sydney. The R. C. M. P. detachment in  
9 Sydney, in all aspects of the work that they did.

10 Q. So you dealt then with seven, eight or nine different police  
11 forces or sub-departments?

12 A. Yes, I think I covered them all.

13 Q. Do you remember if there was any difference in the --

14 A. But excuse me, but we also dealt with the C. N. R. Police  
15 when they had a matter that arose in their work.

16 Q. Do you recall if there was any difference in the degree of  
17 disclosure, the type of information that would be provided  
18 to you by the different police forces?

19 A. No, generally speaking, I would say no. Naturally, the  
20 Sydney Police Force had a larger Detective Unit. I think  
21 that -- I think that perhaps we considered that as compared  
22 to some of the Town Units, we perhaps got -- had things in  
23 better shape coming from them than we might have from Sydney  
24 Mines or one of the out-of-town places. But I hasten to  
25 say, that -- that that's a general comment. That I made --

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1 -- I'd make about the Sydney Force, it's not a reflection on  
2 the others. If there was a problem with any of the others,  
3 we simply had the thing investigated further and went one  
4 way or the other.

5 Q. At what stage would you normally first obtain the police file?

6 A. Well, I'd take it you're asking me about a more serious charge  
7 than --

8 Q. Yes.

9 A. -- yeh, well, when the police officer -- we might get it at  
10 a number of stages. If he -- if he felt that he had all the  
11 information that was needed to proceed with the prosecution  
12 he may not have come to us before then.

13 Q. Yes.

14 A. On the other hand, he might have been investigating the matter  
15 and felt that he was on to something and maybe he had enough  
16 and he'd bring it in for us to look at it.

17 Q. Do I understand then that you would have an opportunity to  
18 review the file before the Information was laid on a major  
19 matter?

20 A. Oh, absolutely, yeh. On a major matter we -- we would have  
21 any opportunity to review the file, yes.

22 Q. And would you also be afforded access to additional statements  
23 that would be obtained, if any, after a charge was laid?

24 A. Yes, sir.

25 Q. Would they be brought to you routinely or would you have to  
ask for them?

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1 A. No, they were brought as a matter of routine, so far as I know.  
2 I -- I don't remember having to ask for them.

3 Q. And in your dealings with the Sydney Police Force on a major  
4 matter, would your contact be through the Detective in charge  
5 of the investigation or some other officer?

6 A. Oh, usually with the Detective involved. We may have spoken  
7 to another fellow that we absolutely knew they would be working  
8 very closely with him on the investigation but from the point  
9 of view of responsibility -- to responsibility, it would  
10 usually be with the Detective involved.

11 Q. In addition to statements by the accused and witnesses, would  
12 there be other information that the police would have that  
13 they would make available to you?

14 A. I'm sorry, I missed the first part of your question.

15 Q. Other than statements by (you said) the accused and witnesses,  
16 would there be other information that the police would  
17 provide you with and I'm thinking of documents like their  
18 own occurrence reports and crime reports that had --

19 A. Yes.

20 Q. -- would be made within the statement?

21 A. Yes, this -- this would apply to all cases, but very  
22 frequently when a -- well, let's say an impaired driver, was  
23 charged and had pleaded not-guilty; we would -- we would then  
24 interview the police officer to prepare the prosecution. And  
25 my recollection is that most of the time the officer would

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1 |       come in with his occurrence sheet which I -- which I presume  
2 |       he wrote at the end of shift on the date of the offense and what  
3 |       reported in the occurrence sheet. He'd have that with him  
4 |       plus whatever notes he might have had in his own notebook.  
5 |       And what he would tell us.

6 | Q.   Still talking generally, sir, and we'll get to to the Marshall  
7 |       case a little later. In your experience as a Prosecutor, did  
8 |       you have occasion to prosecute cases, and I'm thinking again  
9 |       of major cases, in which Detective MacIntyre was the  
10 |       investigating officer?

11 | A.   I guess I'm sure of that, sir, yeh.

12 | Q.   Do you remember, sir, the type of disclosure that Detective  
13 |       MacIntyre would make to you as a Prosecuting Officer in  
14 |       respect to the police file?

15 | A.   I never had occasion to think that -- that there was any  
16 |       lack of disclosure from Sergeant MacIntyre.

17 | Q.   And may I ask you the same questions with respect to Detective  
18 |       Urquhart, did you have opportunity to -- to work with him?

19 | A.   Yes, I did. And the same comment could be made about Detective  
20 |       Urquhart.

21 | Q.   Do you recall --

22 | A.   And I make it, yeh.

23 | Q.   Thank you. Do you recall any occasions in your career as a  
24 |       Prosecutor, sir, when you ascertained that police disclosure  
25 |       to you as Crown Counsel was not adequate?

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1 A. Do I recall a case of that happening.

2 Q. Did it ever happen to you?

3 A. I don't recall, no.

4 Q. Did it ever happen to any other Prosecutors in this area, to  
5 your knowledge?

6 A. Not that came to my attention that I would know.

7 MR. CHAIRMAN:

8 You used the word "adequate", Mr. Orsborn, I take it you mean  
9 complete.

10 MR. ORSBORN:

11 Complete, I'm sorry, yes, it would be a better word. "Adequate"  
12 perhaps requires a bit of definition.

13 BY MR. ORSBORN:

14 Q. But are you aware of any situations, occurred to you or to  
15 your knowledge to other Prosecutors, in which disclosure  
16 by the investigating officer to Crown Counsel was not  
17 complete?

18 A. No, in other words, something he knew that he didn't tell  
19 us that he held back, is that what you're --

20 Q. Yes.

21 A. -- yeh, no, I -- I never became aware of that.

22 Q. The statement that he knew existed and you did not see?

23 A. No, if that -- that never happened.

24 Q. Did it ever happen --

25 A. To my knowledge.

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1 Q. -- to any other Crown to your knowledge?

2 A. I never heard of it happening to another Crown member.

3 Q. I'd like to discuss with you, your Honour, the next step in  
4 the chain, if you will, the disclosure by the Crown to  
5 defense. To your knowledge in your time as a -- during your  
6 time as a Prosecutor, was there any general written policy  
7 in place -- policy of the Department of Attorney General, with  
8 respect to disclosure to defense counsel?

9 A. The only written policy of which I'm aware was a letter which  
10 came early in my days as a Prosecutor. A letter written from  
11 the Attorney General, excuse me, from the Attorney General's  
12 Department, it was written by the dir -- the then Director  
13 of Prosecutions and there was a letter of instruction. It  
14 set out general rules to follow and the law that supported  
15 them.

16 Q. Was this a letter to you or was it a general circular?

17 A. Yes, the letter was -- the letter was to me.

18 Q. Do you recall what necessitated the writing of that letter?

19 A. Yes, it was a prosecution that I had done. Do you want me  
20 to go into all the details of -- for you? I prosecuted a  
21 case --

22 Q. We don't need all the details of the prosecution itself.

23 A. -- in which I made I would say, absolute disclosure to the  
24 defense. I did it for the purpose of having read the file  
25 myself and anticipating that we were going to be four or five



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1 days in court resolving the matter, I thought if the defense  
2 counsel read this -- that he would consider the exercise  
3 futile and in the hope of saving five days work, I gave him --  
4 I called the police station, asked them to bring the file.  
5 And they asked me what I wanted it for, I said I was going to  
6 give it to the defense.

7 Q. What police force was involved, sir?

8 A. Sydney.

9 Q. Yes, continue please?

10 A. And I did so. I believe the fellow pleaded guilty and that  
11 was the end of the matter, I thought, but I expect that the  
12 police were concerned that I had gone beyond what I should  
13 have in the way of disclosure. And there was a letter which  
14 came back to me from the then Director of Prosecutions and --

15 Q. Who was that then, sir?

16 A. That would be Mr. Justice Malachi Jones now with the Supreme  
17 Court. But in that letter he -- he laid out the -- the  
18 rules to be followed on disclosure.

19  
20  
21  
22 jmr  
23  
24  
25

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1 Q. Do you recall what those rules were?

2 A. Generally speaking that we were not to withhold information  
3 that -- that the defense should know. That we would  
4 not conceal facts essential to the defense but in the process  
5 of disclosure, and I'm not quoting his letter, it's --

6 Q. I understand.

7 A. -- 17 or 16 years ago but the -- It's longer than that. It's  
8 1964. We were not to disclose facts which might put a witness  
9 in jeopardy and by that I understood that if we knew that  
10 there was a danger that a witness might be interfered with  
11 then we were not to put that witness in jeopardy and I think  
12 there was also some reference to disclosing information  
13 about police informants but I'd have to say too that I don't  
14 recall seeing the file that indicated that to me.

15 Q. Now, you've indicated in this case it was early in your  
16 career you made absolute disclosure, and I understood  
17 you, in effect, turned the complete file over to defense  
18 counsel?

19 A. That's right. Yeh. And I'd say to this day I didn't do  
20 anything. I think I did the right thing.

21 Q. Yes. Did you discuss the -- Did you discuss this matter  
22 of disclosure with the other Crown Prosecutors after this  
23 directive had been received from Mr. Jones at the time?

24 A. Yes. I shared -- I considered it -- that I had been  
25 corrected and I thought they might be interested in. Yes,

1 | they all saw it.

2 | Q. You say you had been corrected. Do I take it that you  
3 | were advised that your absolute disclosure was not found  
4 | in favour?

5 | A. Well, no. No, there was nothing in the letter that was  
6 | personally critical. It -- To -- When one read the letter  
7 | the inference was that you just don't take Crown file  
8 | and pass it out the front door or -- not the front door but  
9 | even to a defense counsel.

10 | Q. If I understand the restrictions that you outlined, they  
11 | were to do with protecting the safety of a witness and also  
12 | police informants. Do I understand you correctly?

13 | A. Yes. I'm not saying that -- that I'm recalling it -- I'm  
14 | not saying that I recall it exhaustively. He may have  
15 | had other cautions in there. It was -- The letter was  
16 | very short. What he attached to it was a brief on the  
17 | issue and made references to cases of the Courts of authority  
18 | on the subject.

