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#5

ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION

VOLUME XXVIII

Held: November 16, 1987

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

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

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

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

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

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

Donald C. Murray: Counsel for William Urquhart

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

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

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

Al Pringle: Counsel for Correctional Services Canada

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

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

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

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

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

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

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INQUIRY RECONVENED AT 9:35 o'clock in the forenoon on Monday, the 16th day of November, A.D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia.

1 MR. CHAIRMAN:

2 Before we continue the hearings, I would like to indicate to Counsel
3 that we must make a supreme effort to stay on schedule. With that
4 in mind, the following witnesses will be heard today. We will com-
5 plete the testimony of Judge Matheson, and I'm told Judge John F.
6 MacDonald will be called. The testimony of Mr. Roy Gould had been
7 just about completed except for some -- the completion of cross-
8 examination by Counsel for the Union of Indians. That will be
9 completed, and we will hear the evidence of David MacNeil and
10 Douglas Wright. These five will be completed today. If we have
11 not completed their testimony by four thirty, we will either con-
12 tinue on or sit this evening. Mr. Spicer. Oh, Mr. Nicholas.

13 MR. NICHOLAS:

14 Thank you, My Lord. I have a series of questions to Judge Matheson.
15 D. LEWIS MATHESON, resumes testimony, as follows:

16 BY MR. NICHOLAS:

17 Q. Perhaps my first question, Judge Matheson, would be -- I under-
18 stand you were raised here in Sydney, and I'm wondering, when
19 was your first contact with the Micmacs of Membertou Reserve?

20 A. My home was actually in Sydney Mines across the harbour. It's
21 in the same -- It's the industrial area. My first contact, I
22 suppose, with Native people was when Native people would come
23 to the door selling. They would sell baskets and different
24 things of that kind, and they were always welcomed at our house,
25 and we did business with them.

D. LEWIS MATHESON, by Mr. Nicholas

- 1 Q. And in your subsequent educational training, did you at any time -
2 Were you at any time in contact with Indians?
- 3 A. I'm sorry?
- 4 Q. In your subsequent education at the high school and university
5 levels, were you at -- in contact with Indians?
- 6 A. No, I don't recall that there -- Certainly not in high school,
7 and I don't recall that in university I was involved with any
8 Native people that I recall.
- 9 Q. How about in your law practice that you had set up? Did you in
10 fact have Indian clients?
- 11 A. I had some, yes.
- 12 Q. And were you, at any time in your studies -- Did you have any
13 knowledge or obtain any knowledge concerning the socioeconomic
14 life of Indians living on reserves?
- 15 A. No, sir, I -- Not in my studies, no.
- 16 Q. In your role as the Assistant Crown Prosecutor, were you then
17 aware or made aware of the unique cultural setting of Micmac
18 Indians?
- 19 A. No, we from time to time had to deal with Native accused who
20 came before the courts. Quite frankly, sir, they were treated
21 as any person -- any other person.
- 22 Q. When did you first then become aware of the Native Court Worker
23 Program, Judge Matheson?
- 24 A. I believe that the Native Court Worker Program -- The first one
25 I recall was Mr. Francis. I may be -- I -- And I think he was

1 followed by Eva Bernard.

2 Q. And were you, yourself, at that time in support of such a program?

3 A. I certainly wasn't against it. If it was necessary to -- If the
4 powers-that-be considered it necessary that the Native people
5 have someone assisting them at court, I saw nothing wrong with
6 that. I explained what my difficulty was with court workers in
7 general, but I certainly wasn't against them being around or any-
8 thing of that sort.

9 Q. In your role at the time as the Assistant Crown Prosecutor, were
10 you mindful of a very high percentage of Indians being charged
11 in the courts?

12 A. I don't know about the percentages. Yes, there were quite a few.

13 Q. And in a lot of these instances, were -- Did Indians just come
14 there to plead guilty or were trials held or --

15 A. No, I think most Indian people had counsel, and I don't recall
16 that any more Indian people pleaded guilty than others. I don't
17 recall anything in that regard.

18 Q. Now, with respect to also at the time when you were the Assistant
19 Crown Prosecutor, Judge Matheson, were you ever approached to
20 initiate any seminars or workshops to deal with the unique
21 situation of Indians in the courts?

