

RS44
Vol 250
4

ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION

VOLUME XXVII

Held: November 10, 1987

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

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

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

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Charles Broderick: Counsel for Carroll

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Guy LaFosse: Counsel for Davies

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

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

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INDEX - VOLUME XXVII

D. Lewis Matheson, resumes testimony

By Mr. Orsborn	4979
By Mr. Chairman	5040
By Commissioner Evans	5042
By Mr. Ruby	5047
By Mr. Ross	5091
By Mr. Pugsley	5097
By Mr. Murray	5124
By Mr. Elman	5125
By Mr. Bissell	5141
By Mr. Nicholas	5149

COURT REPORTER'S CERTIFICATE	AA-1
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INQUIRY RECONVENED AT 9:35 o'clock in the forenoon on Tuesday, the 10th day of November, A. D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia

1 | MR. CHAIRMAN:

2 | For those who have travel arrangements to make, we propose to
3 | adjourn at four this afternoon.

4 | MR. ORSBORN:

5 | Thank you, my Lord.

6 | D. LEWIS MATHESON, resumes testimony, as follows:

7 | BY MR. ORSBORN:

8 | Q. Judge Matheson, just before we broke yesterday afternoon, we
9 | were discussing the inconsistent statements of Patricia Harriss.
10 | Were you aware that the description of two men in Patricia
11 | Harriss' first statement resembled the description of two men
12 | given in Mr. Marshall's statement?

13 | A. That doesn't come to my mind at the moment, but if it was there
14 | in the statement, I'm sure we were aware of it.

15 | Q. I see. If you were aware of it, would you have looked for an
16 | explanation of that consistency?

17 | A. I believe we did, sir, and found none.

18 | Q. I'm sorry?

19 | A. And found none.

20 | Q. And found none?

21 | A. And found none.

22 | Q. Okay. If I could direct your attention, sir, again to volume 16.

23 | A. Other -- other than I believe that -- that we had a statement
24 | from Donald Marshall or we knew what Donald Marshall said, and
25 | yes, it -- inasmuch as her statement was inconsistent with what
she said, her first statement was consistent was Marshall's.

Yes, we knew that.

D. LEWIS MATHESON, by Mr. Orsborn

1 Q. Yes. But -- Again have to ask you to speak up a little, sir.
2 The fact that the -- her first statement and Mr. Marshall's
3 statement were consistent insofar as the descriptions of the
4 men, my question was, would you not look for an explanation
5 of that consistency? You have -- You've indicated that you
6 were impressed with the fact that Chant and Pratico told
7 consistent stories without collaboration. Here you have con-
8 sistent descriptions between Harriss and Mr. Marshall pre-
9 sumably without collaboration.

10 A. Yes.

11 Q. Would that fact have impressed itself upon you or Mr. MacNeil
12 to your knowledge?

13 A. Yes, it did, and if I recall correctly, there were -- We had
14 reason to believe that Marshall or -- and/or other Indian
15 people had, and specifically Tom Christmas -- had spoken to
16 witnesses and had suggested to them what they might tell the
17 police, and we had the complaint from Pratico that that had
18 occurred. I believe we had a statement from another girl
19 wherein she said that Donald Marshall had contacted her before
20 she was questioned and had suggested to her what story she
21 might give to the police. So I'm sure that that was in our
22 minds and so far as I recall, that was why -- that was one of
23 the reasons why we didn't go further. We took the evidence
24 we had and --

25 Q. I see.

1 | A. -- the police were looking into all avenues that they could so far
2 | as I know.

3 | Q. Do you have any knowledge, sir, of the Indians contacting wit-
4 | nesses other than John Pratico?

5 | A. Yes, if the statement that we had in our possession was to be
6 | believed, Donald Marshall had contacted the girl who made the
7 | statement. I think her name was O'Reilley.

8 | Q. I see. If I might direct your attention, sir, to the Volume 16,
9 | page 147. I believe you have the volume somewhere there in front
10 | of you, sir, the bottom volume there in that pile.

11 | A. Yes, Volume 16.

12 | Q. At page 147. I believe you indicated to us yesterday, Your
13 | Honour, that these notes are in the handwriting of Donald C.
14 | MacNeil.

15 | A. Yes.

16 | Q. And I'll just ask you to direct your attention to about ten
17 | lines down. You see the names of:

18 | Patricia Ann Harriss

19 | and then:

20 | Terrance Patrick Gushue, 2 Tulip
21 | Terrace St.

22 | A. Yes.

23 | Q. Underneath that:

24 | Conversation with Mary Patricia
25 | O'Reilley.

D. LEWIS MATHESON, by Mr. Orsborn

1 Does that in any way assist your recollection on Patricia
2 Harriss' statement?

3 A. Well, I recall we had a statement from Miss O'Reilley, and if
4 I recall, she said that she had received a phone call on the
5 morning following the incident from Donald Marshall, and
6 Donald Marshall had told her that if the police asked her to
7 say that she saw two men and the significance of the statement
8 was that, to our mind; that is, O'Reilley's statement, -- that
9 Donald Marshall was going around trying to tell people what to
10 tell the police, which gave -- which -- We drew an inference
11 from that that it was an indication of his guilt, or it was --
12 of some guilt anyway. If I recall the statement further, she
13 was asked how come Marshall had contact -- how Marshall could
14 possibly have gotten her. I think her phone number was unlisted
15 or something, and Marshall got to her because she was either
16 a previous girlfriend of his or a friend of his --

17 Q. Yes.

18 A. -- and he had given -- She suspected that she had -- that man
19 had given Marshall her number.

20 Q. And you drew an inference of guilt from the fact that Mr. Marshall
21 had --

22 A. It --

23 Q. -- made this contact.

24 A. I wouldn't say an inference of guilt, sir, but at that point in
25 the game, it was indicative that Donald Marshall was doing

D. LEWIS MATHESON, by Mr. Orsborn

1 something he ought not to have been doing, and there must've
2 been a reason for it.

3 Q. I see. I'd like to turn briefly, Your Honour, to the Statement
4 of Facts which is found in the same volume and commencing at
5 page 166. We've already had some discussion on this with -- on --
6 with Mr. Khattar. I understand that this statement is prepared
7 by the Crown Prosecutor for use by the judge in charging the
8 Grand Jury, is that so?

9 A. It sounds like it. Wait until I get there. Yes, sir, that's
10 the Statement of Facts.

11 Q. And on page 170, it's signed by Donald C. MacNeil.

12 A. Yes, on -- signed by Mr. MacNeil.

13 Q. Yes.

14 A. Mr. MacNeil prepared it.

15 MR. CHAIRMAN:

16 I'm having difficulty hearing you.

17 THE WITNESS:

18 I'm sorry. I'll try and speak up.

19 BY MR. ORSBORN:

20 Q. Would -- This would be compiled by Mr. MacNeil?

21 A. Yes, sir.

22 Q. Do you -- Did you review it, sir, before it was filed?

23 A. I may have even been with him when he did it. I -- It's signed
24 by him. It was his responsibility. I don't recall anything
25 about the preparation of it.

- 1 Q. I see.
- 2 A. The contents of it might suggest things to me, but I don't
3 recall.
- 4 Q. How would this statement get into the hands of the judge?
- 5 A. It -- In the first instance -- I don't know if the -- I think
6 a copy of this would have been mailed to Halifax to the pre-
7 siding judge, and if we had done it according to what we --
8 what they wanted us to do, he would've had this two weeks
9 before the trial at least.
- 10 Q. Yes. I noticed the date appearing at the end on page 170 is
11 October 12th, 1971.
- 12 A. Yes.
- 13 Q. Which would be perhaps three weeks or so before trial.
- 14 A. Yes.
- 15 Q. Would it be a fair assumption that this would be indicative of
16 the date of forwarding to the judge?
- 17 A. I imagine as soon as it was completed, and if Mr. MacNeil was
18 ready to sign it, the next thing he did was see that it got
19 in the mail.
- 20 Q. Would a copy be forwarded to defence counsel?
- 21 A. No, not -- I don't know what the practice is today, but there
22 would be copies of this, and they would be left in the
23 Prothonotary's file, but it was never our practice to mail out
24 a copy to the defence.
- 25 Q. When you were acting as defence counsel, sir, would you obtain

D. LEWIS MATHESON, by Mr. Orsborn

1 a copy of the Statement of Facts from the Prothonotary's file?

2 A. Well, yes. I can't say in every case I had one, but you'll
3 recall yesterday I said that most of the work that I did in
4 Supreme Court was as a Legal Aid lawyer, and very often I came
5 on the scene at a late stage in the defence and at the request
6 of the judge. Now, when I was defending, the judge saw to it
7 that I had everything that related to the case, and when I --
8 I recall having these when I defended, but maybe that's the
9 reason.

10 Q. Yes. The --

11 BY MR. CHAIRMAN:

12 Q. Judge Matheson, in your opinion, would it be known to the
13 Cape Breton Bar that copies of the Statement of Facts in
14 criminal cases are left with the Prothonotary and are avail-
15 able to the -- to defence counsel if they wish to obtain it?

16 A. My answer to that would be yes. They -- We never -- When -- This
17 Statement of Facts would have been prepared at the same time
18 that the indictment was prepared. We never mailed a copy of
19 the indictment to the defence either. Now, I can't conceive
20 of anybody defending a case without having -- and the indictment
21 would indicate what witnesses were to be called or if there were
22 any surprise witnesses to be called, and the Prothonotary's
23 file is where they would get their copy. I don't know as I can
24 say any more than that, My Lord.

25

D. LEWIS MATHESON, by Mr. Orsborn

1 BY MR. ORSBORN:

2 Q. In this case, when Mr. Justice Dubinsky acquainted the Grand
3 Jury with the facts, do you know if this statement was actually
4 read by the judge or whether he extracted from it?

5 A. I would have no specific recollection. I do recall that some
6 judges would use it as a guide.

7 Q. Yes.

8 A. And I remember other judges that read directly from it. It was
9 a matter of practice with the judge. And I -- And in the
10 particular case, I don't remember.

11 Q. Do you know what Mr. Justice Dubinsky's practice was?

12 A. No, sir, I can't tell you that.

13 Q. Now, you've indicated that you more than likely went over this
14 with Mr. MacNeil before it was completed, and I'd like to ask
15 you just a couple of questions on the content of the Statement.
16 There is reference in the Statement to Mr. Pratico and his
17 expected testimony. There is no reference in the Statement
18 to the fact that Mr. Pratico gave a prior inconsistent state-
19 ment. Could you suggest any reason why that was omitted?

20 A. No, sir, I can't. I haven't read the whole thing, but if that
21 wasn't mentioned --

22 Q. Take my word for it, it's not there.

23 A. -- it's not there, it's not there, and I don't know why.

24 Q. In the first large paragraph on page 166, the third line of
25 that -- third-last line of that paragraph, it says:

1 As he watched...

2 This is referring to Mr. Pratico. 166.

3 ...he saw the accused remove a
4 knife from his right hand pocket...