19 | Q. In the ensuing years, sir, in your practise as a Prosecutor  
20 | what practise did you follow in terms of disclosure? And let's  
21 | -- let's start with what disclosure did you make, if any,  
22 | of your own initiative to defense counsel?

23 | A. Well, I was always cognizant of that instruction. I never --  
24 | If I had a piece of information that I thought was useful to  
25 | the Crown, I'd let them know about it.

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1 Q. I'm sorry. That you thought was useful to defense?

2 A. Excuse me. To the defense.

3 Q. It's all right.

4 A. I'd let them know about.

5 Q. Of your own initiative?

6 A. Sometimes. Most defense lawyers in the course of preparing  
7 for trial or at the moment before going into Court at least,  
8 you know, would say, "What have you got on this matter?"

9 And I would tell them. I have on occasion been asked,  
10 "Well, what do you mean? Can you see the statement?"

11 And if I felt that the statement could be disclosed within  
12 the admonition I had received early on in my career I would  
13 have done it. Yeh, there was no attempt to try to play games  
14 with the defense.

15 Q. Have you, in fact, given statements to defense counsel upon  
16 request?

17 A. Yes.

18 Q. Statements of witnesses?

19 A. Yes.

20 Q. Statements of accused?

21 A. All the -- If -- Anytime, anytime we had a statement of the  
22 accused the defense had it.

23 Q. When would the defense get it, sir?

24 A. When they'd ask for it. Certainly at the preliminary they'd  
25 get it.

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1 Q. To your knowledge did this practise of disclosure vary  
2 by Prosecutor?

3 A. Not that it came to my attention.

4 Q. To your knowledge did Donald C. MacNeil follow the practise  
5 that you have outlined?

6 A. Yes, sir, as far as I'm aware.

7 Q. Did you have occasion to see him, be in his presence, when  
8 he would -- when he gave statements to defense counsel on  
9 request?

10 A. Well, to -- I believe I was, yes.

11 Q. Have you been in situations where he has refused to give  
12 out statements to defense counsel?

13 A. He may have but I don't specifically recall. But I'm not --  
14 I wouldn't say that he absolutely never did and he would  
15 have his own reasons for that I'm sure. And they would  
16 be good ones I think.

17 Q. From your experience, sir, would you be able to tell us  
18 your impression of the practise of the defense bar? Would  
19 it be the general practise of the bar to approach the Crown  
20 to see what they had to ask for statements?

21 A. I would say yes. Anybody that defended would usually approach  
22 us at some point and sometimes it would be early on, sometimes  
23 later on toward the trial, but I would have to say that my  
24 general experience was that defense lawyers would come to  
25 you somewhere along the line and want to know what was going

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1 on or if there was anything they should know, that they didn't.

2 Q. Did you hear Mr. Khattar's testimony, sir, this morning?

3 A. I did.

4 Q. Mr. Khattar testified, if I remember correctly, to the effect  
5 that it was certainly his practise and he believed Mr.  
6 Rosenblum's practise not even to request statements because  
7 even if you asked for them you wouldn't get them?

8 A. Well, if it was his practise not to ask for them, then --  
9 well, then probably he didn't get any from me and obviously  
10 I didn't go out and volunteer to give him one. But I --

11 Q. Is he --

12 A. -- And I'm not saying that what Mr. Khattar is saying is  
13 not true. All I'm saying is that I, in my experience,  
14 that was not what the general practise of the Cape Breton  
15 Bar was.

16 Q. Thinking upon the point of the view of the Prosecutors  
17 though, if statements were asked for would they be provided  
18 subject to the exceptions that you mentioned?

19 A. Subject to the exceptions that I mentioned, yeh.

20 Q. And if they were not provided would defense counsel be told  
21 why they were not provided?

22 A. Yes, I would expect so, yes. Now, I would have told them.  
23 I would have -- I would have felt that I had to explain why  
24 I wasn't. That's why I say that to you.

25 Q. Would you actually provide copies of the statements to

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1 defense counsel?

2 A. A copy of our copy, yes.

3 Q. Yes.

4 A. Yeh. That wasn't done in every case now, Mr. Orsborn, but  
5 if they were asked for and there was no reason to withhold  
6 them then we wouldn't mind having another copy typed up.

7 Q. So, if I understand your testimony correctly, Your Honour,  
8 and please correct me if I'm wrong, if you felt there was  
9 a fact that would be interest -- of interest to defense  
10 counsel on occasion you would take initiative to -- your  
11 own initiative to tell them. With statements you would  
12 not produce them of your own initiative but you would  
13 produce them if requested subject to the exceptions that  
14 you've outlined. Is that an accurate summary of what you  
15 told us?

16 A. If I thought that I had a fact -- Now, mind you Crown  
17 counsel doesn't know what's in the defense counsel's mind  
18 all the time. But if I thought that I had a fact that  
19 was of significance to the defense and that the defense  
20 could not have known about it upon their own initiative --  
21 In other words if it was something a police officer told me  
22 confidential in the Crown office that would have been  
23 vital to the defense and I didn't think the defense would  
24 know otherwise I would have disclosed it. Now, I -- that's  
25 not to say that I was running out of the Crown office

1 advertising what was going on in the Crown office.

2 Q. Still on a general basis, sir, as Prosecutor what involvement,  
3 if any, would you have in the ongoing conduct of the police  
4 investigation?

5 A. What involvement?

6 Q. Yes, would you have occasion to review the investigation  
7 from time to time and suggest that the police officers  
8 investigate, you know, certain leads or whatever?

9 A. Yeh, there were occasions when that happened. Yes.

10 Q. You would give ongoing advise to the police?

11 A. If they -- If -- It -- What I want to say is, we weren't a  
12 kind of super-policemen. What we would -- Sometimes  
13 the police would come in with a file and it would appear to  
14 us that the investigation could be enhanced by the obtaining  
15 of certain other information. We would ask them if they  
16 could possibly get that and that happened on occasion. It  
17 wasn't our function but it happened.

18 Q. In your preparation for a trial, sir, and again I'm thinking  
19 of just the major cases only, I take it that you would interview  
20 the witnesses you'd expect to testify?

21 A. Yes, sir.

22 Q. Would you interview witnesses with the investigating police  
23 officer present?

24 A. That wouldn't be the rule but I wouldn't say that it didn't  
25 happen either.



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- 1 Q. I see. If there was a juvenile --
- 2 A. Usually if we wanted to get a witness to come in we would  
3 phone them and if we couldn't locate them we might have  
4 asked the police to bring them in but usually when we talked  
5 to the witnesses we talked to them separate and apart from  
6 the police.
- 7 Q. If you had a juvenile witness, somebody who is 13 or 14  
8 years of age, would you -- did you have any practise of  
9 whether or not they should be questioned with their parents  
10 present? One or other parent?
- 11 A. No, I think that -- I don't remember interviewing a juvenile  
12 outside of court without the parents present. Now, if it  
13 happened I --
- 14 Q. Do you know if this was a -- Was this a practise that you  
15 yourself followed then?
- 16 A. Yes, that was my practise and I'm not saying that there may  
17 have been a policy rule. I don't recall if it was a policy  
18 rule or a law but it was certainly what I learned from my  
19 experience in dealing with the fellows that were senior  
20 before me.
- 21 Q. Okay. And I'm thinking of juveniles that are not only  
22 accused. This would be juveniles who are witnesses. Would  
23 you --
- 24 A. Yes.
- 25 Q. -- follow that practise?

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1 A. It may have happened that we would talk to -- It may have  
2 happened that we talked when the parents weren't present  
3 then.

4 Q. When you -

5 A. Certainly not to an accused juvenile.

6 Q. If they were witnesses?

7 A. If they were witnesses. But, again, my experience generally  
8 speaking was that when you were involved with a juvenile,  
9 the parents, whether it was an accused or a witness, was  
10 usually at court.

11 Q. When you were a member of the Defense Bar would you interview  
12 witnesses who you felt would be testifying for the Crown?

13 A. If I thought they were -- That it was important that I do  
14 so I wouldn't have hesitated to interview them and I, in fact,  
15 did when I defended, interviewed witnesses who I expected  
16 the Crown would be calling.

17 Q. And what was the reaction of the Crown to your so interviewing  
18 these witnesses?

19 A. I don't remember any Crown Prosecutor saying anything about  
20 it and I don't remember a specific policeman. Sometimes there  
21 would be grumbling among the police if that occurred.

22 Q. I see. Would you do this in company with another person  
23 direct as a witness for you or simply one on one?

24 A. Well, usually with another lawyer. Most of the time in my  
25 practise I was associated with another lawyer and at all times

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1           that I recall doing that, I was.

2   Q.   And would this be an interview that the witness would  
3       appear voluntarily or would you subpoena the witness?

4   A.   No, we might call the witness to come to our office or  
5       go to where he lived. I've subpoenaed witnesses for many  
6       reasons but not simply to talk to them.

7   Q.   We've heard evidence from Mr. --

8   A.   I may have been -- Now, mind you I may have been brash and  
9       young and didn't know better but that's what I did.

10  Q.   When during your years as a Prosecutor were you aware if  
11       members of the Defense Bar were interviewing your Crown  
12       witnesses?

13  A.   I expect so. That -- I don't remember a remarkable incident  
14       as an illustration of that but I would have expected  
15       that the defense counsel would go to witnesses.

16  Q.   Would you object if they did?

17  A.   No, unless -- Well, if the policeman came back and said  
18       he offered me fifty bucks to tell another story or something  
19       like that then certainly we would but if it was simply a  
20       matter of talking back and forth, no, we wouldn't take  
21       exception to that.

22  Q.   Again in your preparation for trial, sir, for a major  
23       case, have you had any experience, leaving the Marshall  
24       case aside for a moment, of inconsistent statements from  
25       the same witness? And when I say inconsistent I mean almost

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1 black and white. Have you experienced that, sir?