22 A. Not that I recall.

23 Q. So you, yourself, did not think of initiating such areas as well?

24 A. No, sir, I took no initiative. I didn't see a need for it.

25 Q. You didn't see a need for it?

D. LEWIS MATHESON, by Mr. Nicholas

1 A. No, I didn't perceive it if it was there.

2 Q. Did you at any time in the period of the early '70's visit the
3 Membertou Indian Reserve, Judge Matheson?

4 A. In the early '70's?

5 Q. Yes.

6 A. No, I don't recall. I may have.

7 Q. Last week, in your testimony with respect to questions that were
8 asked to you by Counsel for the Commission, Mr. Orsborn, on
9 pages 4936 and 4937, you had made the Lordships aware of a
10 situation in where your friend, Mr. MacNeil, was reported in
11 the newspaper of having made certain comments and had been cen-
12 sored, and you said you had approached Mr. MacNeil.

13 A. I don't recall that he was censored except that the press may
14 have taken exception to it.

15 Q. Yeh.

16 A. I don't know how the matter was disposed of. I remember the
17 incident.

18 Q. But do you remember reading it in the newspaper and approaching
19 Mr. MacNeil about the matter?

20 A. Yes, sir.

21 Q. Well, as part of your response, if I may just first read that to
22 you, Judge Matheson, on page 4937. You said -- You asked him
23 this question:

24 "Did you say that?" and he said, "Yeh,
25 that's what I said." And I to be quite
frank with you, I laughed at him.

D. LEWIS MATHESON, by Mr. Nicholas

1 | A. Yes, I did --

2 | Q. I --

3 | A. Sorry.

4 | Q. I'm sorry.

5 | A. I didn't laugh at what he said. I was laughing at the predicament
6 | in which he had gotten himself and laughing at him. I was not
7 | laughing at what he said. What he said was clearly something
8 | I felt he ought not to have said and had no need of saying, and
9 | he had gotten himself into a predicament and there was nothing
10 | much that as a friend that I could do other than to make light
11 | of his situation.

12 | Q. Well, in making light of the situation yourself then, did
13 | Mr. MacNeil at the time express any regret or remorse for having
14 | have this appear in the newspaper here?

15 | A. Well, he wasn't pleased about the situation that was confronting
16 | him.

17 | Q. And did you, in no uncertain terms, let him know that you were
18 | not in agreement with that statement?

19 | A. No, sir, I don't recall that I did.

20 | Q. Now, in the allegations that have been made by Mr. Francis of
21 | which you've said they're of no substance --

22 | A. Pardon?

23 | Q. There were certain allegations that Mr. Francis had made in his --

24 | A. Yes, sir.

25 | Q. -- testimony before the Commission.

D. LEWIS MATHESON, by Mr. Nicholas

- 1 A. Yes, sir.
- 2 Q. And in response last week, you said there was no substance to
3 this -- to these -- to his statements, and what I'm wondering
4 is why then would Mr. Francis fabricate this kind of allegation?
- 5 A. I don't know, sir.
- 6 Q. Now, you also stated to Counsel that in jest you may have made
7 such a statement although you don't quite recall it.
- 8 A. I don't recall it at all, sir, but I may've made such a state-
9 ment in jest or in frustration, yes.
- 10 Q. And although -- Also last week, you said this was not -- Such
11 statements if made -- and out of frustration. They were not
12 made in relation to any particular case before the court. Is
13 it possible, Judge Matheson, that such statements were actually
14 made in the court itself -- in the courtroom itself as opposed
15 to an actual case being heard?
- 16 A. What do you mean? Inside the courtroom --
- 17 Q. Inside the courtroom, yes. Could that -- Could you have --
- 18 A. -- and when a case was not going on?
- 19 Q. Yes.
- 20 A. Well, sir, it's a hypothetical question. I suppose if it was
21 said at all it might've been anywhere. I certainly am sure I
22 never said it in the course of a trial.
- 23 Q. I see. Now, in the -- In your role as a judge now in the
24 provincial courts --
- 25 A. Yes, sir.

D. LEWIS MATHESON, by Mr. Nicholas

1 Q. Your Honour, I was wondering have you or your fellow Provincial
2 Court Judges had any seminars or workshops on cross-cultural
3 training with respect to Indians?

4 MR. D. PINK:

5 Objection, My Lord. It seems to me that Judge Matheson is here to
6 testify as regarding his involvement as a Crown Prosecutor in this
7 matter, and I think the Commission should rule on what the propriety
8 of questioning of Judge Matheson is for current practice in the
9 provincial courts and the scope in which the Commission wants to go
10 on that.

11 MR. CHAIRMAN:

12 I don't see anything wrong with that question because it is -- It
13 is information that as Commissioners we would like to receive, and
14 rather than bring His Honour back before the Commission later on, it --
15 I find that question quite inoffensive and extremely relevant.