5 From my reading, sir, of Mr. Pratico's statements and his
6 testimony at the Preliminary, his testimony boils down to the
7 fact that he saw Mr. Marshall remove something from his pocket.
8 I stand to be corrected, but I don't recall a reference to a
9 knife or to a right-hand pocket, and I'm not so much interested
10 in the details here, but I'm interested in how information
11 can be refined from the Preliminary to this Statement of Fact.

12 A. Well, Mr. MacNeil had had a personal interview with Mr. Pratico,
13 as I told you yesterday. I know for a fact that they talked.
14 Mr. Pratico may have indicated to Mr. MacNeil in the course of
15 that that it was a knife and that he took it from his right-
16 hand pocket. Otherwise, Mr. MacNeil, I'm sure, would not have
17 put it in.

18 Q. We spoke yesterday, sir, of Mr. MacNeil and particularly in a
19 case such as this where you were concerned with inconsistent
20 statements in young witnesses -- that Mr. MacNeil would go over
21 the stories with the young witnesses. Would this be the type
22 of detailed information that would be gone over in that -- in
23 those interviews?

24 A. Well, I would expect so. He would ask them for details.

25 Q. So those interviews would fill in details that were not otherwise

D. LEWIS MATHESON, by Mr. Orsborn

1 evident in earlier testimony or the statements?

2 A. Well, no. The purpose of the interview was to acquaint counsel
3 with the demeanor of the witness, and --

4 Q. Yes.

5 A. -- you can read a person's statement, but in order to assess
6 anything, credibility or anything, it's purpose is to get a
7 look at the person and become familiar with them, and I -- In
8 the course of that, Mr. MacNeil, I'm sure, would test their
9 memory and particularly in the case of Pratico because of his
10 inconsistent statement and his health, and so on. Mr. MacNeil
11 would go over it with Pratico. Now, I'm saying to you, and I'm
12 not -- I wasn't there -- of -- You're asking why this is in the
13 statement, and all I'm saying, I presume that in the course of
14 that interview, Pratico informed Mr. Macneil that it was a
15 knife and that it was in his right-hand -- It was taken from
16 Marshall's right-hand pocket.

17 Q. Okay. On that same page, sir, the third-last line of the page
18 referring to Mr. Chant's expected testimony, the sentence reads:

19 He...

20 meaning Mr. Chant.

21 He knew both the accused and Mr. Seale...

22 Again, sir, from my review of the statements and the Preliminary
23 Inquiry, Mr. Chant in fact said and testified that he did not know
24 Sandy Seale. He didn't know him at the time. He didn't know
25 him before this evening -- before that evening. Are you able

1 to suggest how that information could be modified from the
2 Preliminary to this statement?

3 A. Again, it would've been a result of the interview, I suppose.
4 And I have to say that Mr. Pratico --

5 Q. This is Mr. Chant, this one it refers to. I'm sorry.

6 A. Chant in this one, yes.

7 Q. Mr. Chant told us the story under oath at the trial that we
8 believed that -- That appears today to be at odds with the
9 facts, and Mr. Chant is saying that today. Yeh. Mr. Chant
10 has given different stories many times. Now, how this got in --
11 I presume Mr. MacNeil in the interview that Chant told him
12 that or it wouldn't be in there.

13 Q. Would it put an extra burden on you as a prosecutor when you
14 know that you've got witnesses coming up that have given incon-
15 sistent stories?

16 A. Yes, sir. It did, and it always would for any prosecutor, I'm
17 sure.

18 Q. Do you take extra care to see that they get the story right?

19 A. I presume that's what Mr. MacNeil did to see that the witness
20 got the story right, not to get a story that was --

21 Q. No.

22 A. -- untrue.

23 Q. To see that he got it right.

24 A. That's right.

25 Q. To see that it was consistent in its aspects?

D. LEWIS MATHESON, by Mr. Orsborn

1 A. Yes, sir, that's correct.

2 Q. On page 167, Your Honour, just above the names Naqvi and Gaum,
3 the last couple of sentences of that paragraph:

4 Mr. Chant at first related to
5 the police the story the accused
6 gave him but later advised that he
7 related the false story because of
8 fear of the accused.

9 Do you have any knowledge for the -- of the basis of that state-
10 ment that Mr. Chant had a fear of the accused?

11 A. There were several witnesses expressed a fear of -- threats from
12 not only the accused, but certain other of the accused friends.
13 I have no specific recollection of the details of Chant's fears
14 whatever they may have been.

15 Q. Did you have any knowledge of Mr. Chant's fear of the accused?

16 A. Yeh, I was aware that certain witnesses were afraid of -- and
17 they had been in the park and they were very young. They had
18 seen the murder, and they were of the -- They were telling us
19 that Donald Marshall did it, and they were afraid to -- This is
20 what they told us at the time that they were afraid of giving
21 their evidence lest there be some recrimination flow from it.

22 Q. I'd like to turn now, sir, for a moment, to the Grand Jury
23 process. Again, we've already discussed this. I'd like to
24 ask you if you can indicate to the Commission what that docu-
25 ment is. Exhibit No. 80.

26 A. Yes, it's a -- It's the -- a copy of the -- a part of the
27 indictment.

1 Q. Yes. Page --

2 A. And it lists the names of the witnesses that the Crown propose
3 to call on the trial.

4 Q. And this part of the Bill of Indictment would be filed, as you
5 say, in the Prothonotary's Office?

6 A. Yes, sir.

7 Q. The initials that appear beside the names, can you tell us
8 what they indicate?

9 A. I presume -- I've never been in a Grand Jury room, as you well
10 know. The Grand Jury once instructed by the judge in the manner
11 that we've set out earlier, retired from the courtroom, and
12 presumably the person designated as foreman proceeds to inform
13 the Sheriff of -- that he wants to hear what the witnesses
14 have to say. Their duty in their -- if I may say, is only to
15 be -- to satisfy themselves that there is a case to be heard,
16 and the initials beside each name I presume are those of the
17 foreman of the Grand Jury, and it appears from the document in
18 front of me that that was Lawtin B. Isherwood, and I presume
19 that those initials beside the names are his initials indicating
20 that they had called those witnesses into the Grand Jury room
21 and interviewed them.

22 Q. I believe there is or at least there was a requirement under
23 the Criminal Code that the foreman of the Grand Jury in fact
24 initial the Bill of Indictment in this manner.

25 A. Yes.

D. LEWIS MATHESON, by Mr. Orsborn

- 1 Q. As to the witnesses that were in fact called?
- 2 A. Yes. Yes, that they were in fact called. I don't recall it
3 as a matter of law. I know it was always done, and perhaps
4 I should know, but that's the explanation for that, sir, as
5 far as I know.
- 6 Q. So we can take it from this that; for example, Patricia Ann
7 Harriss, Mr. Chant, and Mr. Pratico, were all called in to
8 give their evidence to the Grand Jury.
- 9 A. Yes.
- 10 Q. Along with about eight others.
- 11 A. Yes.
- 12 Q. And do I understand correctly that there is only the Grand Jury
13 present? There is no judge, no prosecutor, no defence counsel?
- 14 A. No, sir.
- 15 Q. No Sheriff?
- 16 A. No. Absolutely -- There is nobody. There are -- The Grand Jury
17 as it was embodied on that day -- I don't recall. I presume
18 there were twelve of them. They retired to a room alone, and
19 the only one that had any access to them at all was the Sheriff
20 and the Sheriff remained outside the room. I'm not saying what
21 happened that day --
- 22 Q. Yes.
- 23 A. -- but that's what was supposed to happen. The Sheriff remained
24 outside the room, and as they informed him of the name of the
25 person that they wanted to interview, he would go and get that

1 person and deliver him to the Grand Jury Room and then retire,
2 and the story would be told by the witness to the Grand Jurors,
3 and that's the way the process worked as I understand it.

4 Q. So -- And this was heard in a Grand Jury Room, not in a court-
5 room?

6 A. Now, I don't recall that -- Yes, I believe that -- There's
7 just one jury room in the court house. It's called the
8 Petit Jury Room, but Grand Juries and Petit Juries shared the
9 same room.

10 Q. Do you know if there was any communication between either your-
11 self and Mr. MacNeil and any of these witnesses immediately
12 prior to being called -- to going into the Grand Jury?

13 A. No, it would've been quite improper. I certainly don't recall
14 anything.

15 Q. Were these witnesses --

16 A. Well, I shouldn't say that. We may have -- I don't recall
17 having anything to say. What do you mean, immediately prior --

18 Q. Yes.

19 A. -- to them going into the room?

20 Q. Yes.

21 A. No, I don't recall anything like --

22 Q. Were the witnesses all together in a room waiting to be called
23 or --

24 A. Well, the witnesses were all subpoenaed to appear in court,
25 and no, there was no room set aside to which witnesses were

D. LEWIS MATHESON, by Mr. Orsborn

1 designated to go. There isn't a witness room. I presume
2 these people would've come to the door of the court house, and
3 nobody would've paid much attention whether they were there or
4 not until 9:30 or 10 o'clock came and it was time for court.

5 Q. Yes. On the matter of timing, sir, I would ask you to refer
6 to page 152 of Volume 16. These notes, I believe, are in your
7 writing?

8 A. They are, sir, yes.

9 Q. You have a note there on the first line:

10 Nov. 2, ...
11 3:20 p.m. Grand Jury returned.

12 A. Yes.

13 Q. Are you able to indicate from that how long the Grand Jury
14 might have been questioning these witnesses?

15 A. No, I'm satisfied with that note there that that's the time
16 they came out.

17 Q. Yes.

18 A. As to when they went in, it would depend entirely on, well,
19 on the length of time for the judge to instruct them, any
20 conferences between counsel and judges, or any other case
21 that might've been on the docket that some aspect had to be
22 dealt with. There's -- It's impossible --

23 Q. I see.

24 A. -- for me say. I'm --

25 Q. I'm sorry.

D. LEWIS MATHESON, by Mr. Orsborn

1 A. I presume -- There's no need presuming. It's impossible --

2 Q. Okay. So you could not conclude on that basis that the Grand
3 Jury was considering the Marshall case from 10 o'clock until
4 3 o'clock?

5 A. No, I couldn't say that for sure.

6 Q. Okay. Moving, sir, to the trial itself, I understand you were
7 assistant -- assisting Mr. MacNeil in the trial?

8 A. Yes, sir.

9 Q. What role were you expected to play as an assistant?

10 A. Well, I was to keep my eye on the statements. I'd keep my eye
11 on the transcript of the Preliminary hearing. Obviously, I
12 was making notes for some reason, and more than that, if I
13 thought -- If I had anything to communicate to Mr. MacNeil
14 that might be useful, I was there to communicate with him.