2 A. Well, that's -- That occurs frequently in trials and  
3 I suppose that's why section 9(2) is there. Yes, in -- over  
4 the years I've had that happen.

5 Q. I'm thinking not so much of giving evidence at trial which  
6 is inconsistent with the previous statement but being given  
7 a file in which is contained two statements?

8 A. Oh, I see. Thank you. No, that wasn't a common thing to  
9 happen but -- And I can't specifically remember a case but  
10 yes, it -- You asked me not to refer to the Marshall case.  
11 It did occur in that case but I'm sure Marshall wasn't the  
12 first one it happened in.

13 Q. I see. Is that the kind of a fact you would consider  
14 disclosing to defense on your own initiative?

15 A. Yes, sir.

16 Q. It is?

17 A. Yes.

18 Q. The fact that a witness has given two inconsistent written  
19 statements?

20 A. Yes, sir.

21 Q. Are you able to tell us whether or not Mr. MacNeil, Donald  
22 C. MacNeil would be of the same opinion? Would that --

23 A. I believe so.

24 Q. Have you ever seen him do it?

25 A. Again I can't remember a specific case. I would expect him

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1 to do. Again if -- Well, I don't know what next you're  
2 going to ask me but I was going to add something and I thought  
3 I'd wait until you ask me.

4 Q. Add it anyway because I might not ask it.

5 A. Now, I might have forgotten. Mr. MacNeil may not have  
6 disclosed the evidence of the previous -- of the two  
7 statements of Pratico for the reason that I set out earlier,  
8 that he was concerned for the safety of a witness.

9 Q. I see. So you're indicating that going to the Marshall  
10 case itself the two inconsistent statements of Pratico may  
11 not have been revealed because of a concern out of safety for  
12 the -- Mr. Pratico?

13 A. That's correct.

14 Q. I see. And where did that concern come from, sir?

15 A. Well, Pratico had indicated, and I don't remember exactly  
16 when but early on after his statement was made aware and  
17 maybe even as he gave it, that he was concerned that  
18 friends of Donald Marshall Junior might do him harm.

19 Q. So the disclosure then would relate simply to the actual  
20 facts of the statements and presumably people all ready knew  
21 that he was a witness?

22 A. Yes.

23 Q. You were right. We'll come -- We will come back to that.  
24 I presume you know Simon Khattar, do you?

25 A. Yes, I do.

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1 Q. Worked on cases with him over the years, have you?

2 A. Yes, I've had many cases over the years.

3 Q. On opposing sides or on the same side?

4 A. I don't recall if we were ever on the same side but certainly  
5 a lot on the opposite sides.

6 Q. Do you recall if you worked with Mr. Khattar on any case  
7 involving Blacks? Other Black accused, Black victim,  
8 defendant?

9 A. With Mr. Khattar?

10 Q. Well, he may have been on the other side.

11 A. Oh, yeh. Do you mean on opposite sides?

12 Q. Yes.

13 A. Yes. Oh, I don't remember one specifically but I'm quite  
14 sure I did.

15 Q. What about involving Indians?

16 A. Again I don't remember any one particularly but again  
17 I'm sure I did.

18 Q. Do you remember if on any occasion Mr. Khattar expressed  
19 to you any -- if he had any views concerning Blacks or  
20 Indians?

21 A. No, as far as I'm concerned Mr. Khattar treated everybody  
22 right and I don't recall having any conversations with  
23 Mr. Khattar that related to any special treatment of any  
24 race.

25 Q. Would it be fair to say you've also worked with Mr. Rosenblum --

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1 A. Yes.

2 Q. -- in a similar fashion?

3 A. Yes.

4 Q. Did Mr. Rosenblum at any time ever express to you an  
5 opinion or express an opinion in your presence concerning  
6 Blacks or Indians?

7 A. I don't recall that there was. Again Mr. Khattar and  
8 Mr. Rosenblum were two senior experienced members of the  
9 Bar. I never discussed -- They never said anything to me  
10 that I can recall about a problem of race concerning any  
11 case that I had or anyone else.

12 Q. Mr. Bernie Francis testified before this Commission, I  
13 believe last week, to the effect that Mr. Rosenblum was  
14 less aggressive when he was defending Native people and  
15 did not afford them the type of a defense that he might  
16 have otherwise afforded a White defendant.

17 A. Well, --

18 Q. Do you have any knowledge of that, sir?

19 A. No, Mr. Rosenblum approached any case that I was ever  
20 involved with, with the vigour that was described here this  
21 morning. I would say -- I couldn't add anything to what  
22 was said to that and if he ever went easy in any case regardless  
23 of what colour his client was it wasn't noticable from  
24 our side. I'll tell you that.

25 Q. You worked with Mr. MacNeil over a number of years. Did

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1 | at anytime Mr. MacNeil express an opinion to you concerning  
2 | Blacks or Indians?

3 | A. That is Mr. Donald C.?

4 | Q. Yes, I'm sorry. Yes.

5 | A. Yeh. No.

6 | Q. Did he ever use any pejorative terms to refer to Blacks?

7 | A. None that -- None that I recall.

8 | Q. About Indians?

9 | A. Mr. MacNeil was a brash outgoing fellow. He'd make a lot  
10 | of statements about a lot of people a lot of the time but  
11 | I never -- I never heard him make a remark and say that  
12 | was a racial slur. It wasn't in the man's character.

13 | Q. Do you have any knowledge of Mr. MacNeil's dealings with  
14 | the Human Rights Commission in 1969 and 1970 when he was,  
15 | I believe, censored for making some remarks concerning  
16 | Indians at Eskasoni?

17 | A. Yes, sir.

18 | Q. Did Mr. MacNeil have any occasion to discuss that with you?

19 | A. Well, at the time I became aware of it I read what was  
20 | in the paper and I shook my head and I went and spoke to  
21 | him. Before I mention that, I was aware prior to that that  
22 | our office had received complaints from people on the Reserves  
23 | that they were concerned about their personal safety and  
24 | property. This Mr. MacNeil became aware of and later on  
25 | Mr. MacNeil was quoted in the press, as he was, and I said,



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1 "Did you say that? and he said, "Yeh, that's what I said."  
2 And I to be quite frank with you, I laughed at him. I said,  
3 you're, you know, that was crazy. And he said, "Well, that's  
4 what I did." And he referred, again, to the fact that  
5 complaints had been received and that was the way he handled  
6 it. That's --

7 Q. Mr. Khatter referred to, this morning, to a phrase that  
8 Mr. MacNeil doesn't like Indians and if you wanted to get  
9 him riled up you could say this at the appropriate opportunity  
10 and get him somewhat upset.

11 Q. Mr. Khattar said that he did that for the purpose of riling  
12 Mr. MacNeil up and I suppose if somebody said that to me in  
13 the courtroom it might rile me. I don't know -- The record  
14 will show how it effected Mr. MacNeil. Mr. MacNeil was a  
15 kind of a fellow -- He -- A lot of stuff could roll off him  
16 like water of a duck's back. I -- Whatever he -- reaction  
17 he had to Mr. Khattar's remark in court, I suppose it's  
18 on the record. You can read that for anyone that's interested.

19 Q. Mr. Francis, again, testified before this Commission. He  
20 said: I always felt that Don C. MacNeil was a  
21 guy who really wanted to win very badly and  
he would do anything to win.

22 A. Well, --

23 Q. Do you have that impression, sir, of Mr. MacNeil?

24 A. No, sir. I didn't. Yes, he wanted to win badly but the  
25 fact, you know, if he appeared that way to Mr. Francis --

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1 That's what -- That's how he did appear. That's what  
2 Mr. Francis said. As far as I'm concerned Mr. MacNeil was  
3 -- respected the rules as he knew them and understood them  
4 and to say that he would do anything to win is an insult  
5 to him. Yeh. If by that they mean that he would circumvent  
6 the law deliberately.

7 Q. Circumvent the law deliberately.

8 A. Yes.

9 Q. Are you suggesting in that that he would go to an extent  
10 somewhat less than circumvent --

11 A. No.

12 Q. -- of the law to win?

13 A. No. Thank you for pointing that -- No. He did nothing  
14 in my experience with him that indicated to me that he would  
15 do anything other than present the case in the manner that  
16 I've described earlier.

17 Q. To your knowledge, sir, were there ever any complaints  
18 received from defense counsel with respect to incomplete  
19 disclosure by Mr. MacNeil?

20 A. I don't recall any. Unless the present Inquiry is one of  
21 them and I don't think that -- I don't think what I've heard  
22 so far was complaints. It's just a statement of facts and --

23 Q. No, I was thinking --

24 A. -- I don't remember complaints being made about Mr. MacNeil  
25 not disclosing. No, sir.

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1 Q. I'd like to turn now, sir, to May of 1971. Were you  
2 employed as an Assistant Crown Prosecutor in May of 1971?

3 A. Yes, sir. Back in 1971, yes sir.

4 Q. Yes. There was a brief hiatus though in your career as to -

5 A. Yes, on the 19th of May there was an interruption and  
6 that lasted until, I believe it was, the 22nd of June.

7 Q. Okay. If I understand it correctly you were removed or  
8 asked to resign on the 19th of May because of the way  
9 the affairs of men change and then you were  
10 reinstated or reappointed on the 22nd of June?

11 A. Yes, sir.  
12  
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25

*JMK*

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1 Q. I see.

2 COMMISSIONER EVANS:

3 Do I understand there was an election or something of that nature?

4 THE WITNESS:

5 It's a long story, My Lord.

6 COMMISSIONER EVANS:

7 I always try to keep it short.

8 THE WITNESS:

9 Yes, that was the reason I was there.

10 BY COMMISSIONER EVANS:

11 Q. In August, the 19th -- I'm sorry, May the 19th to  
12 June 22nd?

13 A. May the 19th to June the 22nd, correct.

14 BY MR. ORSBORN:

15 Q. When you returned to the office, sir, did you become involved  
16 in the Marshall case?

17 A. Well, in the ordinary course of doing my regular work. Perhaps  
18 I might -- Well, yes, I became involved in the Marshall case.