16 BY THE WITNESS:

17 A. No, sir, I have had no special -- I forget the word you used --
18 the inter --

19 Q. Any seminars or workshops since your appointment as Provincial
20 Court Judge?

21 A. No, sir, we haven't had any such.

22 Q. Perhaps I could ask you another question then -- one more, Mr. --
23 Judge Matheson. With regard to the -- Your experience with the
24 Court Worker Program in the early '70's -- It's my understanding
25 this program is no longer in place today in Nova Scotia. If a

D. LEWIS MATHESON, by Mr. Nicholas

1 person such as Mr. Francis had that rule, would he be welcome
2 in your court today?

3 A. He would be welcome, yes. There's -- I believe -- There are
4 court workers -- I was -- I thought they were still active,
5 and I thought still were for women, but I -- They're not visible
6 in my court. I -- They'd be welcome if they came back.

7 Q. All right. Excuse me. I guess that --

8 MR. NICHOLAS:

9 I just have one further question, My Lords. In the -- Just this
10 morning, I was recently given a copy or shown a copy of a report
11 called BRIDGING THE GAP. It was prepared by -- and I apologize to
12 your Lordships for not having any copies of this.

13 BY MR. NICHOLAS:

14 Q. But I was just wondering if -- In the report itself it indicates
15 a very high percentage of Indian offenders before the courts
16 and sort of confirms one of your earlier statements you made
17 this morning. What, in your opinion, Judge Matheson, could be
18 done to make Indian offenders more -- I shouldn't say more at
19 home because I imagine no offenders are at home in court, but
20 more comfortable with the court system in this province?

21 A. I don't know, sir. I wouldn't want to treat Indian offenders
22 different than any other offender prior to now or in the future.
23 If accused people have difficulties in the court, and we have
24 seminars to study why they do, I'll attend them attentively, but
25 I have -- As you observed, no accused person is comfortable before

1 a court.

2 Q. No.

3 A. And if the problems for such people can be eased in a proper way
4 by the participation of the judges, I'm sure we all would be
5 receptive to any good suggestion.

6 Q. Okay.

7 MR. NICHOLAS:

8 That's all my questions, My Lord.

9 MR. CHAIRMAN:

10 What's the name of the author of the book you referred to, BRIDGING
11 THE GAP?

12 MR. NICHOLAS:

13 Yes, it's prepared by Robert N. Wall.

14 MR. CHAIRMAN:

15 Robert?

16 MR. NICHOLAS:

17 N. Wall. And it was a report written in 1984, My Lords, by the
18 University College of Cape Breton Press.

19 MR. CHAIRMAN:

20 Thank you. Mr. Pink.

21 BY MR. D. PINK:

22 Q. Judge Matheson, I'd just like to review a number of areas with
23 you that other counsel have covered, and I'll try my best not
24 to repeat areas but mostly by -- for means of clarification.
25 The first area I'd like to ask you about is the Grand Jury as

1 | it existed in the early 1970's. Do I understand correctly that
2 | the Grand Jury role was very limited, and in the early 1970's
3 | there was talk about the abolition of the Grand Jury in Nova
4 | Scotia?

5 | A. Yes, Grand Juries in addition to hearing cases -- They had other
6 | roles at least theoretically. They had the power to -- for one
7 | thing, to investigate county institutions and pass on the -- on
8 | how well the services in those institutes -- the goal for one
9 | thing.

10 | Q. You're talking now about -- That was their traditional role?

11 | A. That was their traditional role, but I think that they really
12 | didn't function much in that area toward the end, and really
13 | what they were doing was making a decision something similar
14 | to what a Provincial Judge now does when he holds a Preliminary
15 | Inquiry.

16 | Q. Yes.

17 | A. So there was talk of them being done away with.

18 | Q. And in the standard Charge that the presiding judge would give
19 | to the Grand Jury, they would only have to be satisfied that
20 | there was some evidence to return a True Bill?

21 | A. That's correct.

22 | Q. And the Statement of Facts that we've heard about and that we've
23 | seen for this particular case, am I correct that that wasn't
24 | to be an exhaustive review of the evidence that was intended
25 | to be called?

D. LEWIS MATHESON, by Mr. D. Pink

1 A. No, that's correct. It was a brief outline.

2 Q. And simply to give the Trial Judge and the Grand Jury an idea of
3 the -- what the witnesses would say if they were called into
4 the Grand Jury hearings?