15
16
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21 gmr
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25

D. LEWIS MATHESON, by Mr. Orsborn

1 Q. Did you and Mr. MacNeil discuss the type of jurors that you
2 would like to see or not to see on the jury?

3 A. Oh, I -- lawyers don't get to pick out the jurors that they
4 want generally. When a session of Supreme Court is scheduled,
5 the Clerk of the Court goes to the rate-payers role I believe
6 it was in those days and I don't -- I'm not sure, but they
7 in the presence of the Judge would randomly select the
8 required number of names to compose the panel. And once that
9 panel was completed, it was typed up and circulated to anybody
10 who was interested in -- that is, any lawyer who was interested
11 in any of the cases coming forward. Our practice was when we
12 received that we made copies of it and we sent the copy to
13 each of the police stations and I enumerated them yesterday.
14 We would ask the police to -- again to consult among themselves
15 and confer, and to inform us if there was any name on that jury
16 that -- that they felt they had reason to object to because
17 of perhaps lack of integrity or it might have been any reason,
18 or it -- sometimes it would be a health reason. If a man was
19 stone deaf then they would inform us that that was a fact too,
20 so -- Now we would pool the information that came in from the
21 police, make notes of it as it came, and as the jury -- as
22 the jurors were called we would -- we would have that information
23 available to us and -- and we went through the process in that
24 way.

25 Q. Do you know in 1971 that you could have women on the jury?

D. LEWIS MATHESON, by Mr. Orsborn

- 1 | A. I'd be inclined to say no, but women did come on the jury after--
2 | Women did become eligibile -- Well, maybe I've wrong now. I
3 | don't remember seeing women on juries until quite late on in
4 | my practice as an Assistant Prosecutor, and when they came on,
5 | I don't know.
- 6 | Q. I note, sir, from volume one, page 90, that the -- if these
7 | times recorded here are accurate, page 90 of volume one. The
8 | time at the top of the page, three-thirty p.m. and then part
9 | way down, "JURY SELECTED, JURY SWORN", three fifty-five.
10 | Would that time of twenty-five minutes reflect your recollection
11 | of how long it took to choose the jury?
- 12 | A. I can't --I have no specific recollection of how long it took
13 | or any of the specific process in that trial. What I told you
14 | was -- was the general practice and if the record says that
15 | we began at three-thirty, and I forget what volume -- my notes
16 | said in volume 16, but the yes, I would say that is the time
17 | it took in fact.
- 18 | Q. Am I correct in saying that you ended up with an all White
19 | male jury?
- 20 | A. You referred me to a note that I made yesterday.
- 21 | Q. Page 153-- Page 153 is a list of your names.
- 22 | A. It is volume 16?
- 23 | Q. Yes, sir, I'm sorry.
- 24 | A. The page again, you say 150?
- 25 | Q. One fifty-three, Your Honour.

D. LEWIS MATHESON, by Mr. Orsborn

- 1 A. One fifty-three. The names that I have noted here, do you
2 want me to read them off?
- 3 Q. No, it's quite all right.
- 4 A. I read the list, sir. There may be one or two of those people
5 that I know and remember, so that the composition of the jury,
6 I don't really recall. I don't recall that it was other than
7 a male White jury. I don't recall that it was --
- 8 Q. Would you have recalled it if there were a Black on it?
- 9 A. No, I wouldn't have. It wouldn't have been remarkable to
10 my --
- 11 Q. Have you ever seen a Black on a jury?
- 12 A. I can't recall that I -- I can't recall whether I did or didn't.
- 13 Q. Ever seen an Indian on a jury?
- 14 A. No, I don't believe I did.
- 15 Q. In this case would you have had any objection to an Indian
16 being on a jury?
- 17 A. Not necessarily. It would depend according to the information
18 that we had about him.
- 19 Q. So the fact that the accused was an Indian would not necessarily
20 mean that you would object to an Indian juror?
- 21 A. Well, I -- I -- It would be for Mr. MacNeil to take the
22 objection. I suppose if -- You'd have to ask Mr. MacNeil that
23 question. It wouldn't -- it wouldn't bother me one way or the
24 other.
- 25 Q. It may be a difficult question, sir, would you consider an all-

D. LEWIS MATHESON, by Mr. Orsborn

1 | White male jury to be a jury of Mr. Marshall's peers?

2 | A. Yes, sir.

3 | Q. Now, sir, turning also to your notes of the trial, page 151.

4 | A rather cryptic note at the top of the page there:

5 | "Didn't --Didn't the stabbing". Are you able to tell us what
6 | that refers to?

7 | A. Not looking at that, sir, I see the note under it refers to
8 | Pearl MacMillan. That leads me to believe that -- that the
9 | transcript will reflect that some previous witness had -- In
10 | fact, that note doesn't communicate a whole lot, but it's
11 | pure speculation. I don't know.

12 | Q. Do you remember during the course of the trial an incident
13 | involving John Pratico?

14 | A. The course of the trial?

15 | Q. Yes, not necessarily in the courtroom, but do you remember an
16 | incident involving Mr. Pratico in the court house?

17 | A. I'm sorry, I --

18 | Q. We've been told by Mr. Khattar that at one point during the
19 | trial Mr. Pratico approached him --

20 | A. Approached me?

21 | Q. No, approached Mr. Khattar with respect to his-- his testimony
22 | and then a group gathered around Mr. Pratico outside the courtroom.
23 | Do you have any knowledge of that incident?

24 | A. Yes, I recall that. I recall that.

25 | Q. What is your recollection of that, sir?

D. LEWIS MATHESON, by Mr. Orsborn

- 1 A. I recall leaving the courtroom.
- 2 Q. Was the Court --
- 3 A. The Court was --
- 4 Q. Was proceeding at the time, the trial?
- 5 A. The Court was proceeding. Now I left the courtroom, and when I
6 got to the door of the courtroom I met Mr. Khattar, and
7 Mr. Khattar was excited more than he normally is and he said
8 to me, "Pratico has said that Marshall did not stab Seale",
9 or words to that effect. He said, "I didn't do anything to get
10 him to say that". And he said that to me. It was quite
11 unnecessary. It never occurred to me that Mr. Khattar would
12 do that. I saw Donald Marshall and John Pratico standing
13 behind Mr. Khattar.
- 14 Q. When you say Donald Marshall who are you referring to?
- 15 A. Donald Marshall, Sr.
- 16 Q. Okay.
- 17 A. And I went back into the courtroom and got Mr. MacNeil.
- 18 Q. Was Court then recessed?
- 19 A. I believe that Court was just breaking at the time. I really,
20 I really don't know, but anyway I went in and got Mr. MacNeil
21 and he came out and he and Mr. Khattar and I don't know who
22 else, there was a huddle around Pratico and apparently
23 Pratico gave a story at that time that indicated that
24 Donald Marshall did not stab Seale.
- 25 Q. Was this just in the hallway in the court house?

D. LEWIS MATHESON, by Mr. Orsborn

1 | A. Yes, it was on the main floor just outside the courtroom.

2 | Q. Yes, and were you present?

3 | A. I was not present. I never heard Pratico make the statement,
4 | but immediately Mr. MacNeil said, "Pratico..." -- I don't
5 | know exactly what he said, but he indicated that they
6 | changed -- that he'd changed his story, that is, Pratico,
7 | and --

8 | Q. Mr. MacNeil told this to you?

9 | A. Yeh. Yes, sir. And at that point, there was a conference.
10 | I don't know who participated in it. I'm sure that Mr. MacNeil
11 | and Mr. Khattar, and Mr. Rosenblum, and myself were there.

12 | Q. Yes.

13 | A. And the purpose of it was, you know, what are we going to do.

14 | Q. Was Mr. Pratico present?

15 | A. No.

16 | And the decision was that we would take Pratico into a room
17 | exclusive of the Judge. Now what I expected we were going to
18 | do was that we'd meet with Pratico and all the Court Officers
19 | other than the Judge would be there. We went in to the
20 | Barrister's Library. There was anteroom on the outside of the
21 | library and several people went in there. The ones that I
22 | recall being there were Mr. K -- myself, Mr. Khattar, John
23 | MacIntyre, John Pratico, and Donald MacNeil. There were other
24 | people in the room, how many I don't know, but I remember
25 | those because they were people -- all those people spoke. I

D. LEWIS MATHESON, by Mr. Orsborn

1 don't remember what was said, except to say this, that I
2 listened carefully and I was satisfied that -- that it was
3 communicated to Pratico that he was -- that it was a very
4 important matter, that we all realized he was young and that
5 the burden -- that every -- the burden on him and what
6 everybody expected of him was to tell the truth so far as he
7 could recall it, and if he couldn't recall it to say nothing,
8 and -- and to tell the truth. And there may have been a reference
9 to perjury because I remember the last thing that was said in
10 the room, Mr. MacNeil said, "About the perjury and about anything
11 you've said before", he said, "forget about that, you don't
12 have to worry about it". And that stands out in my mind and
13 I recall talking to Mr. MacNeil after and saying that we'll
14 have to make -- it's up to you to make that stick.

15 Q. You then have a specific recollection of Mr. MacNeil advising
16 Mr. Pratico that he should not be concerned about changing his
17 testimony from the Preliminary to the trial?

18 A. I don't know exactly what was said and I may not have -- I
19 don't -- What -- I do remember what I recounted to you. All
20 I can say to you, sir, is -- is that Mr. Khattar was present
21 and I don't remember Mr. Rosenblum being there, but if he
22 wasn't there I can't imagine why he wasn't, and statements
23 were made and all four of us left the room satisfied, I'm
24 sure, that we had done the best we could to -- to resolve the
25 matter. If I had -- it occurred today I might to it different,

D. LEWIS MATHESON, by Mr. Orsborn

1 | but we were satisfied.

2 | Q. Do you recall Mr. MacNeil's demeanour when he was talking to
3 | Mr. Pratico?

4 | A. I don't recall that he had any different demeanour.

5 | Q. Was everybody standing?

6 | A. Yes, sir, they're all standing.

7 | Q. In this room did Mr. Pratico repeat his story that he did not
8 | see the stabbing?

9 | A. No, not to my -- not that I recall. I mean I'm sure -- No,
10 | he didn't. I'm sure he didn't. The -- The -- The inconsistent
11 | story conversation took place outside the Barrister's Room,
12 | and when we went back in in the group, we weren't there to
13 | cross-examine him or anything. It was more -- The purpose
14 | of going there was to try to set the young fellow at ease and
15 | to impress on him that he should tell the truth.

16 | Q. Did Sergeant MacIntyre say anything?

17 | A. Yes.

18 | Q. Do you remember what he said?

19 | A. I don't remember what he said but I was well aware he was
20 | a police officer and I listened to what he said and I -- I was
21 | satisfied that there was nothing disruptive in any way about
22 | it, and Mr. Khattar was there for sure. Mr. Khattar had no
23 | comment on it and I'm pretty sure Mr. Rosenblum was there and
24 | Mr. Rosenblum made no comment on what MacIntyre had to say.