19 Q. And how did you become involved?

20 A. Well, in the ordinary course of things, Mr. MacNeil and I often  
21 particularly on important cases would -- would share knowledge  
22 of the file and Mr. MacNeil would do this with other prosecutors  
23 if --

24 Q. Would you have been the most experienced assistant prosecutor?

25 A. No. No, sir. No, I would not, but -- I wouldn't have been the

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1 most experienced but I would have been the one most under  
2 Mr. MacNeil's feet if I put it that way. I was here in Sydney.  
3 My -- I always had a couple of Court days in Sydney and  
4 sometimes I would go out to the outlying areas. Now the  
5 result of that was that on any given day there might be two  
6 Provincial Judges and perhaps County Court and Supreme Court  
7 sitting in Sydney, so my duties and more so perhaps than --  
8 than the other prosecutors brought me in the daily contact  
9 with Mr. MacNeil and on the -- in order to -- to prepare for  
10 the eventuality that one of us might not be available on  
11 the day a trial was scheduled and the other had to go in to  
12 fill in so to speak, we tried to keep as -- keep each other as  
13 abreast of what was going on as possible.

14 Q. And did you become involved in the prosecution of the Marshall  
15 case?

16 A. I was -- I was acquainted with the Marshall file and I sat with  
17 Mr. MacNeil at least during part of the Preliminary and I think  
18 throughout the trial.

19 Q. Did you become involved in this file immediately upon your  
20 return?

21 A. Oh, I would think so.

22 Q. Did you have occasion to review any files on the matter when  
23 you returned?

24 A. Yes, I had read the files.

25 Q. Do you know at that time if Mr. MacNeil had a file or did you

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1 have to go to the police to get the file?

2 A. Well, what I saw -- Well, I'm sure that I had all the information  
3 that was available about the Marshall case.

4 Q. Do you know, sir, if Mr. MacNeil had a file at the time or --

5 A. Yes. Oh, yes, Mr. MacNeil had a file which would have been  
6 accumulated in the manner that I set out when you asked me  
7 earlier how it was done.

8 Q. Yes. Would the -- And you said you would have copies of the  
9 statements from the police files. You would have copies of the  
10 statements from the police files?

11 A. Yes, sir.

12 Q. Would these be typed copies that you would have?

13 A. Oh, yes, sir. Yeh.

14 Q. Would you ever have occasion to have a handwritten copy of the  
15 statement?

16 A. Well, we always used to ask for them typed because police  
17 officers like anybody else, their handwriting is not consistent  
18 and some of them weren't good writers. We would ask them to  
19 type -- type out the statements so that we could read them with  
20 more facility.

21 Q. Would it be a fair conclusion, sir, that if in the Marshall case  
22 there were one or more statements that had not been typed, would  
23 you then not have seen them?

24 A. Well, I -- All I can say to you sir, is -- is that I believe  
25 I saw all the material pertinent and relating to the Marshall

1 case. Now --

2 Q. Do you have any recollection now of reviewing that file?

3 A. Yes, I remember reviewing the file.

4 Q. Do you remember what, if any, impressions you obtained from  
5 the reading of the file?

6 A. Well, it was -- I recall that the -- that the witnesses with the  
7 most-- with the most probative evidence, the eyewitness were  
8 very young and that was a matter of concern. In the case of  
9 Pratico we were aware, and I'm not saying I derived this from  
10 what I read, but we were aware that at the time he made his  
11 observations he was very intoxicated and -- and I thought there  
12 were problems with the file in that way. I was aware that they  
13 had given -- earlier on they had made statements which were not  
14 consistent.

15 Q. When you say "they" sir, who are you referring to?

16 A. Yeh. I believe Chant and Pratico --

17 Q. Yes.

18 A. --had made statements which were not consistent with what we  
19 came to believe as the truth of the matter. I was concerned  
20 that the police had not been successful up to that point  
21 in locating the murder weapon and it just seemed to me that we  
22 could pretty well track where Marshall had been that night  
23 and I was surprised that with the effort I believed had been  
24 made to locate the knife, it hadn't been located and I thought  
25 that was negative. And I noted and this would have been after

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1 | the 22nd of July, but I noticed when they came back that there  
2 | was no autopsy report.

3 | Q. The 22nd of June?

4 | A. I'm sorry, the 22nd of June, that there was no autopsy report  
5 | and normally in -- in the -- we got an autopsy report not just  
6 | in murder cases. We -- I believe the practice at that time,  
7 | if there was a highway death we'd get a medical examiners' report  
8 | and if an autopsy was done, we'd have an autopsy about it, and  
9 | I was surprised that in that case that we didn't have an  
10 | autopsy report.

11 | Q. It's been suggested to us there was no reason for an autopsy  
12 | because the cause of death was apparent?

13 | A. Yes. When I -- When I raised the matter with -- all these  
14 | matters with Mr. MacNeil that was his one emphatic reply and  
15 | he said, "So what! We haven't got an autopsy report", but he  
16 | said, "If that's the biggest worry with this", he said, "I think  
17 | we can handle that all right". And the way he did it was the  
18 | way the record discloses. I believe he was correct.

19 | Q. So you then reviewed the file and discussed these matters with --  
20 | with Mr. MacNeil. Did you raise with him your concern of the  
21 | fact that no weapon had been found?

22 | A. Yes, I did.

23 | Q. And do you recall his response?

24 | A. He was concerned too.

25 | Q. Do you know if -- if either you or he issued any instructions



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1 or advice to the police as to --

2 A. Oh, we asked them.

3 Q. --where they might look?

4 A. We asked them to get busy and find it. If they --And I shouldn't  
5 say, "get busy." We knew the police were exerting their best efforts  
6 to -- to locate the knife. In effect what I was saying to  
7 Mr. MacNeil was I hope they find it. I don't think the police  
8 had to wait to be told by us to go to look for the knife and  
9 I wouldn't want to leave that impression.

10 Q. It's our understanding that no search was conducted, for  
11 example, at Mr. Marshall's residence for the knife. Were you  
12 aware of that when you reviewed the file?

13 A. I don't recall that I was but I believe, as I mentioned  
14 earlier, the statements gave a pretty good indication of  
15 where Donald Marshall had been and I believe he was in the  
16 presence of the police shortly after this occurred and I don't  
17 recall knowing that he had been searched but my concern about  
18 the knife was, we should have been able to find it in that  
19 where we knew the places where Marshall had been and his  
20 opportunities of disposing of it if he was the person who --  
21 who in fact wielded it, that we should have been able to find  
22 the knife and I was concerned about that and I expected that  
23 the Defence would be concerned about it.

24 Q. Did that raise a question in your mind as to Mr. Marshall's  
25 guilt?

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- 1 | A. No. I wondered about the knife and I considered that it would  
2 | be an argument that would make the prosecution of the case  
3 | awkward but I can't say that I -- that I really thought that  
4 | he wasn't guilty because of the absence of the knife.
- 5 | Q. I take it then that you were of the opinion that Mr. Marshall  
6 | was guilty?
- 7 | A. I was of the opinion that the statements we had in the file,  
8 | that is, the statements that the -- the final statements given  
9 | to the police were the correct ones. I knew that the young  
10 | people would make poor witnesses but when we went into that  
11 | trial I believed that they were telling the truth and Chant  
12 | and Pratico and, of course, in a corollary way the witness,  
13 | Patricia Harriss. I couldn't conceive of the three of them not  
14 | telling the truth and having such a coincidence -- or I could  
15 | see no connection between the three people except for the fact  
16 | that they had met in the park, and I couldn't understand why  
17 | they -- they would all have the story unless there was truth  
18 | to it.
- 19 | Q. You've indicated earlier that you were -- concerned may be too  
20 | strong, but you were aware after you reviewed the file that  
21 | there were inconsistent statements from at least Chant and  
22 | Pratico. Did you raise this matter of the inconsistent  
23 | statements with Mr. MacNeil?
- 24 | A. Yes.
- 25 | Q. Do you recall what his response was?

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- 1 A. Yes, I certainly did discuss that with Mr. MacNeil.
- 2 Q. Do you recall his response?
- 3 A. Well, I don't recall specifically what he said but I just went  
4 through what my beliefs were and I don't recall him having  
5 anything to say consistent to the fact that Mr. MacNeil  
6 believed that what he had in his file was true.
- 7 Q. Did you question at all the process whereby two young people  
8 would initially give statements which did not implicate  
9 Mr. Marshall, and then on a later date both gave statements  
10 which implicated Mr. Marshall?
- 11 A. I believe we had -- we had -- we asked the officers about it  
12 and in particular Sergeant MacIntyre, and I don't recall that  
13 we quizzed him about the process but he assured us that he  
14 had questioned them on one occasion and got one answer when  
15 he questioned them on the second occasion he got another and  
16 a different answer and I'm -- I sincerely believe to this day  
17 that Detective MacIntyre believed that his second answer was true,  
18 MacNeil did, and I did.
- 19 Q. I see. In the review of the file, sir, you've mentioned  
20 inconsistent statements from Chant and Pratico. Do you recall  
21 if you saw inconsistent statements from Patricia Harriss, and  
22 by a statement in her case I mean even a paper with information  
23 from her on it which is not necessarily signed by her?
- 24 A. Again I can't recall that I read that. I'm satisfied I had  
25 all the information that there was, but no, I don't recall

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1 reading that we had an inconsistent statement from Patricia  
2 Harriss which is not to say we didn't have it. I'm just saying  
3 I don't recall it.

4 Q. But the other two you do?

5 A. Yeh.

6 MR. ORSBORN:

7 It may be an appropriate time to take a break, Mr. Chairman.

8 MR. CHAIRMAN:

9 A short recess.

10

11 INQUIRY ADJOURNED AT: 3:32 p.m., AND RECONVENED AT: 3:53 p.m.

12

13 BY MR. ORSBORN:

14 Q. Judge Matheson, when we were discussing the -- the various  
15 Counsel involved in this I neglected to ask you in your  
16 experience with Mr. Rosenblum did he -- (And leaving aside the  
17 Marshall case.) did he ever come to you inquiring as to what kind  
18 of a case the Crown had?