5 A. I don't know how -- what happened inside a Grand Jury room but
6 it might be useful to say that Grand Juries, I believe, were
7 selected -- I don't know how they were selected, but there
8 would always be four men on the jury who would have three years'
9 experience. There would always be four who had two years'
10 experience, and there would be the new four, and they would go
11 off in that sequence and rotate so that the jury itself had
12 within itself the knowledge of how to interview witnesses brought
13 before it.

14 Q. How to conduct the proceedings.

15 A. On how to conduct the proceedings. And the Statement of Facts
16 was an attempt by the Crown through the judge to make them aware
17 of what to look for and what to question about.

18 Q. And just finally on the Grand Jury, there was no one present in
19 the Grand Jury proceedings except the Grand Jurors themselves
20 and the witness that they were then interviewing?

21 A. That's correct.

22 Q. No prosecutor, no police?

23 A. No. No. That's correct.

24 Q. Justice Evans raised the question last week about "will-say"
25 statements. Are you familiar with that term?

- 1 A. Will-say?
- 2 Q. Yes.
- 3 A. Yes, I think it may be used in the Statement of Facts.
- 4 Q. But in terms of a will-say statement -- a statement that would
5 be prepared by the police and provided to the prosecutor about
6 what a witness will say when they're called?
- 7 A. Well, I presume that when -- If the word, "will-say," is used
8 it -- I never gave it much thought, but if the witness had
9 stated something in the Preliminary, we'd feel confident using
10 the word, "will-say," in the Statement of Facts.
- 11 Q. Yes.
- 12 A. Now --
- 13 Q. Was there any practice in the early 1970's by the police in
14 indicating for the Crown what witnesses will say?
- 15 A. I'm sorry?
- 16 Q. Was there any practice from any of the police forces that your
17 office dealt with to provide briefs or summaries of what wit-
18 nesses would say for the Crown Prosecutors?
- 19 A. No. In those days -- I don't know whether I made it clear
20 before. The police would come with their occurrence sheets
21 and any statements they had taken from accused or witnesses,
22 and of course, they would discuss matters with us orally, but
23 no, we didn't get summaries of the case from the police except
24 to some extent from the R.C.M.P. We didn't use the Crown sheet
25 as it's known today.

1 Q. And that was the situation with the eight or nine different
2 police departments that the Sydney office dealt with?

3 A. That's correct.

4 Q. You've been referred, Judge Matheson, to the transcripts, and I
5 won't go into it in detail, but you've reviewed the transcripts
6 prior to testifying here over the last several days?

7 A. I've scanned them, yes, and in some cases I've read them in
8 detail.

9 Q. And there was a reference that Mr. Elman directed your attention
10 to last week regarding the tattoo on Mr. Marshall's arm.

11 A. Yes.

12 Q. Am I correct that when the issue was raised, there was no
13 objection raised by the defence to that line of questioning by
14 the Crown?

15 A. What Mr. Elman pointed out to me was that it was Mr. Rosenblum
16 who demonstrated the -- Marshall's arm to the jury. The record
17 doesn't show exactly how that was done. Marshall may have indeed
18 stood before each juror and held out his arm. I don't recall.

19 Q. Can you recall that Mr. --

20 A. But later on -- Later on, Mr. MacNeil in questioning Mrs. Davis --

21 Q. Who was the nurse?

22 A. Who was the nurse, made reference to the tattoo, and I don't
23 think the record discloses that there was any objection taken
24 at that time.

25 Q. And as well, there were no objections raised to anything that was

1 said by Mr. MacNeil in his address to the jury?

2 A. No, Mr. Elman showed me that, and I read that from the record.

3 The judge asked if there was any comment on the -- I don't know
4 if it was his address or addresses generally, but that would've
5 been the time to make any objection if there was one, and there
6 was none.

7 Q. You've been asked questions about a number of the witnesses,
8 and I appreciate it that it's a long time ago, Judge Matheson,
9 but I'd like you to just think briefly about Mr. Pratico.
10 Was there anything about his demeanor or his appearance that
11 gave you cause for concern about his ability to testify?

12 A. No, not that I recall.

13 Q. Or about his competence to testify?

14 A. No, I thought he was a nervous type of fellow and kind of shifty,
15 but I didn't note anything much more than that.

16 Q. Could you -- Could the registrar give you Volume 1 -- Exhibit 1?
17 You were asked some questions last week about Mr. Chant, and
18 without reviewing Mr. Chant's testimony in detail, the record
19 reveals that at trial, originally Mr. Chant tried to change his
20 story from the one he had testified to at the Preliminary hearing,
21 is that correct?