25 | Q. Did Mr. Pratico say anything at all?

D. LEWIS MATHESON, by Mr. Orsborn

- 1 A. I don't recall him making any statement at the time. He
2 was -- gave the appearance of being a pretty concerned young
3 fellow, I want to tell you.
- 4 Q. Did he give you any indication that he was scared?
- 5 A. Well, I don't know how you -- He might have been scared. He
6 never -- But he never gave us an indication of that; that is,
7 orally.
- 8 Q. Yes. Specifically did he give you any indication that he was
9 scared of Donald Marshall, Sr.?
- 10 A. No, and that fact never occurred to me. It never occurred to me
11 at all. He never said that and I never thought it.
- 12 Q. Can you suggest any reason why when Mr. Pratico got back into
13 Court that Mr. MacNeil pursued that line with him and left
14 the impression with the Court that Mr. Pratico was scared of
15 Donald Marshall, Sr.?
- 16 A. Mr. MacNeil got back into Court and asked questions about it.
17 He was going at it in direct examination. I suppose that
18 Mr. MacNeil felt that that whole scene should be brought
19 before the Court. The Judge ruled against it. In -- I read
20 the transcript and Mr. MacNeil -- or rather it was the Defence
21 raised the issue before the Judge and the Judge ruled that the
22 fact that Mr. Pratico had made an inconsistent statement could
23 be revealed, but the details of it, he didn't want to hear.
24 In the course of doing that there was some reference to people
25 that were present and in re-examination Mr. MacNeil brought out

D. LEWIS MATHESON, by Mr. Orsborn

1 | that Donald Marshall, Sr., was present. The Judge cut him off
2 | there and that's as far as he got. What -- This was not a
3 | calculated attempt to put a suggestion that Donald Marshall, Sr.,
4 | had anything to do with Pratico changing his story. I believe
5 | it was an attempt by Mr. MacNeil to put the facts in evidence
6 | which the Judge had already said he couldn't, but we felt --
7 | we all felt, I think, that that should have been made known to
8 | the jury and the background to it.

9 | Q. Do you know after you --

10 | A. And I want to say this, that the Judge made all of his rulings
11 | so far as I know, without any detailed knowledge of what had
12 | occurred in the hall the previous day. As a matter of fact,
13 | when we went into the room with Pratico, it was a -- it was
14 | a common agreement among the four of us that this would be
15 | done away from the Judge and to my knowledge none of us
16 | communicated anything about that to the Judge.

17 | Q. And just let Mr. Pratico tell the story on the stand?

18 | A. That's correct.

19 | Q. After this conference finished with the four of you and
20 | Mr. Pratico in the room, to your knowledge was there any
21 | communication between Mr. Pratico and say Donald Marshall, Sr.,
22 | and Sergeant MacIntyre, Mr. MacNeil?

23 | A. I'd like to be able to answer that question, but I'm sure that
24 | so far as MacNeil and I were concerned, we had no further
25 | communication with Pratico, and I don't know who he may have

D. LEWIS MATHESON, by Mr. Orsborn

1 spoken to?

2 Q. Were you surprised at the verdict in the trial, sir?

3 A. No.

4 Q. Did you form any opinion of the effort mounted by the Defence?

5 A. Yes, I thought they had -- I thought they had done a good and
6 a vigorous job to the best of their ability. I was puzzled
7 by some things that were not done. Now that was my impression
8 at the time. As I speak to you today I've had the benefit
9 of not reading the entire transcript, but I realize now that
10 some of the things that I expected them to do, they were --
11 they didn't do because of interpretations that they placed on--
12 I'm only guessing, but interpretations that they placed on the
13 Judge's ruling and Mr. Khattar said so here yesterday.

14 Q. What sort of things puzzled you at the time?

15 A. Well, it puzzled me at the end of the trial that -- and I
16 realize now they are rulings the Judge made, but the conversation
17 between Pratico and Mr. Khattar and in the presence of others,
18 (There's no doubt he made it.) that should have been before the
19 jury and if I -- I'd like to think that if I had been in their
20 position I would have shot it forward. I realize now that --
21 that there were rulings made by the Judge that impeded that
22 but that's the only comment I made -- I want to make. At the
23 end of a trial you -- you don't go and look to see if the
24 other fellow made a mess of it. You're going around wondering
25 what -- if you did well enough yourself. That's my experience.

D. LEWIS MATHESON, by Mr. Orsborn

1 | And I don't mean to suggest for a minute that I thought
2 | at all that they made a mess of it. I didn't. I thought
3 | it was a hard-fought trial. I was satisfied with the verdict
4 | and --

5 | Q. Were you surprised --

6 | A. --until I read the transcript I -- I never put my mind to that.

7 | Q. Were you surprised that Defence had not cross-examined
8 | witnesses, such as, Harriss, Chant, and Pratico, on their
9 | earlier written statements?

10 | A. Yes, but I thought that that was a matter of tactic. If they
11 | went after those people about the statements that they had made
12 | previously, the evidence was going to come out as to why
13 | they had made the previous inconsistent statement and then they
14 | were going to be left with the "bogey man" that -- that they'd
15 | have to explain that certain Indian people were threatening.
16 | There may have been some suggestion of that and there was at
17 | the trial, but I'm sure Mr. Khattar and Mr. Rosenblum wanted
18 | to keep that -- not to make that an issue in the trial.

19 | Q. Did you ever discuss the trial with Mr. Khattar and Mr. Rosenblum
20 | subsequently?

21 | A. No, sir.

22 | Q. Even informally?

23 | A. No, sir.

24 | Q. Following the trial there was an Appeal filed. Did you have
25 | any part to play in the Appeal?

D. LEWIS MATHESON, by Mr. Orsborn

1 A. No, sir.

2 Q. Did you have any contact with this case at all following the
3 trial?

4 A. Yes, sir.

5 Q. Could you tell us about that please?

6 A. Some -- A short time after the trial while I was at home having
7 a late supper-- I'm not sure of the time. It was -- I know
8 that I was late for supper that night and I was finishing
9 supper and I received a phone call to go to the police
10 station that a new witness had come forward indicating that
11 somebody other than Marshall had stabbed Sandy Seale.

12 Q. You recall --

13 MR. CHAIRMAN:

14 A few days after the trial?

15 THE WITNESS:

16 Not -- I don't remember the specific date, My Lord; maybe about
17 a week.

18 BY MR. ORSBORN:

19 Q. That you were called?

20 A. I -- And as a result of that call I went directly to the
21 police station.

22 Q. Was Mr. MacNeil in town at the time?

23 A. No, Mr. MacNeil -- Mr. MacNeil -- Following the termination of
24 the Supreme Court term, Mr. MacNeil went off for a few days
25 vacation. I don't recall now where he went. I knew at the time

D. LEWIS MATHESON, by Mr. Orsborn

1 | where he was, but I also knew that -- that I couldn't contact
2 | him by phone wherever he was. So I went to the police station
3 | alone. I -- I was the assistant and I knew about it and I
4 | went to the police station.

5 | Q. And what happened at the police station?

6 | A. I went down to the police station and there were many police
7 | officers milling about.

8 | Q. Do you know roughly what time of day it was?

9 | A. Pardon?

10 | Q. Do you know roughly what time of day it was?

11 | A. Well, as I said, I was having a late supper, I received the
12 | call and went directly to the police station. It would only
13 | be a matter of -- of five minutes for me to get to the police
14 | station. I was there quite promptly. I was presented with
15 | a statement that the police told me they had taken from
16 | another gentleman who was in the building. The name -- The
17 | fellow's name was James MacNeil. I read what MacNeil had
18 | to say and I was impressed that -- that it had a version of
19 | the facts that was consistent with what Marshall -- what we
20 | understood Marshall was saying all along.

21 |
22 |
23 | *JMR*
24 |
25 |

D. LEWIS MATHESON, by Mr. Orsborn

- 1 Q. Yes.
- 2 A. And that was -- that was -- that was glaring. I went back
3 and reread the statements we had on file from the others.
- 4 Q. Did you do this that night at the police station?
- 5 A. I did it -- well, I don't recall if the statement was all that
6 long.
- 7 Q. Yes.
- 8 A. It took whatever time it would take me to read those statements.
9 And I think I read them quite carefully and at the conclusion
10 of that I was satisfied that what this fellow, MacNeil, was
11 saying could be true and that we were going to have to do some
12 investigation.
- 13 Q. Did you speak to Mr. MacNeil yourself?
- 14 A. Yes, I went -- I asked the police about him and they gave
15 me their description of him and I thought that -- that I
16 should go up and have a look at him myself.
- 17 Q. What was the description you received from the police?
- 18 A. Well, they -- I don't remember their words but they said
19 look -- they were shaking their head. They didn't think
20 Mr. MacNeil was reliable.
- 21 Q. Do you know which policeman you were talking to?
- 22 A. No, I was talking to several.
- 23 Q. Do you know if either Sergeant MacIntyre or Detective
24 Urquhart were there?
- 25 A. I don't recall.

D. LEWIS MATHESON, by Mr. Orsborn

1 Q. You decided then you would speak to Mr. MacNeil yourself?

2 A. Yes.

3 Q. And this is all taking place this evening?

4 A. Oh, yes, it's all -- all in the same evening, yes.

5 Q. And did you, in fact, talk to Mr. MacNeil?

6 A. Yes, I did.

7 Q. By yourself?

8 A. No, there were other people around. I don't remember who was
9 there but there were other people there.

10 Q. And what did Mr. MacNeil tell you?

11 A. Well, I -- first of all I took Mr. MacNeil's statement and
12 I went in and introduced myself. I didn't warn him or
13 anything like that. I didn't consider myself an investigating
14 officer, I was just curious to have a look at him. So I
15 took his statement. And I went in and told him who I was
16 and I asked him if he would repeat the story that he had
17 told to the police. And as he did so I checked it to what
18 was on the paper in my hand.