19 A. Mr. Rosenblum as a matter of practice did that in my experience.  
20 See Mr. Rosenblum had been a Crown Prosecutor and many other  
21 things in his long career and mostly he was a very good Defence  
22 Counsel. And in almost -- I'd almost say every case Mr. Rosenblum  
23 would ask me something. Now that-- that doesn't mean that  
24 Mr. Rosenblum and I would go in and read the Crown file, but he'd  
25 ask what was coming and I would disclose appropriately and I'm

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1       sure to his satisfaction.

2   Q.   Had you had occasion in your experience to make statements  
3       of witnesses available to Mr. Rosenblum on his request?

4   A.   Yes.

5   Q.   So do I take it from that that he was aware that statements  
6       were available on request in your experience?

7   A.   He was aware that statements might be obtained from the Crown  
8       if the Crown felt according to the rules that I set out before,  
9       if the Crown felt free under those rules to disclose them he  
10      was aware that he might get them.

11   Q.   And had he, in fact, made such requests of you?

12   A.   Yes, he had.

13   Q.   When you reviewed the file, Your Honour, on your return to  
14      the prosecutor's office, did you see anything in the file  
15      that indicated that a police line-up had been held?

16   A.   I don't recall seeing that, no.

17   Q.   If there had been a line-up held would you expect the file  
18      to indicate that?

19   A.   Yes.

20   Q.   Now, Your Honour, I'd like for a moment for you to identify  
21      some documents for us that are found in volume 16, the pages  
22      144 and following. There are a number of handwritten documents  
23      here, and I don't propose at this moment to enter into a  
24      discussion on them, but I ask if you can, to identify the  
25      handwriting on the document and if possible the document.

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1 Starting at page 144.

2 A. Yes, sir, I have it.

3 Q. Do you recognize the handwriting on that page, sir?

4 A. Yes, sir.

5 Q. Whose handwriting is it?

6 A. Mr. Donald C. MacNeil's.

7 Q. And from what appears on the page there are you able to suggest  
8 what the document is? Would I be correct that these appear to  
9 be notes taken during the trial?

10 A. Oh, yes, of course.

11 Q. I see.

12 A. I was looking at them in more detail.

13 Q. I'm sorry.

14 A. I'm wondering -- Yes, I would expect, depending on where these  
15 were found, they appear to be notes taken at the trial, yes  
16 or at the Preliminary.

17 Q. Would it be the -- What would you do with your notes when the  
18 case was over?

19 A. Well, we'd gather them up and put them in the file.

20 Q. Which file?

21 A. I would put them in my file.

22 Q. Yes.

23 A. Now the fact that these notes are here today I presume is:  
24 when this case went on Appeal--and again I'm just telling you  
25 what I expect happened and not what I know happened. But when

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1 the case went on Appeal we would have been notified from  
2 Halifax to send all pertinent information on to Halifax so  
3 they could deal with it for the handling of the Appeal, and --

4 Q. Would this include your own notes?

5 A. That -- That would include our notes along with the file that  
6 we would call up from the police station and anything else  
7 that we could gather up.

8 Q. What about page 145, sir. Do you recognize the handwriting?

9 A. Yes, again that's Donald C. MacNeil's.

10 Q. And 146, sir?

11 A. Yes, Donald C. MacNeil's.

12 Q. And 147?

13 A. Donald C. MacNeil's.

14 Q. I point out on that page the signature at the bottom of the  
15 page appears to be Sergeant MacIntyre's handwriting or his  
16 signature by comparison to the statements that we have. Other  
17 than that you're telling us that this page is in Mr. MacNeil's  
18 handwriting?

19 A. Well, I'm not a handwriting expert. Now you suggest that that  
20 name at the bottom of the page is a signature.

21 Q. It may be.

22 A. Now it may be, but -- and I'm not going to quarrel with you  
23 about that but I think that is a list of witnesses and in  
24 awkward writing of Mr. MacNeil's. On the bottom line he  
25 just lists the name of Detective Sergeant MacIntyre.

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- 1 Q. I see. Page 148, sir?
- 2 A. Yes, sir, Donald C. MacNeil's
- 3 Q. And page 149?
- 4 A. Those notes are mine, sir.
- 5 Q. Can you tell us briefly what they are, sir?
- 6 A. Yes, they would have been notes that are made trying to keep
- 7 track of the process of empanelling the jury I expect.
- 8 Q. Page 150?
- 9 A. Again, sir, they're mine.
- 10 Q. And are you able to indicate what they represent?
- 11 A. They were -- They're not very complete but they were again
- 12 keeping -- keeping an eye on salient points that I felt were
- 13 being elicited from witnesses either at the Preliminary or
- 14 at the trial.
- 15 Q. I see. There are a set of notes from the Preliminary and
- 16 it does appear from the content that these were, in fact,
- 17 trial notes?
- 18 A. I see.
- 19 Q. And page 151, sir, is this your handwriting?
- 20 A. Again it's my handwriting.
- 21 Q. Page 152, and I apologize for the order of these?
- 22 A. My handwriting, sir.
- 23 Q. And these -- 152 would be, in fact, the notes at trial -- the
- 24 commencement of the trial?
- 25 A. Yes, "Grand Jury return." That would have been at the trial.



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- 1 Q. Yes. And 153, sir?
- 2 A. Again, sir, that's my note.
- 3 Q. This relates to the calling of the Petit Jury?
- 4 A. Yes. I find it strange though that -- You said the earlier  
5 notes that you mentioned were at the trail too?
- 6 Q. No, I said I apologize for the order in which you may find  
7 these, sir. They may not be filed in the order in which you  
8 made them.
- 9 A. Yeh. The note -- The note on page 153 at the top of the page  
10 says: "The calling of the Marshall Petit Jury...", so those  
11 are the notes that I made in the Marshall case that relate to  
12 the calling of the jury.
- 13 Q. Are you able to indicate to us what the symbols mean on the  
14 initials?
- 15 A. Oh --
- 16 Q. The "S.A." would be stand aside I presume?
- 17 A. Yes, "S.A." is stand aside. It looks like I was designating with  
18 a star the people that were called -- that were received on to  
19 the jury. I have a "D" marked beside some names. I would take  
20 it that that was an objection by the Defence. This was -- The  
21 whole purpose of my doing this was to see that we did not use  
22 up more than our objections or the --
- 23 Q. Yes.
- 24 A. And that's why that record is there. I hope it's accurate.
- 25 Q. And the twelve names on the right-hand side do I take is the

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1 jury that was eventually selected?

2 A. Yes, sir.

3 Q. What is that note on the bottom right-hand corner, sir?

4 A. It says: "Next to foreman, hung over for two days". That's what  
5 it says, sir. I --

6 Q. Do you have any recollection of that?

7 A. I have no recollection of that.

8 Q. Now, sir, the next ones are not in order. It may be easiest if  
9 we went to page 157 first?

10 A. Yes.

11 Q. Is that your handwriting, sir?

12 A. It is.

13 Q. And these would be your notes taken at the Preliminary Inquiry?

14 A. Yes, sir.

15 Q. And if we now go back to 154, is this also in your handwriting?

16 A. Yes, sir.

17 Q. And a continuation of those notes?

18 A. Yes.

19 Q. And 155, sir, the same thing?

20 A. Yes, sir.

21 Q. And 156?

22 A. Yes, sir.

23 Q. And the handwriting, sir, on 158?

24 A. That's my writing also.

25 Q. Thank you. I presume, sir, that prior to the Preliminary Inquiry

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1 | you were aware that you would be assisting Mr. MacNeil on this  
2 | case?

3 | A. Yes.

4 | Q. What role did you expect --

5 | A. Oh, yeh, prior to the Preliminary Inquiry.

6 | Q. Yes, sir.

7 | A. Yeh. I don't know if it was decided at that point or not,  
8 | but at the Preliminary Inquiry stage, you may recall when I  
9 | was first asked about it. I don't recall sitting through  
10 | the entire Preliminary Inquiry.

11 | Q. Yes.

12 | A. I'm sure that Mr. MacNeil expected that I would be in the room  
13 | for whatever assistance I might have been to him if I wasn't  
14 | otherwise occupied in Court -- I don't know that -- in another  
15 | Court. I don't know what significance there is to that, but that  
16 | straightens out anything and I just wanted to say it.

17 | Q. I think the note indicates that you were certainly present for  
18 | the first day of the Inquiry on July 5th?

19 | A. Yes, undoubtedly.

20 | Q. Apart from your review of the files, sir, do you recall, if any,  
21 | what preparation you were involved in prior to the Preliminary?

22 | A. Apart from acquainting myself with the file and perhaps being  
23 | present when police officers would be in and out on it, I don't  
24 | recall any work -- specific work that I did other than say that  
25 | I was available from the 22nd of June up to the time the Inquiry

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1 commenced and what you have put before me here, sir, indicates  
2 that this is some of the work that I did, but I can't remember.

3 Q. Do you remember if you visited the scene of the incident?

4 A. Not as a-- I remember on two occasions I visited the scene  
5 but I did it all alone.

6 Q. By yourself?

7 A. I went once in the day and once at night.

8 Q. Why did you do that?

9 A. Well, the park is on my way home and I did it, curious to  
10 check the vantage point of some of the witnesses and particularly  
11 Pratico and Chant and I just wondered: did they see what they  
12 were purporting to see.

13 Q. Do I take it from that that you -- you visited the park and  
14 reviewed their statements in the context of the park itself?

15 A. No, sir, don't -- I don't -- I had read their statements.

16 Q. Yes.

17 A. And I -- I didn't take their statement with me and go to the  
18 park, no. I just happened on the way home to stop and try  
19 it out. I did it during the day time. I saw that in spite of the  
20 trees in the area that, yes, they could have seen, and I went  
21 back and did it at night to see if there was sufficient lighting  
22 that they could have seen and I formed the opinion that it was  
23 possible that they could have seen it. The night visibility  
24 was not everything one might desire.

25 Q. Prior to the Preliminary, sir, to your knowledge were there

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1 any approaches made by either Mr. Rosenblum or Mr. Khattar to  
2 yourself or Mr. MacNeil with respect to the Crown's case?

3 A. You mean with respect to disclosure.

4 Q. Yes.

5 A. There were none made to me and had their been, I would not have  
6 in that case disclosed without Mr. MacNeil's permission, but  
7 no request was made to me for disclosure and I don't know of  
8 any to Mr. MacNeil?

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1 | Q. You don't know of any to Mr. MacNeil?

2 | A. No.

3 | Q. Now, when you refer toward disclosures or do you mean disclosure  
4 | of statements?

5 | A. I mean --

6 | Q. As opposed to sitting down across the table and saying, "What  
7 | have you got?"

8 | A. That's -- The answer to all of those questions is no. If there  
9 | was disclosure, I was not present when it occurred.

10 | Q. Based on your knowledge of Mr. Rosenblum, would you have  
11 | expected that he would've made such an approach?

12 | A. I would expect at some time Mr. Rosenblum to have come forward,  
13 | and quite frankly, had Mr. Khattar not testified to the con-  
14 | trary this morning, I would've expected him to, too.

15 | Q. Expected Mr. Khattar to?

16 | A. Yes.

17 | Q. Did Mr. Khattar, in your experience, approach you with respect  
18 | to the Crown's case?

19 | A. I don't remember that he did.

20 | Q. I see.

21 | A. I don't remember that he did, and I don't specifically remember  
22 | taking a file and discussing it with Mr. Khattar. If he says  
23 | he never did it, well, then he says so, but if you would ask  
24 | me, now, I would've thought he would. And that's not to dispute  
25 | what he's saying --

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- 1 Q. Of course.
- 2 A. -- it's just what I would've said.
- 3 Q. With respect to the Preliminary Inquiry itself, sir, and I would  
4 ask you to turn to page 157. Looking at the notes that you  
5 made, about a third of the way down the page there, there is  
6 a note of yours:
- 7 MacNeil informs court that exhibits  
8 are in Sackville. Will inform  
defence of results of tests.
- 9 And I believe these were tests relating to blood grouping in  
10 particular.
- 11 A. Yes, I'm quite sure if you -- I'm not all that familiar with  
12 the transcripts, but if you check the transcript, the lab  
13 people hadn't been called at that point, and the Preliminary  
14 was commenced before any exhibit that was sent to the lab  
15 for examination were returned, and Mr. MacNeil simply informed  
16 the Court that -- where the exhibits were and that he would  
17 inform the defence of the results of the tests.
- 18 Q. Would that be consistent with the practice of the time to  
19 provide these test results to defence when they became available?
- 20 A. Yes, sir.
- 21 Q. Do you know if in fact they were provided to the defence when  
22 they became available?
- 23 A. No, I -- They were not -- I didn't do it, and it wasn't done in  
24 my presence, but that's -- That was Mr. MacNeil's undertaking  
25 in open court in the presence of both Mr. Khattar and

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1 Mr. Rosenblum at that time.

2 Q. Okay.

3 A. And I made the note of it there.

4 Q. So I take it these notes were made at the time of the Inquiry  
5 itself?

6 A. I wrote that, sir. I can look at that record and say that I  
7 wrote it in the courtroom in the Provincial Building, the  
8 downstairs courtroom, provincial courtroom.

9 Q. A couple of other points on the notes, sir. Turning to page 155,  
10 if you would. And at No. 7 there you have a note regarding  
11 Patricia Ann Harriss:

12 ...Age 14...

13 Etc. Immediately above that you have:

14 Good witness today...

15 Then I'm not quite sure what follows that.

16 A. That's my initials.

17 Q. Okay, it's your initials. Could you tell us what that reference  
18 means?

19 Good witness today...

20 A. Well, the first thing I want to comment on about it, I said  
21 to you earlier that I had no recollection of seeing a prior  
22 inconsistent statement by Patricia Harriss. Now, having seen  
23 that, I think that my comment in the notes refreshes my mind  
24 enough that I'd now say I probably was aware that Patricia  
25 Harriss had made inconsistent statements, and if I used the



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1 words, "Good witness today," that would probably indicate that  
2 she had given the story that was the most recent one she had given  
3 us and the one that we expected her to give.

4 Q. I believe we have in evidence, sir, the first statement given  
5 by Patricia Harriss. I believe we have the original in  
6 evidence, and it may perhaps help to see if you ever did in  
7 fact see it.

8 MR. ORSBORN:

9 Has that been entered yet? I'm not sure if that's been entered  
10 or not, the original statement of Patricia Harriss. Exhibit 56?  
11 Yeh, I want the handwritten one.

12 BY THE WITNESS:

13 A. Do I have those here?

14 Q. No, I'll just get it for you.

15 MR. ORSBORN:

16 Fifty-five. I'm sorry.

17 BY MR. ORSBORN:

18 Q. This may or may not refresh your memory, sir, and I'll just ask  
19 you to take a look at that. That is, we believe, in the  
20 handwriting of Detective Urquhart, and it's being referred to  
21 as the first statement of Patricia Harriss even though it is  
22 unsigned, and I'd also point out that, to our knowledge, there  
23 is not a typed version of that that was typed up by the Sydney  
24 Police Department. Does the form and the writing of the --

25 A. Oh, it's the form. There's no question about it. It's the

1 City Police Department --

2 Q. Yes.

3 A. -- form of statement and the handwriting, I wouldn't even know  
4 if that was Detective --

5 Q. No.

6 A. -- MacIntyre's rather than alone it's a particular statement.

7 Q. Do you have any recollection of --

8 A. I was trying to read the statement, and again, that's why we  
9 had them typed. The handwriting --

10 Q. Yes.

11 A. -- isn't neat enough to read.

12 Q. You made reference to perhaps having some knowledge then of the  
13 previous inconsistent statement of Patricia Harriss, and I'm --

14 A. Yes.

15 Q. -- curious as to whether or not you may have been aware of that  
16 statement.

17 A. The reason -- I said earlier, when I had no recall at all -- I  
18 said that I couldn't remember seeing an inconsistent statement  
19 of Harriss. The note on page 155 indicates to me that I probably  
20 did and now -- I -- And I say again, I probably did. I'm sure  
21 I did, but looking at this particular statement that you've  
22 passed me, maybe it's the passage of time, but that -- My own  
23 note refreshes my memory.

24 Q. Yes.

25 A. The statement itself doesn't.

- 1 Q. Thank you. But your evidence is then, sir, that you are sure  
2 that you were aware that Patricia Harriss had given inconsis-  
3 tent statements. And -- I think I've captured your evidence  
4 correctly.
- 5 A. I think you asked me if I was aware, and I think I said, "No."  
6 Now, --
- 7 Q. Yeh, but you --
- 8 A. I haven't read this statement, you see --
- 9 Q. No. No, but you just indicated that this note refreshed your  
10 memory to the effect that you were sure that she had given a  
11 previous --
- 12 A. No.
- 13 Q. -- inconsistent statement.
- 14 A. That's what the note, yeh, "Good witness today." means.
- 15 Q. Yes.
- 16 A. But -- And I think this was taken at the Preliminary.
- 17 Q. Yes.
- 18 A. Now, I don't recall ever having interviewed or been present when  
19 Patricia Harriss was interviewed; so the only way I could have  
20 an opinion that I would record there at all would be in relation  
21 to some statement that I had read.
- 22 Q. Yes.
- 23 A. And to make a comparison as to what she was any other day  
24 indicates to me that I must've been aware of two inconsistent,  
25 previous statements.

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1 Q. So if I were to ask you directly, sir, as -- for your opinion  
2 as to whether or not the police provided you with both state-  
3 ments of Patricia Harriss, what would your answer be?

4 A. My note indicates to me that they did.

5 Q. Thank you. On page 156, sir.

6 BY COMMISSIONER EVANS:

7 Q. Before you leave 155, right under:

8 Good witness today. Patricia Ann  
9 Harriss: Age 14 -- Completed  
Grade 7.

10 There's also this line:

11 Perjury -- Go to the home -- SWORN.

12 A. Yeh. You'd have to refer, My Lord, to the transcript itself.  
13 Those are the notes I made -- I -- Without looking, I would  
14 expect that somebody asked her if she understood perjury and  
15 what would happen, and I expect her answer will be --

16 Q. She go to a home.

17 A. -- she'd go to a home.

18 Q. Yeh. Fine. I'm satisfied. Okay. I recollect this now.

19 MR. ORSBORN:

20 I believe, Mr. Justice Evans, that would be reflected at the  
21 Preliminary Inquiry, Volume 1, page 19, at about lines 27, 28, 29.

22 BY THE WITNESS:

23 A. Excuse me, now, you were referring me to?

24 Q. I was referring you to -- I was referring Mr. Justice Evans to  
25 Volume 1 --

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1 COMMISSIONER EVANS:

2 I'm satisfied . Thank you.

3 BY MR. ORSBORN:

4 Q. On page 156, sir, I notice opposite the first number ten the  
5 name:

6 Partago

7 I presume that means John Pratico.

8 A. Yes.

9 Q. There's nothing there to indicate what his testimony was even  
10 though he was a fairly significant witness. Can you suggest  
11 any reason for that?

12 A. Yes, I -- You'll anticipate that -- And perhaps your question  
13 gives me a chance to apologize for the incompleteness of the  
14 notes, but my function there was to check the writing that we  
15 had of what the witnesses had told us before. So when Partago  
16 or Pratico came to the stand, I was probably intently watching  
17 the statements as to -- so as to compare them with his testi-  
18 mony that day and the statement of -- and that I did so to the  
19 exclusion of making any note, and anything I had to say on this  
20 I would've said orally to Mr. MacNeil after, and quite frankly,  
21 I don't recall what my impression of his testimony on that day  
22 was.