19 Q. Yes.

20 A. And again I have to say that there was no substantial difference
21 if any at all, from what was written on the paper. And I asked
22 him, I said, "Mr. MacNeil, why didn't you come forward when
23 the police publicized they were looking for witnesses"? And
24 he said that, "Well", he said, "I knew Marshall wasn't guilty
25 and I didn't think -- I didn't think that a jury could

1 possibly find him guilty". Because he knew -- he knew that
2 Marshall didn't do it. And that was his answer and I began
3 to think well, one of the reasons I'm doubting you is that
4 exactly for that reason the jury has found him guilty. I
5 remember that running through my mind. I then asked him,
6 I said, "Why are you coming forward now"? And he said,
7 "Because my brother told me to". And I -- I must say that
8 when I looked at -- another note that I made, he was wearing
9 a blue Burberry which again, was --

10 Q. Mr. MacNeil was?

11 A. Mr. -- yes, James MacNeil was wearing a blue Burberry and I
12 thought, well, that -- he -- he says he's one of the guys that
13 was involved and Marshall said that they were two fellows
14 dressed like priests --

15 Q. Yes.

16 A. -- and it occurred to me that maybe -- maybe there was
17 something.

18 Q. Mr. MacNeil, in fact, used that word "priests" in his
19 statement too, I believe, the same word?

20 A. I don't recall. I haven't read it since. I wouldn't be
21 surprised.

22 Q. What was your impression of Mr. MacNeil?

23 A. He -- well, first of all in appearance he was -- he looked
24 emaciated. He -- he didn't express himself with confidence
25 at all in anything that he said. He gave the appearance of

D. LEWIS MATHESON, by Mr. Orsborn

1 | being totalling lacking in conviction and I just -- I -- I
2 | believed what I read. I didn't believe what he said. At
3 | that point I thought that MacNeil was lying.

4 | Q. You thought he was lying?

5 | A. Yes.

6 | Q. What was the basis for that conclusion?

7 | A. It was just the impression that I got. As I say, every -- I
8 | couldn't from my observation of him get any confidence that
9 | he had any conviction in what he was saying. And I wondered
10 | also and he gave the appearance of a fellow being scared and
11 | nervous and because of the experience we had had during the
12 | trial with other witnesses saying that they had been
13 | threatened; the thought crossed my mind that somebody may
14 | have put this fellow up to a story or threatened him to come
15 | and -- and that he was doing it by compulsion. That thought
16 | crossed my mind.

17 | Q. Let me read you what Inspector Marshall wrote of Mr. MacNeil
18 | in the following couple of weeks. It says:

19 | We interviewed MacNeil and it was
20 | obvious by his demeanour and speech
21 | that he has sub-normal intelligence
 and is slightly mental.

22 | Did you reach that -- a conclusion similar to that?

23 | A. No, I didn't -- well, I -- I only spoke to him for a short
24 | time. I didn't think that he was lacking in intelligence.

25 | I wondered whether perhaps he might have had mental troubles.

D. LEWIS MATHESON, by Mr. Orsborn

1 I remember -- I -- taking a close look to see was this fellow
2 drunk or was he under drugs.

3 Q. Yes.

4 A. And I went to -- I made a point to observe that and I saw
5 no sign of it. But I wondered at the time whether -- whether
6 he was perhaps in the process of recovering from something
7 like that.

8 Q. Okay, there's one other point on the R. C. M. P. later reports,
9 sir, you don't need to turn to it, but I am reading for the
10 record from volume 16 at page 204. It's talking about Mr.
11 MacNeil coming forward, and it says in paragraph three of
12 this report:

13 MacNEIL, James MacNEIL (it says)
14 was interviewed by Sydney City
15 Police and the Prosecuting
16 Officer for Cape Breton County,
17 Donald C. MacNEIL, Q.C.

18 Would I be correct in saying that this is an error in the
19 R. C. M. P. and that Mr. MacNeil was, in fact, interviewed
20 by yourself?

21 A. That's correct. Mr. MacNeil was out of town at the time.

22 Q. Following your interview with Mr. MacNeil, what did you do?

23 A. I -- well, as I indicated the -- I believed what -- that
24 what was written on the paper could be true. I didn't
25 believe MacNeil.

26 Q. When you say "what was written on the paper", you're
27 thinking of MacNeil's statement?

D. LEWIS MATHESON, by Mr. Orsborn

1 | A. Right, statement -- MacNeil's statement could have been true.

2 | Q. But you didn't believe him?

3 | A. No, I didn't believe him; but it could have been true. And
4 | I said, we can't let this rest.

5 | Q. Okay, let me -- let me understand you so were not -- were
6 | not at cross purposes. You -- you did not believe what he
7 | told you but you did believe that --

8 | A. When I --

9 | Q. -- at least what had -- what was on the statement could have
10 | been true, even though you didn't believe it?

11 | A. That's --

12 | Q. Is that correct?

13 | A. Yes, thank you. Thank you I didn't -- well, anyway you
14 | clarified it. I -- it occurred to me that further
15 | investigation was going to have to be carried out. I talked
16 | to the police officers who were present as to whether or not
17 | that investigation should be done by another police force
18 | and it further concerned me that just what was our and
19 | by our I mean, what was the local Prosecutors position in
20 | this from -- an Appeal was pending, if not on file, and I
21 | wondered whether -- whether somebody from the Department in
22 | Halifax should deal with the situation or whether -- whether
23 | I should deal with it, or try to deal with it. It occurred
24 | to me also and what was most compelling at the time was
25 | people were in and out. The fact that James MacNeil had

1 had come forward and made a statement was known, at that point,
2 to my knowledge among enough people that I feared that somebody
3 would get to the Pratico's. The Pratico family. Excuse me,
4 the Ebsary family. And -- and alert them that they were going
5 to be confronted with this. I didn't want to -- them to have
6 time to prepare a story that wasn't true. And I felt that the
7 quicker they were confronted the better and I felt that had
8 to be regardless of anything else that had to be done that
9 night. And I asked the police --

10 Q. Do you recall who you asked?

11 A. No, there were several officers there. I can't specifically
12 remember who they were. I asked them if they would go and
13 round-up the Ebsary family wherever they were. To isolate
14 them and to confront them with MacNeil's story and to record
15 their answers.

16 Q. MacNeil in his statement refers to "Roy, his wife, daughter and
17 son", is it fair to say that you would have been aware after
18 reading that that Mr. Ebsary had a wife, daughter and son?

19 A. Yes, and I didn't know how many but my instructions -- like
20 I didn't know Roy Ebsary or his wife or how many children
21 he had. My instructions --

22 Q. Had you ever heard of him?

23 A. Pardon.

24 Q. Had you ever heard of him?

25 A. No, sir.

D. LEWIS MATHESON, by Mr. Orsborn

1 Q. Your instructions were what?

2 A. I told them to round-up the Ebsary family and to isolate them
3 and to confront them with the MacNeil statement and record
4 their answers.

5 Q. And did you issue any instructions with respect to checking
6 the police record of Mr. MacNeil or Mr. Ebsary?

7 A. I may have -- I may have asked the police if they knew anything
8 about either MacNeil or Ebsary, but I certainly didn't ask
9 them to go check the records, no.

10 Q. And following your instructions to the police to round-up Mr.
11 Ebsary's family, what did you do then?

12 A. I sat and waited for a period of time. And eventually the
13 police came back in and they said that they had talked to
14 the Ebsarys' and presumably all of them, and that they had
15 said that MacNeil's story was untrue. And at that point it
16 was getting quite late and I felt that it was absolutely
17 essential that I communicate to the office in Halifax what
18 had transpired. Quite frankly, I couldn't get Mr. MacNeil
19 and I was looking for assistance in what to do.

20 Q. Did you see any of the statements that were taken from the
21 Ebsary family?

22 A. I don't recall if I did.

23 Q. And do you know which of the police advised you that the
24 Ebsarys' had said it wasn't true?

25 A. No, I have a -- I have a recollection of this and this only,

D. LEWIS MATHESON, by Mr. Orsborn

1 that I asked and I don't know whether this was after the police
2 came back or not; but I -- I recall asking, I think it was
3 Detective Norman MacAskill, if he knew Ebsary. And I don't
4 even recall that he answered but somebody said Ebsary is
5 a bit of an eccentric. And I said what about his wife? And
6 it was MacAskill who said that she worked at, I think he
7 said, the Wandlyn; but at least some motel in the town, and
8 that she was - described her as, I think, the anchor of the
9 household and he didn't think that she would be a party to
10 involving her children in covering up an offense of this
11 magnitude.

12 Q. At this time it's about a month or, I'm sorry, less than a
13 couple of weeks after the trial concluded, would the trial
14 transcript be available?

15 A. Not at that point.

16 Q. In his --

17 A. I would -- I know I'm quite sure it wouldn't be.

18 Q. No, the -- the court reporter's certificate at the end of the
19 transcript, I think, is dated December 16th; but in his Charge
20 to the jury, the Judge read verbatim from some of the evidence
21 thus indicating that the Judge may have had some aspects of
22 the proceedings transcribed. Those portions that the Judge
23 had transcribed, would they have, in any way, found their
24 way into the police file or the Prosecutor's file?

25 A. It wouldn't be -- if they're there -- they're there -- it

D. LEWIS MATHESON, by Mr. Orsborn

1 | wouldn't be -- it would be highly unlikely. If a Judge is
2 | in doubt about what he may have in his notes and he
3 | considers it important and he's going to make a comment on
4 | it, he asks the Court Reporter to select that portion from
5 | the record, have it typed, it goes to the Judge. There would
6 | be no reason to expect that any of that information would get
7 | into the file for the Crown or for the defense.

8 | Q. Okay, now after the police advise you that -- of the story
9 | the Ebsary's told you, did you think it necessary to pursue
10 | the matter further?

11 | A. Yes.

12 | Q. What did you do?

13 | A. I -- my immediate superior next to Mr. MacNeil who was
14 | absent was Robert Anderson in Halifax. And I made a call
15 | and determined what his home number was. And I called him
16 | and informed him of the situation pretty well the way I
17 | already outlined to the Court.

18 | MR. CHAIRMAN:

19 | Q. That was the same night?

20 | A. Yes, sir. And it was from the police station in the same room
21 | I called him and asked if he would recommend -- oh, another
22 | thing that I didn't mention. When the police came back, they
23 | indicated that Mr. Ebsary and MacNeil were both willing to
24 | take a polygraph test. And I thought, well, I was in enough
25 | of a quandary. I knew that a polygraph was not admissible

D. LEWIS MATHESON, by Mr. Orsborn

1 evidence in court; but I was in a bit of a quandary and I
2 thought, well, it might be some sort of an investigative
3 aid along with other evidence and I thought it would be a
4 good idea if he was done. And since they were both willing
5 in addition to the other matters I mentioned, the only
6 polygraph instrument operative in Nova Scotia at that time
7 to my knowledge was in Halifax. And I phoned -- when I
8 phoned Mr. Anderson I mentioned that to him too if he could
9 get us a polygraph instrument. I mentioned about whether
10 investigations should be done by another department. I told
11 him my impressions of the witness and everything that -- well I
12 told him, I think, everything that I told the Court up until
13 now.

14 BY MR. ORSBORN:

15 Q. And what advice did you receive from Mr. Anderson?

16 A. He -- he didn't have any further suggestion as to what might
17 be done that night. He told me that he would get back to
18 me about the other matters that I put to him. I don't
19 recall receiving a call the next day. But early the next
20 day I was aware, how I became aware I don't know, that --
21 that Inspector Marshall of the R. C. M. P. and a polygraph
22 operator were coming, I think, the following week to -- to
23 do an investigation.