23 Q. Underneath that, sir, at Note No. 10, Mr. MacKay. The note  
24 appears to be:

25 according to script.

1 If I got it correctly. What does that mean?

2 A. Perhaps an unfortunate word, but according to his statement  
3 would've been the --

4 Q. I see. Now, above that, sir, when you speak of Mr. Chant, you  
5 make a note of the route, which he testifies that he took, and  
6 I'd just like to review that with you on the map to see if my  
7 understanding of the note accords with yours. And as I under-  
8 stand your note, sir, which would reflect his testimony,  
9 Mr. Chant walked from the bus terminal on Bentinck Street.

10 It says:

11 He walked from the bus terminal  
12 to the park. He crossed the  
13 bridge on Bentinck to the rail-  
road tracks --

14 A. Yes.

15 Back along tracks toward George --

16 This way and then on the way he saw a man hunched over and --

17 A. Just wait now until I read the notes:

18 Saw man hunched in the bushes.

19 Yes.

20 Q. So his route would take him --

21 A. Yes.

22 Q. -- in a triangular fashion. I believe he then testified that  
23 he ran back towards the bus terminal and then later reversed.

24 The question that comes to mind, sir, --

25 A. Just a minute, now.

1                   Looking towards... Checked --  
2                   Saw two guys talking...

3           Yes, carry on. That -- You're --

4   Q. Does that accord with your --

5   A. Yes, that corresponds with the note.

6   Q. Yes.

7   A. And I haven't had a better recollection than that. That cor-  
8       responds with the note.

9   Q. Now, Mr. chant testified that he was going through the park  
10       to take a shortcut to George Street so he could get a ride  
11       home. That route that you've written there, which we have  
12       traced out on the map, is that, in your opinion, consistent  
13       with a shortcut through the park?

14   A. Well, no. If he was leaving the bus terminal and wanted to  
15       get on to George Street to get a ride home, he could've gone  
16       directly down -- I'm not sure which street it is at the moment.  
17       Bentinck and -- Wentworth. The one that runs by there near  
18       the bus terminal. He was just a block --

19   Q. Yes.

20   A. -- from George Street at that time.

21   Q. Yes.

22   A. That's where he wanted to go to hitchhike. And to walk all the  
23       way down there certainly -- It was not even the most direct  
24       route if he wanted to get farther out on George.

25   Q. Even if he had walked down Bentinck to Byng Avenue --

1 A. Yes.

2 Q. -- the shortcut would have been down Byng Avenue then across  
3 the park?

4 A. Yes. Or as I said earlier, the shortcut would've been right  
5 back at the bus terminal, one block down to George.

6 Q. Do you recall if there was any discussion between yourself  
7 and Mr. MacNeil on the route that Mr. Chant said that he took?

8 A. I don't recall, sir. But that's I made the notes. So we  
9 discussed them and we were probably concerned that -- Pratico  
10 was an erratic witness --

11 Q. I'm sorry, this is Mr. Chant that we're speaking of.

12 A. I'm sorry, Chant wasn't a -- was not so erratic in my opinion  
13 as Pratico, but he -- We were aware that he had given us a  
14 bit of an odd story there, yes. Now, what we did about it,  
15 I don't know.

16 Q. Okay. Let me make sure I understand you. You were aware that  
17 his testimony here at the Preliminary that you've written  
18 down was a bit of an odd story?

19 A. Well, that's an unfortunate word too. I don't have the state-  
20 ment in front of me. Now, I don't have Chant's statement in  
21 front of me.

22 Q. His statement is in the same --

23 A. That was different.

24 Q. His statement is in the same volume, sir, his second statement  
25 found at page 46 if it would assist you at all. And I believe,



1 at least insofar as his route is concerned that he was generally  
2 consistent through the statement and the Preliminary and trial.

3 A. Yeh. Your question to me is --

4 Q. Well, let me put it bluntly then, sir, and clear as I can. The  
5 route that I just mapped out there, did you think that was an  
6 odd route?

7 A. Yes. Yes. For a shortcut. Now, whether this was consistent  
8 with Chant's statement, I don't know until I see the statement.

9 Q. Yes.

10 A. If it is different from Chant's statement, Mr. MacNeil and I,  
11 I am sure would've discussed it. I don't remember the results  
12 of the discussion, but if the whole point of the question to  
13 me in the first place: is that an odd route to take from the  
14 bus terminal, the answer is yes.

15 Q. Yes. I think, sir, his route -- That is consistent with his  
16 statement. Your note is consistent with his statement and is  
17 consistent with his later testimony.

18 A. Then I don't recall discussing with Mr. MacNeil the mere fact --  
19 Well, I don't recall any discussion to this effect with  
20 Mr. MacNeil including the fact that Mr. Chant was taking an  
21 odd route.

22 Q. Would you -- If you had been defending this case, would you have  
23 cross-examined Mr. Chant as to his route? It was odd.

24 A. I hope I would've been -- I hope I would've picked that up. I'd  
25 like to think I would've.

1 Q. Following the Preliminary Inquiry, Your Honor, and prior to  
2 the trial, do you remember if you were involved in any further  
3 preparation for trial?

4 A. I recall that I was not to this extent: that Mr. MacNeil informed  
5 me one day that he was going to be interviewing certain wit-  
6 nesses relating to the Marshall case, and he invited me to come  
7 and to be present. I informed him when he told me that that  
8 I had Probate duties at the time, and as soon as I finished  
9 them, I would come up, and when I did come up that day, the  
10 interviews with the witnesses had been completed except there  
11 was a -- One of the young men -- I don't know -- I don't recall  
12 now whether it was Chant or Pratico, but they were leaving the  
13 office, and I came up and I said to Mr. MacNeil, "I'm sorry  
14 I'm late," and he said, "Well, it's all right. It's over."  
15 But one -- Pratico or Chant was leaving at that time.

16 Q. Do I take it then that you were not present at any interviews  
17 with the witnesses?

18 A. I have no recollection of a personal interview with anybody  
19 involved as a witness in this case other than James MacNeil.

20 Q. Yes. Did Mr. MacNeil -- Don MacNeil -- Donald MacNeil --

21 A. Yes.

22 Q. Did he discuss with you whether or not he had any concerns about  
23 the testimony of one or more of the witnesses?

24 A. Yes, Mr. MacNeil was concerned about Pratico in partiucular.  
25 Pratico had indicated to us that he was afraid, and we thought

1 that not only his story -- He had given inconsistent statements  
2 up to that point, and we were afraid that he might be threatened  
3 and that dear knows what he might say. That was about the  
4 attitude we had for him. That was my impression and that -- We --  
5 Mr. MacNeil and I discussed that possibility. I don't remember  
6 any more than sharing the concern -- that he had anything  
7 specific to say about it.

8 Q. Was there any discussion between you with respect to getting the  
9 people who were threatening him out of the area -- out of town?

10 A. Well, no. What I recall was done -- A police surveillance --  
11 Now, I don't know when it was put on or how long it was main-  
12 tained, but at some time after I came back into the office  
13 on the 22nd of June, there was a police surveillance kept on  
14 Mr. Pratico, and my specific recollection -- And this doesn't  
15 jive with what it should've been, but I recall going to dinner  
16 on Bentinck Street with Mr. MacNeil and Corporal McKinlay  
17 of the R.C.M.P. Pratico's home was somewhere along Bentinck  
18 Street.

19 Q. Yes.

20 A. I didn't know which house it was, but as we entered the  
21 restaurant, Sergeant McKinlay left, and he came back and he  
22 went and spoke to some peace officers. He came back and told  
23 us that yes, they had seen Pratico. He had walked up the  
24 street, and MacNeil asked him did Pratico threaten him. Did  
25 anybody threaten him, and it was specifically Tom Christmas that

D. LEWIS MATHESON, by Mr. Orsborn

1 | they had seen walk up the street. Did Tom Christmas threaten  
2 | him? And the answer was, "No." Tom Christmas didn't even  
3 | indicate that he knew where Pratico lived. That was McKinlay's  
4 | answer.

5 | Q. Yes.

6 | A. But the surveillance was kept on, and I don't recall, apart  
7 | from Pratico telling us that he was threatened -- I don't  
8 | recall that any material evidence -- (that Tom Christmas  
9 | threatened him) came out at all.

10 | Q. Do you know how long the surveillance was maintained?

11 | A. I don't recall, sir.

12 | Q. Did you have any knowledge of Mr. Pratico's mental condition  
13 | prior to trial?

14 | A. I knew sometime prior to the trial, and I believe after the  
15 | Preliminary -- I don't recall. I was aware that Pratico  
16 | was taken to the -- I believe, to Dartmouth. that he was --

17 | Q. Dartmouth. You mean the the Nova Scotia Hospital?

18 | A. Nova Scotia Hospital. And that he was in the care of the  
19 | doctors there, and I understood it was because of his anxiety  
20 | over the threats that he had received.

21 | Q. Do you know on what basis you formed that opinion?

22 | A. From what I heard at the time.

23 | Q. From who?

24 | A. I presume Mr. MacNeil. I don't recall hearing it from anybody  
25 | else.

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- 1 Q. I see. The fact that Mr. Pratico was hospitalized in the  
2 Nova Scotia Hospital, would that be the kind of a fact that  
3 you would acquaint Defence Counsel with?
- 4 A. Well, I -- I believe it was commonly known. If it was something  
5 that I didn't think they would know, yes. It is something that--  
6 that I would say Defence Counsel should have known.
- 7 Q. Yes.
- 8 A. Now if they didn't know it, it wasn't as a result of our office  
9 trying to keep it a secret. Anybody that knew Pratico or had  
10 an interest in him knew his whereabouts.
- 11 Q. Did Mr. MacNeil -- Mr. Donald MacNeil, prior to trial express  
12 to you any concerns that the eyewitnesses might not stick to  
13 their story?
- 14 A. I beg your pardon?
- 15 Q. Prior to trial did Mr. Donald MacNeil express to you any  
16 concern that the eyewitnesses might not stick to their stories?
- 17 A. Well, I don't know that Donald MacNeil said that. I had that  
18 impression myself from the fact that they had made inconsistent  
19 statements. There was a possibility that they -- they might  
20 say something different. I suppose, sir, that's -- that's true  
21 of any witness that ever were --
- 22 Q. Given that you then have inconsistent statements at --
- 23 A. But we had -- We had -- Excuse me again, but we -- yes, we  
24 had reason to -- to be alerted to that in this case because  
25 they had made previous inconsistent statements.