24 Q. And when you say "to do an investigation", what did you
25 understand by that?

D. LEWIS MATHESON, by Mr. Orsborn

1 | A. Well, I -- I don't recall having any specific details of what
2 | his mandate would be.

3 | Q. What did you want done?

4 | A. Well, I wanted the thing investigated. I had spoke of the
5 | prospect of bringing in another police force and since
6 | Inspector Marshall was coming, I presumed that's what he
7 | was going to do.

8 | Q. You say "you wanted the thing investigated", did you want the
9 | whole thing looked at or simply Ebsary and MacNeil looked at?

10 | A. No, I think it would have been -- if I had been doing it, I
11 | would have talked to more than Ebsary and MacNeil. I would
12 | have talked to the witnesses who gave evidence at the trial
13 | also. At least, if not -- if not -- and then anybody else
14 | that that investigation might bring to light that was unknown
15 | to us at that time.

16 | Q. Did you expect then when the R. C. M. P. became involved, that
17 | they would, in fact, interview witnesses that testified at
18 | trial?

19 | A. Yes, I -- I expected that was -- that was done.

20 | Q. Did you issue any instructions to them not to do that?

21 | A. No, sir. No, it would -- far be it for me to -- I requested
22 | that -- that an investigation be done. And as I said, my
23 | whole presence there -- another thing that was in my mind there
24 | talking to MacNeil, was I don't want to get mixed up so I'm
25 | going to become a witness and, you know, I wanted to get the

D. LEWIS MATHESON, by Mr. Orsborn

1 thing thrashed out; but I don't -- I never presumed to tell
2 police officers how they should conduct their investigation.
3 I might suggest that it would be nice if something was
4 investigated; but -- and I -- I wouldn't -- it wouldn't --
5 it wouldn't occur to me to tell Marshall what to do. If
6 there was anything to be said from the Crown point of view
7 at all, it would have, should have been said, if at all,
8 by Mr. MacNeil. Who by the time Marshall arrived in town was
9 back -- back in his office.

10 Q. And your expectation was, none the less, that the investigation
11 would go beyond Ebsary and MacNeil?

12 A. I understood, yeh.

13 Q. Now did you brief Donald MacNeil on his return?

14 A. Yes.

15 Q. What did you indicate to him?

16 A. Well, I think I told -- certainly told him everything I told
17 the Court here this morning, you know.

18 Q. And what was his reaction?

19 A. Well, I -- I don't remember. I do remember what I was looking
20 for in a way of a reaction. I said, "You know, what else
21 could I, you know, should I have done anything else or...".
22 And I don't really -- as far as I recall, I think, he was
23 satisfied that I had done -- at least, he was kind enough
24 not to be critical of what I had done.

25 Q. Did he then concur in your involvement with the R. C. M. P.?

D. LEWIS MATHESON, by Mr. Orsborn

1 | A. Yes.

2 | Q. Did he give you any indication that he felt the R. C. M. P.
3 | investigations should only be Ebsary and MacNeil?

4 | A. I don't recall that we discussed that.

5 | Q. Did you have any involvement in the actual investigation that
6 | the R. C. M. P. carried out?

7 | A. No, sir.

8 | Q. Do you know what was done?

9 | A. No, I don't know what was done; but again a few days later
10 | at the -- at the end of the work day Mr. MacNeil said to
11 | me that Inspector Marshall, who was a -- when I say friend
12 | and acquaintance, he had been stationed here. Mr. MacNeil
13 | knew him. And he said Marshall had completed his
14 | investigation and that -- that although he was not reporting
15 | to us, he was kind enough to let us know how things stood.
16 | And that meeting was in the evening, I don't know, around
17 | seven o'clock at the Prosecutor's office. And he said if
18 | you're interested, he said, come on over and meet the
19 | fellows and let's here what -- what happened. So we went
20 | to the office and Inspector Marshall and Sergeant Smith,
21 | the polygraph operator were there. Now what I remember --
22 | my recollection of the conversation is that Sergeant Smith
23 | said that on the polygraph the result was that Ebsary was
24 | telling the truth and my recollection is that Marshall was
25 | unreliable.

D. LEWIS MATHESON, by Mr. Orsborn

- 1 Q. You mean MacNeil was unreliable not Marshall?
- 2 A. I'm sorry, yes, MacNeil was unreliable. And there was -- there
3 was other conversation. Marshall, that is Inspector Marshall,
4 was present at the -- he didn't say a whole lot. He indicated
5 that that's the way it looked for the moment and that he
6 would be making a full report to Halifax.
- 7 Q. Did you ever see a written report from Inspector Marshall?
- 8 A. No, sir. I did see a written report from Sergeant Smith
9 subsequent to that. And I recall the conversation as I recounted
10 it here. But when I saw the official report from
11 Sergeant Smith, it said that Ebsary was telling the truth but
12 that the test on MacNeil was unreliable.
- 13 Q. Yes. Do you remember if whether or not during your meeting
14 with Inspector Marshall, he reported his conclusion that Mr.
15 Marshall and Mr. Seale had, in fact, been involved in a
16 robbery attempt that night or a rolling attempt?
- 17 A. No, I don't remember that, sir. I'm -- I'm not saying --
18 I think I would have -- I don't remember Mr. Marshall saying
19 a whole lot to us and our interest mainly in their report
20 was -- was in the polygraph results.
- 21 Q. Do you know -- did you ask Inspector Marshall if they had
22 interviewed the witnesses at the trial?
- 23 A. I didn't ask him and I don't think Mr. MacNeil did in my
24 presence.
- 25 Q. Do you now know the extent of that investigation?

D. LEWIS MATHESON, by Mr. Orsborn

1 | A. No, sir.

2 | Q. Would you --

3 | A. I'd never seen the --

4 | Q. Would it surprise you to learn that the only people interviewed
5 | were Ebsary and MacNeil?

6 | A. Yes, it would surprise me, yes. But not - Again I didn't know
7 | what Inspector Marshall was -- what his mandate was.

8 | Q. Was there any communication to your knowledge to defense
9 | counsel concerning this development?

10 | A. Well, on the night that it happened, I specifically told the
11 | police, I said, "Look, don't, you know, keep this under your
12 | hat until we get it investigated". I thought that was
13 | important. So at that point I wasn't telling anybody. Once
14 | the investigation was known, I think it would have been
15 | important to disclose it to defense counsel.

16 | Q. You say "once the investigation was known", you mean the
17 | results?

18 | A. The results of the investigation was known, yes. Then it
19 | would be important and significant throughout the rest of
20 | the proceedings that this be known.

21 | Q. Now is that only if the results were in Mr. Marshall's
22 | favour?

23 | A. No, I think that they should have known that -- that a witness
24 | had come forward and given a statement inconsistent with the
25 | conclusion of the trial. And now I think the defense, I

D. LEWIS MATHESON, by Mr. Orsborn

1 thought, should have been aware of that.

2 Q. And who should have told them?

3 A. The Crown.

4 Q. Which is you and Mr. MacNeil?

5 A. At that point, we -- we never saw the report. The report
6 went on to Halifax. It certainly was not my responsibility
7 to tell to the defense or anybody what occurred. I don't
8 think it was incumbent upon Mr. MacNeil. So as far as I
9 know, he never saw the final report either. If the report
10 was in the hands of somebody in Halifax, the results of
11 the investigation were known, Mr. Rosenblum was present
12 with Crown Counsel on the Appeal and I would have -- I
13 would have thought that if it was known, that -- I thought
14 they knew everything about it that I did.

15 Q. I see.

16 A. And I thought they'd tell them.

17 Q. Are you now aware that we're told by Mr. Khattar, that defense
18 counsel were never told of the investigation?

19 A. Yes, sir, I'm --

20 MR. CHAIRMAN:

21 I think it would be any appropriate time for a short break.

22 INQUIRY ADJOURNED: 10:59 a.m.

D. LEWIS MATHESON, by Mr. Orsborn

1 INQUIRY RECONVENED AT 11:18 a.m.

2 BY MR. ORSBORN:

3 Q. Judge Matheson, just a couple more questions on the
4 1971 re-investigation. Were you aware that Donna Ebsary
5 was not interviewed by the Sydney Police on the night
6 that Mr. MacNeil came forward?

7 A. No, sir. I don't recall that I was. I understood they
8 had all be interviewed.

9 Q. Did you later become aware that she was not interviewed?

10 A. Yes.

11 Q. When did you become aware of that?

12 A. When I first met with the counsel for the Commission and
13 counsel that represented the officers of the Department,
14 they suggested to me that Donna Ebsary had sat out in the
15 car with the dog and it was the first knowledge that I had
16 that the Ebsary family had been interviewed in the police
17 station where I was.

18 Q. The fact that Donna was not interviewed, was that contrary
19 to the intent of your instruction to the police?

20 A. Yes. If -- I asked them to separate them and interview
21 them all.

22 Q. With respect, sir, to the polygraph examinations, do you
23 have any knowledge of whether or not a polygraph test
24 was considered for Donald Marshall Junior?

25 A. Pardon me?

D. LEWIS MATHESON, by Mr. Orsborn

1 Q. Do you know whether or not a polygraph test was considered
2 for Mr. Marshall?

3 A. I don't recall.

4 Q. Did Mr. MacNeil ever discuss it with you?

5 A. No, sir. Not that I recall.

6 Q. We were told sir and we expect to hear evidence that the
7 R.C.M.P. through Constable Gary Green looked at -- or
8 approached the Sydney Police in 1973 about Ebsary's story.
9 Do you have any knowledge of that approach to the Sydney
10 Police?

11 A. No, sir.

12 Q. We were also told or we will be told that in 1975, an
13 R.C.M.P. officer named Eugene Coles reviewed the Ebsary
14 file at the Sydney Police office. Do you have any
15 knowledge of that approach by the R.C.M.P.?

16 A. I don't -- I don't recall being aware that that was done.

17 Q. You were none the less still in the prosecuting office?

18 A. Yes, I would have been there at that time. It wasn't done
19 as a result of instructions from our office to my knowledge.

20 Q. Were you contacted, sir, by the R.C.M.P. in the course of
21 their re-investigation in 1982?

22 A. Yes.

23 Q. What was the nature of that contact?

24 A. I had a conversation with Sergeant Wheaton in the Wandlyn
25 Motel in Port Hawkesbury and I was sitting down having a meal

D. LEWIS MATHESON, by Mr. Orsborn

1 and he came over and spoke to me and said that he was
2 doing a re-investigation of the Marshall case and I knew
3 that the investigation was ongoing at the time. He asked
4 me some questions and I presumed that he knew, being a
5 member of the R.C.M.P. and being instructed to do it by
6 the Department, I presumed he knew everything that I knew
7 and maybe he has notes of what we had to say. I told him
8 that, in effect, you know what I know about it and that's
9 it.