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1 Q. As a Crown Prosecutor what, if anything, then do you do to  
2 prepare a witness of that sort prior to trial?

3 A. I suppose you go back over his statement with him and remind  
4 him of the dangers of perjury and the consequences of perjury,  
5 and having acquainted him with that you -- you go back over it  
6 with him and try to satisfy yourself that -- that the witness  
7 is telling the truth, and if you were in any great doubt about  
8 it you -- I would -- I would say we would have called the case  
9 off. We had concerns about Pratico and we had concerns about  
10 Chant. The concerns about Chant were only to my knowledge and  
11 recollection now is that he made a previous inconsistent  
12 statement. The fact that there were two people telling us  
13 essentially the same story who were not connected other than  
14 that they were in the park together on that night, it didn't  
15 occur to us that it was the kind of a situation where we'd call  
16 the whole thing off. It -- We felt that we had a bunch of  
17 young people and particularly Pratico who had essential evidence  
18 to give in a very important case and that we should try to  
19 nurture them the best way we could to -- to see that that evidence  
20 came forward, but we would -- would be very careful to see that  
21 they were cautioned of the consequences of perjury and the  
22 importance of the whole trial.

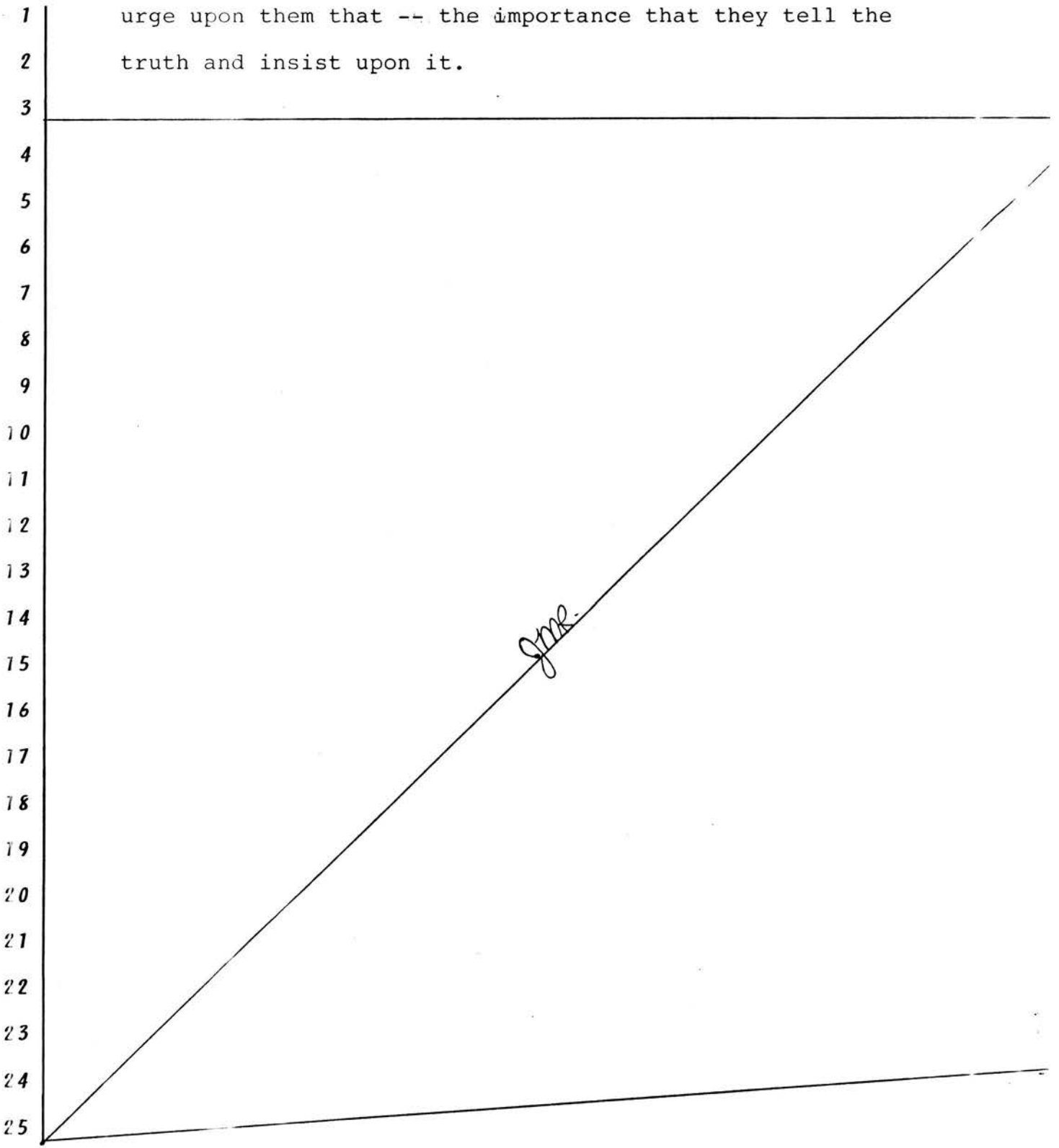
23 Q. How do you nurture a young witness?

24 A. Well, sir, all I mean to say is that we would treat them with  
25 respect and --and try not to frighten them in any way, but

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1     urge upon them that -- the importance that they tell the  
2     truth and insist upon it.  
3

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D. LEWIS MATHESON, by Mr. Orsborn

1 Q. Would repetition of their story with them  
2 so that they became used to it be part of that nurturing  
3 process?

4 A. No, it wouldn't be any part of the nurturing process that I  
5 had anything -- that I would have anything to do with. And I  
6 don't think that Mr. MacNeil if -- I remember one day  
7 Mr. MacNeil had Pratico and I believe Chant and Harriss. I  
8 believe those three witnesses were there that day. Now I  
9 was around the court house. I was invited to that meeting that  
10 day and I was around the court house every other day, and I'm  
11 sure -- and that was the office to which I would go if I had  
12 Crown duties to perform. I don't think Mr. MacNeil saw that  
13 much of those witnesses. He wasn't --

14 Q. Were you invited to that meeting?

15 A. I was invited to the -- to the initial meeting that I mentioned  
16 to you earlier.

17 Q. Would it be customary to -- to talk with three witnesses at the  
18 same time?

19 A. No, he wasn't talking to the three at the same time.

20 Q. I'm sorry, I misunderstood you.

21 A. They would have -- They would have come on that afternoon. The  
22 order in which they appeared, I wasn't there, I don't know.  
23 When I arrived Pratico was leaving. Now Mr. MacNeil would not  
24 have taken the three in together. He would have dealt with  
25 them individually.



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1 Q. Mr. Chant has testified, I believe, before the Inquiry that  
2 when he met with Mr. MacNeil it was a matter of going over and  
3 over his story. Would that be consistent with this concern  
4 that you had about their unreliability?

5 A. It -- Pratico said they went over and over his story.

6 Q. Mr. Chant, I believe.

7 A. Or Chant, I'm sorry. Well, if they went over and over the  
8 story -- How many times is over and over? If they went over  
9 it three times I wouldn't think there's anything unusual about  
10 that. If they went over it a hundred and fifty times, that  
11 would be unusual. MacNeil would ask them, and I'm sure he'd  
12 ask them to repeat it and I'm sure he questioned them about it  
13 and probably asked them to repeat it again, not to rehearse  
14 them, but to satisfy himself that what he was hearing was the  
15 truth.

16 Q. Could you call that drilling a witness?

17 A. If it -- Well, if it was -- I don't know what number of times  
18 is a safe number, but I think you -- I think you understand  
19 what I mean.

20 Q. Mr. Chant also swore an affidavit in July of 1982, sir, in  
21 which he claims or alleges that he met with Mr. Donald MacNeil  
22 after the Preliminary and he says that Mr. MacNeil indicated  
23 to him that if he changed his statement he would be charged  
24 with perjury. Now I think you've testified earlier that  
25 there was -- there could be mention of perjury with respect to

D. LEWIS MATHESON, by Mr. Orsborn

1 changing statements. With that kind of a statements would  
2 Mr. MacNeil be --

3 A. Just a moment. Just a moment. In case you -- I don't want  
4 to put something on -- If-This interview about which I'm  
5 talking, I think took place after the Preliminary so that we  
6 had sworn testimony from all those people.

7 Q. Yes.

8 A. And yes I think he would have cautioned them about perjury.  
9 Again, sir, I wasn't there. I would have expected him to do  
10 that. It would be perjury if they had done that.

11 Q. Okay.

12 A. If -- If he had any doubt.

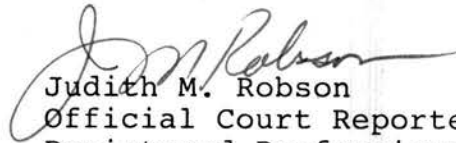
13 MR. CHAIRMAN:

14 We'll adjourn; nine-thirty.

15  
16  
17  
18 INQUIRY ADJOURNED AT 4:38 p.m. o'clock in the afternoon on the 9th  
19 day of November, A.D., 1987.  
20  
21  
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23  
24  
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COURT REPORTER'S CERTIFICATE

I, Judith M. Robson, an Official Court Reporter, do certify that the transcript of evidence hereto annexed is a true and accurate transcript of the Royal Commission on the Donald Marshall, Jr., Prosecution as held on the 9th day of November, A.D., 1987, at Sydney, in the County of Cape Breton, Province of Nova Scotia, taken by way of recording and reduced to type-written copy.



Judith M. Robson  
Official Court Reporter  
Registered Professional Reporter