10 Q. Is that the extent of your contact with the R.C.M.P?

11 A. Yes, sir.

12 Q. Were ever contacted by Mr. Aronson?

13 A. I don't recall being --

14 Q. Do you know Mr. Aronson or know of him?

15 A. No, I -- I know a Mr. -- There was a Mr. Aronson that
16 represented Mr. Donald Marshall Junior. I don't know the
17 man and I don't recall ever having spoken to him or received
18 any communication from him.

19 Q. Now, sir, you were in the prosecuting office for a number
20 of years in this area and now a judge. You had the opportunity
21 to attend the proceedings involving Mr. Marshall. Looking
22 back on it now, can you express whether or not, in your
23 opinion, the system of administration of justice functioned
24 properly in Mr. Marshall's case?

25 A. Well, if the -- If what is now being said is true, that is

D. LEWIS MATHESON, by Mr. Orsborn

1 what the witnesses are telling the Inquiry, it's obvious
2 that there -- an error was made. And obviously the system
3 didn't work, if that's the case. I suppose that's why the
4 Inquiry is sitting, to determine where it went wrong or
5 if it went wrong and --

6 Q. From your knowledge of the matter, sir, could you be of
7 any assistance to the Commission in making suggestions that
8 might prevent it from happening again?

9 A. Yes, I would suggest that once an officer become seized
10 with a case, --(By that I mean a crown officer.) that he
11 would pursue the case to the end unless he was doing something
12 wrong and had to be removed from it. But that he follow
13 the case right through to its conclusion. Now, I couldn't --
14 There are other areas where maybe things went wrong and
15 they're not within the ambit of my ken to -- Other people
16 can make better suggestions than I can.

17 Q. When you say a crown officer see the case through to it's
18 conclusion, are you referring to the fact that the
19 prosecuting officers at trial did not pursue the Appeal.
20 Is that what you're referring to?

21 A. Yes, I'm not saying that's -- I didn't expect to have
22 to make recommendations.

23 Q. I understand.

24 A. That occurs to me that things might have occurred differently
25 if that had been the case.

D. LEWIS MATHESON, by Mr. Orsborn

1 Q. How may they have occurred differently?

2 A. Well, Mr. MacNeil knew that Marshall had -- All right, that
3 Mr. MacNeil knew that MacNeil had come forward and so far as
4 I am aware it appears that nobody ever was made aware of
5 that, either the defense or the Appeal Court. At least they
6 made no comment about that in the decision that they handed
7 down in the disposing of Donald Marshall's original appeal.

8 Q. The appeal from the Crown point of view was taken by
9 a prosecutor in Halifax? Is that correct?

10 A. Yes, I don't know who it was but I believe it was --

11 Q. I believe Mr. Veniot.

12 A. -- somebody with the Department.

13 Q. And the --

14 A. And so far as I know, now that I think of it, I suppose
15 Mr. Veniot didn't know -- may not have known about this
16 either.

17 Q. But would it be fair to conclude that at least Mr. Anderson in the
18 office in Halifax knew of Mr. MacNeil's coming forward?

19 A. I believe -- I know that Mr. Anderson knew that MacNeil
20 had come forward and that Marshall had; that is Inspector
21 Marshall, had done some sort of an -- Well, let me be
22 careful there too. I don't recall who told me the next
23 morning that Marshall was coming down. I know that Judge
24 Anderson knew that I went to the police station and interviewed
25 MacNeil and I've already, I think, recounted what I told him.

D. LEWIS MATHESON, by Mr. Orsborn

1 I don't know what more he knew about it.

2 Q. Did you or, to your knowledge, Mr. MacNeil, Donald
3 MacNeil, have any communication with anybody else in the
4 Department of Attorney General other than Robert Anderson
5 concerning this matter?

6 A. I expect that Mr. MacNeil had but I have no knowledge that
7 he did.

8 Q. Do you know Mr. Bernie Francis?

9 A. Yes, sir.

10 Q. Two or three days ago Mr. Francis testified before this
11 Commission that he had occasion to work with you in the
12 system while he was a Native Court Worker here in Sydney and
13 in his testimony given under oath he attributed certain
14 statements to you that I would like to put to you and
15 ask for your comments. And I'm reading from Volume 22
16 of the transcript at pages 3920 and 3921 and Mr. Francis
17 is referring to yourself as an Assistant Crown Prosecutor
18 in court. And he says, and I read, 3920 at the bottom:

19 He...

20 referring to you as a Prosecutor,

21 He was the Assistant Crown Prosecutor at the time.
22 When an Indian would be on, for instance, a
23 witness stand, he would -- he might say --
24 make statements to the effect, "What are
25 doing coming here in the City causing problems?"
"Why can't you stay on the Reservation where
you belong?" "Why are you Indians coming
here and upsetting the peace and quiet in the
City of Sydney?" And remarks like this were

D. LEWIS MATHESON, by Mr. Orsborn

1 happening all the time and surprisingly
2 enough, I'm a bit ashamed of it now, but
3 I sat there and I took this until perhaps
4 about the third year into the Court
5 Worker Program when that same -- same Judge...

6 I believe referring to yourself.

7 ...said that a fence should be built around
8 the Eskasoni Reservation so that the Indians
9 couldn't get out to come to Sydney to cause
10 problems...

11 Now, is there any time during your work in court
12 as an Assistant Crown Prosecutor did you make one or
13 more of those statements or statements to a similar
14 effect?

- 15 A. Well, there are a lot of them I would -- I don't remember
16 having -- I -- Catagorically I'd say I never said that
17 in court. I can't imagine that I would have said that
18 in court and I can't imagine that a Judge would have
19 permitted me to say it in court. Mr. Francis never
20 approached me with his complaints in that regard and I
21 never became aware of them until I heard them over the
22 radio the other night. And I certainly did not -- I had
23 no prejudice against Indian people or any other race and
24 any -- anything of that, that I would harbor, I would have
25 made it a positive effort to keep it out of my work.
- 26 Q. Did you make any one or more of those statements or statements
27 to that effect not in court?
- 28 A. I don't recall any. I didn't -- If I did I didn't mean them
29 seriously. I don't know what I may have said in jest. I'm sure.

D. LEWIS MATHESON, by Mr. Orsborn

1 I'm sure I could not have said -- made those statements
2 in court.

3 Q. Can you suggest any reason why Mr. Francis would testify
4 under oath that those statements were made by yourself
5 in court?

6 A. No, I can't imagine. I knew Bernie Francis when he came
7 on as an Indian Court Worker. He -- I forget how long
8 he was there. He -- When he first came he would frequently
9 approach me sometimes discussing matters that related to
10 cases and I frequently said that -- to him that he should
11 take his questions and problems to the defense lawyer so
12 that the defense lawyer could raise them in court. He
13 persistantly came back. I didn't want to -- I felt
14 awkward that he might disclose something that an Indian
15 person had told him and that it would be detrimental
16 to the case. I told him, "Look, talk to the defense".
17 He didn't do that and subsequently I did my best to avoid
18 him. He may have seen this as a shunning of him. If he
19 did I'm sorry. If he took it as a reflection of my attitude
20 toward Indian people in generally -- in general, I'm sorry.
21 That's all I can say.

22 Q. Is it possible that you made those statements, sir, in jest
23 as you point out?

24 A. In court?

25 Q. No.

D. LEWIS MATHESON, by Mr. Orsborn

1 A. No. Yes, I'm -- I'm capable of making a statement like
2 that in jest. Yes.

3 Q. And is it not possible that somebody hearing statements such
4 as those would take them to be a reflection of your attitude
5 towards Indians?

6 A. Yes, I suppose and we should all be careful what we say
7 about -- in matters of that kind.

8 Q. Were you ever spoken to by Judge John F. MacDonald concerning
9 remarks of this nature or concerning a complaint by Mr.
10 Francis?

11 A. No, sir. Not that I recall.

12 Q. Do you have any knowledge of a radio show during which
13 Mr. Francis made complaints about the way the legal
14 system was operating with respect to Indians?

15 A. I never heard such a radio show and I think if one was
16 aired in which my name was mentioned I think that at least
17 some of my family or friends would have brought it to my
18 attention to see what I thought of it. I was not aware
19 of any radio show that discussed those matters.

20 Q. Mr. Francis testified that he in fact --

21 A. And I might say, if that was publically aired, not only
22 my family and friends but I think the Department might
23 have been very concerned about it and would have had something
24 to say to me also.

25 Q. Mr. Francis testified that he did, in fact, go on a CHER radio

D. LEWIS MATHESON, by Mr. Orsborn

1 talk show called Pulse. I don't believe he said when he
2 did it and in his words and speaking of yourself and John
3 F. MacDonald he said:

4 I blasted them over the air.

5 Reading from page 3922 of the transcript. And he then says,
6 And at Mr. Spicer's question:

7 Subsequent to the radio show did you have
8 an opportunity to observe whether or not
Mr. Matheson's attitude changed?

9 Mr. Francis said:

10 He became more vindictive. He was less co-operative
11 with me after that and, of course, he wasn't
very co-operative anyway to begin with...

12 It goes on:

13 ...it got so that he wasn't speaking to
14 me in the hallway and he just looked at
me with disdain I guess.

15 Do you have any recollection of exhibiting that attitude
16 towards Mr. Francis?

17 A. Well, I've already told you all that I can remember about
18 my relationship with Mr. Francis and if he attributed
19 certain meanings to my conduct then I'll tell you quite
20 frankly that I deliberately avoided Mr. Francis for the
21 reason that I gave. When somebody doesn't talk to you
22 whether that's -- you may perceive that as disdain but
23 he's telling the truth about that. He and I were not
24 close in association although we were present at the court
25 house together on many occasions.

1 | Q. Mr. Francis also testified and I'm looking at page 4089
2 | of the transcript, in response to a series of questions
3 | from Mr. Wildsmith. And he is speaking about manner
4 | in which Indians were addressed in court and I believe
5 | he is referring particularly to Judge MacDonald and the
6 | answer to one of the -- The question was:

7 | Was another common thing for some Judges to do,
8 | to call Indians by their last names?

9 | And the answer was:

10 | Yes, that was one of the -- That was one of the
11 | instances I noticed in the courtroom where
12 | Micmac's would be addressed by their last name
13 | in a very sort of disrespectful way. There's no
14 | such thing as, for instance, to say, "Would
15 | you stand up please, Mr. Christmas". It
16 | would be something like, "Christmas, get up",
17 | something like that.

18 | Do you have any recollection of Indians being addressed
19 | differently in court than other witnesses or accused in
20 | court?

21 | A. No, sir. That you might find a transcript where a Judge
22 | or a prosecutor or maybe even me address somebody and said,
23 | so and so get up. Anybody who did that consistently all the
24 | time toward the public generally, in particular if it
25 | was addressed to any -- that person would be a remarkable,
notable person and, you know, people would know that.

Q. During your years on the bench, Your Honour, --

A. I never had any complaints of that regard from anybody other
than Bernard Francis and he never communicated those complaints

D. LEWIS MATHESON, by Mr. Orsborn

- 1 to me until I heard them over the air.
- 2 Q. Over the air meaning?
- 3 A. On the radio the other night when I --
- 4 Q. From this Commission?
- 5 A. Yeh.
- 6 Q. During your years on the bench, Your Honour, since 1980,
- 7 I presume you've had an opportunity to observe a lot of
- 8 people on the witness stand?
- 9 A. Yes, indeed.
- 10 Q. Have you noticed whether or not there is any difference
- 11 between the demeanor of Indians on the witness stand
- 12 and the demeanor of Whites and Blacks? I'm thinking whether
- 13 or not there is a tendency to be shy, reserved or otherwise?
- 14 A. Yes. I -- Indian peoples appear to be reticent. If I can
- 15 be permitted to make a general statement, yes, their --
- 16 but again Indian people are like anybody else. They're
- 17 individuals but if you're asking me compare, and you
- 18 are, I believe.
- 19 Q. Yes.
- 20 A. Indians as opposed to say White people, Indians give
- 21 the appearance when giving evidence to be reticent. I can't
- 22 describe it any better than that.
- 23 Q. Any general comments, sir, concerning the demeanor of Black
- 24 people?
- 25 A. No, I think that Black people communicate better than Native

1 Indians do. Although any time I have seen a Native Indian
2 in court, I was always satisfied that he was able to make
3 known to us what he wanted to express.

4 Q. Have you had any requests during your years on the bench
5 that an Indian be -- would testify through the services
6 of a -- an interpreter?

7 A. Yes.

8 Q. And what have you done with those requests?

9 A. Well, communicated to the Judge and the Judge would arrange
10 to appoint a suitable interpreter and that's what we --

11 Q. So, did these cases happen while you were a prosecutor?

12 A. Yes, and I've had occasion not -- I don't recall that
13 I've ever had to get a Micmac translator but I've had
14 occasion to get translators to translate for French-speaking
15 people who couldn't understand English.

16 Q. Would you have any objection to a request for a Micmac
17 translator?

18 A. Objection?

19 Q. Yes.

20 A. If -- The only objection I would make is if I really and
21 sincerely felt that the witness was capable of communicating
22 in English, then I certainly preferred to communicate directly
23 in English. But if I was satisfied that the man needed
24 a translator, then I would have nothing to say about it.

25 Q. Thank you, sir. You've been very patient.

D. LEWIS MATHESON, by The Chairman

1 A. Thank you.

2 BY MR. CHAIRMAN:

3 Q. Judge Matheson, before Mr. Ruby starts cross-examining you
4 there are one or two things I'd like to get cleared up if
5 you could help me. Was Mr. Donald MacNeil still a Crown
6 Prosecutor at the time the appeal was taken to the -- in
7 the Marshall case to the Court of Appeal?

8 A. Yes, sir.

9 Q. Was that the usual practise in Nova Scotia at that time that
10 if there was an appeal from -- to the Court of Appeal from
11 a -- from outside Halifax that someone in Halifax would
12 take the appeal?

13 A. That is the general rule, yes.

14 Q. Is it still the practise to your knowledge?

15 A. As far as I'm aware.

16 Q. What was the -- or do you know, what was the position of
17 Mr. Veniot who took the appeal in the Marshall case
18 vis-a-vis Mr. Anderson? Was Mr. Anderson -- Robert Anderson
19 his superior or --?

20 A. I'm not entirely sure whether he'd be his immediate superior.
21 Yes, it -- Mr. Venoit would have been -- You'd have to
22 ask them, sir. I think he would be but I'm not sure.

23 Q. You think that Mr. Anderson -- Why I ask that, I think
24 you referred at one point, or someone did, to Mr. Anderson
25 as being Director?

D. LEWIS MATHESON, by The Chairman

- 1 | A. His title I'm not -- He was the person in the Department
2 | that was in charge of criminal prosecutions. I don't
3 | know whether he held the title Director of Criminal Prosecutions
4 | or not. I'm --
- 5 | Q. It's my --
- 6 | A. I'm not entirely sure.
- 7 | Q. But as far as you know he was the senior lawyer in the
8 | Department of the Attorney General in 1971 with -- on the
9 | prosecutorial side?
- 10 | A. So far as I'm aware, yes.
- 11 | Q. There -- It's my understanding Nova Scotia does not have
12 | a Director -- the office of Director of Public Prosecutions?
- 13 | A. I think you're correct. That's why I avoided using that
14 | title.
- 15 | Q. The -- Just one other thing. The -- When Jimmy MacNeil came
16 | forward with the -- this additional -- this new evidence
17 | a few days after the conviction of Donald Marshall Junior,
18 | did I understand you to say that Mr. Donald MacNeil had
19 | returned from his vacation by the time Inspector Marshall
20 | had arrived in Cape Breton or?
- 21 | A. Yes, Mr. MacNeil returned from his vacation before Inspector
22 | Marshall arrived.
- 23 | Q. I see. Do you know whether Inspector Marshall met with Mr.
24 | Donald MacNeil?
- 25 | A. I -- Other than the incident I told you about I don't know.

D. LEWIS MATHESON, by The Chairman, by Commissioner Evans

1 Obviously they had had a conversation of some sort when
2 Mr. MacNeil invited me to the meeting I described.

3 Q. You had already briefed Mr. MacNeil, I think you said.

4 A. Yes, sir.

5 Q. On what had happened.

6 A. My Lord, yes.

7 Q. Do you know if Mr. Donald MacNeil communicated this-- the
8 information relating to James MacNeil's statement and the
9 interviews with some of the Ebsarys to Mr. Rosenblum or
10 Mr. Khattar?

11 A. Did Donald MacNeil?

12 Q. Yes.

13 A. He didn't do it in my presence. I --

14 Q. And he didn't tell me that he had done it?

15 A. He didn't tell me that he did.

16 Q. And I understand --

17 A. Did or didn't.

18 Q. -- from you that you didn't do it?

19 A. No, sir. I didn't.

20 Q. All right. Thank you.

21 BY COMMISSIONER EVANS:

22 Q. I'm interested in the letter that you received from
23 Malachi Jones when he was the Director with respect to
24 disclosures. I understood you to say that you had turned over
25 a copy of the file to the defense?

D. LEWIS MATHESON, by Commissioner Evans

1 A. Yes, sir.

2 Q. And that you were -- And that there was an acquittal as
3 a result or a conviction?

4 A. No, sir. A conviction.

5 Q. A conviction?

6 A. Yeh.

7 Q. But then you were -- A letter, personal letter to you,
8 was critical of what you had done?

9 A. No, I think I said yesterday, sir, it wasn't entirely critical
10 but the tone of the letter setting out what prosecutors ought
11 to do, it was clear to me that I had gone beyond those
12 bounds.

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D. LEWIS MATHESON, by Commissioner Evans

- 1 Q. Yes, and you didn't expect --
- 2 A. I don't recall -- I don't recall that he commented one way
3 or the other so far as criticism, but when I read the full
4 report I knew what I said.
- 5 Q. Yes, so that what you would do then in your practice was, as
6 I understood it, was to -- not to withhold any essential facts
7 or any facts from the Defence which would be essential to the
8 case and you would give them the witness's statement except
9 when it would be prejudicial to that particular witness, like
10 the safety of the witness. And then would you give him a copy
11 of what is called a "will-say" statement or is it an actual
12 statement?
- 13 A. I'm sorry.
- 14 Q. Is it an actual statement, a copy of a statement made and
15 signed by the witness?
- 16 A. Well, it is in some cases and in cases of disclosure sometimes
17 I gave copies of the statement. I didn't do it the same way
18 every time, My Lord. There is varying ways.
- 19 Q. But any time the Defence came to you they got what you at least
20 felt was adequate information with respect to it?
- 21 A. I felt -- I felt -- I felt that I adequately did what I had
22 to do. Again you can -- I suppose lawyers can be called
23 to say differently. So far as I was aware, no lawyer ever
24 commented to me that -- that I was close to the vest with
25 information.

D. LEWIS MATHESON, by Commissioner Evans

- 1 Q. Dealing with the Statement of Facts, that you say is sent
2 by the Crown to the office of the judge, it says a Statement
3 of Facts, but I take it that is a statement of the evidence
4 that the Crown hopes to introduce?
- 5 A. Yes, sir.
- 6 Q. It's kind of a one-sided statement, isn't it?
- 7 A. It is indeed, sir, yes. Now the title on it, "Statement of
8 Facts", wasn't one that I'm sure -- It certainly wasn't one I
9 dreamed up or one Mr. MacNeil dreamed up. I think it was
10 just the custom to do it that way and that's the way -- we
11 followed the precedent, sir -- My Lord.
- 12 Q. Yeh, but that Statement of Facts would not go to the jury, the
13 Grand Jury?
- 14 A. No way.
- 15 Q. Not unless the Trial Judge read the whole thing to them I
16 suppose?
- 17 A. Any communication of the Statement of Facts to the Grand Jury
18 would have been through the conduit of the judge.
- 19 Q. Yes. Now you were aware, were you not, that some of the
20 statements by these juveniles, particularly Pratico, Chant,
21 and Miss Harriss, that some of those statements were taken by
22 the police when the parents or guardians were not present?
- 23 A. I -- If that's so, sir, I expect we were aware of it.
- 24 Q. Yes.
- 25 A. I don't have a specific recall.

D. LEWIS MATHESON, by Commissioner Evans

- 1 Q. And if you had been aware of it, you would be concerned,
2 would you, as to how voluntary they were or how -- not necessarily
3 voluntary, but yes, how voluntary those statements would be?
- 4 A. Yes, it would be a concern of ours.
- 5 Q. The only other matter I was interested in -- Did I understand
6 that you were of the view that nothing had been said by the --
7 by Mr. MacNeil, the Crown Attorney, in his address to the jury
8 about the -- concerning the statement made by Pratico in the
9 corridor that Mr. --
- 10 A. Excuse me, My Lord, I'm -- I'm a little -- Let me make this
11 observation about what you said already. I don't recall giving
12 any testimony relating to Donald C. MacNeil's address to the
13 jury?
- 14 A. Now I don't mean to interrupt --
- 15 Q. No, that's fine. That's just as well.
- 16 A. Thank you.
- 17 Q. Where you -- You don't recall anything that was said then by
18 Mr. MacNeil to the jury in his address to the jury?
- 19 A. No, sir, I don't recall it and I haven't read it. If you want
20 me to comment on it I will read it and --
- 21 Q. No, that's fine. Was the investigating officer ever called
22 in either the trial or the Preliminary? I don't recall --
- 23 A. Sergeant MacIntyre?
- 24 Q. Yes, was he called at the --
- 25 A. The trial and the Preliminary?