22 A. Yes, I believe that's correct.

23 Q. And he didn't identify Mr. Marshall as the person who was involved
24 in the incident?

25 A. I'd have -- I think you're correct, yes.

D. LEWIS MATHESON, by Mr. D. Pink

1 Q. Okay. Without going into the details, he was ultimately declared
2 a hostile witness.

3 A. Yes.

4 Q. And the Crown was allowed to cross-examine him as a result of
5 that.

6 A. Yes.

7 Q. Mr. Ruby asked you some questions regarding supposed threats
8 that had been made to any witnesses and whether you were aware
9 of any threats that had been made to Mr. Chant, and as I under-
10 stood your testimony, you that no, you were not aware of any
11 threats that were made to Mr. Chant.

12 A. Yes.

13 Q. And Mr. Ruby asked if you were able to give any explanation as
14 to why the defence would not have cross-examined Mr. Chant on
15 his previous statements, and I believe you were not able to do
16 so.

17 A. Yes.

18 Q. I'd just like you to look at page 153 in Volume 1 only for the
19 sake of completeness, and I'm referring to the re-direct of
20 Mr. Chant by Mr. MacNeil where the question appears at line 20:

21 Q. You told my learned friend in
22 your evidence that you told
23 the police an untrue story. Why
24 did you tell them an untrue story?

25 A. Because I was scared.

And I believe, having looked at the transcript, that's the only

D. LEWIS MATHESON, by Mr. D. Pink

1 reference that may shed some light on that -- on the rationale
2 or the reasoning for Mr. Chant doing what he did.

3 A. Yes, I -- That's all that I know of.

4 Q. I'd like you to turn your mind, Judge Matheson, to the 1971
5 R.C.M.P. involvement. Perhaps we could start by just confirming
6 the timing, and in order to assist you in this, I'd like you to
7 have Volume 16 in front of you. And if you could turn to page 204
8 of Volume 16. 204 is the report prepared by Inspector Marshall
9 as a result of his involvement in the matters in November, '71.

10 A. Yes.

11 Q. Just for clarification, MacNeil -- Jimmy MacNeil came forward
12 on November the 15th, which was a Monday, is that correct?

13 A. I'm not sure of the date or the night. If the report indicates
14 that, I'd agree with it.

15 Q. Okay. The report goes on to indicate that the R.C.M.P. Inspector
16 Marshall travelled to Sydney on Tuesday the 16th and began his
17 investigation in detail on the 17th of November, and that appears
18 on page 204. Does that square with your recollection?

19 A. Yes, sir. It was a short time after -- The day -- The night I
20 made the phone call, the following day I knew that Inspector
21 Marshall was coming, and he'd have a polygraph capability. I
22 never saw Inspector Marshall until his investigation was complete,
23 and I don't remember the span of time that was in between.

D. LEWIS MATHESON, by Mr. D. Pink

1 | Q. At the time that you met with the Sydney Police on Monday,
2 | November 15th, Donald C. MacNeil was out of town?

3 | A. That's correct.

4 | Q. And you indicated that he returned to Sydney prior to the R.C.M.P.
5 | commencing their investigation?

6 | A. If it was a Monday then Mr. MacNeil returned Tuesday night.

7 | Q. Tuesday night.

8 | A. And I phoned him as soon as he was back in town.

9 | Q. The polygraph report which appears at pages 202 and 203, indicates
10 | that the polygraph was taken on the 23rd which was the following
11 | Tuesday?

12 | A. Yes.

13 | Q. And that's the night that you met with Inspector Marshall and
14 | Mr. Smith or Sergeant Smith to review the investigation that
15 | they had carried on at that point?

16 | A. That's -- I believe that's correct, yes.

17 | Q. The report of Sergeant or Corporal Smith as he was then, is
18 | dated the 30th of November?

19 | A. That's correct, yes.

20 | Q. And the report of Inspector Marshall is dated the 21st of
21 | December?

22 | A. That's correct.

23 | Q. Do I understand that you had no knowledge of what transpired --
24 | you have no knowledge of what transpired between the 23rd of
25 | November and the 21st of December regarding the R.C.M.P. and

D. LEWIS MATHESON, by Mr. D. Pink

1 | their examination of this matter?

2 | A. No.

3 | Q. Now there was reference last week and the Chairman asked you
4 | or picked up on this, the notion of a report to Halifax. When
5 | you indicate that you understood they were going to report to
6 | Halifax, did you understand to whom they were to report?

7 | A. No, I don't recall. He may have said at the time. I don't
8 | recall who -- who it was. I just understood that -- that the
9 | Halifax office would be receiving the official report.

10 | Q. I'm instructed, Judge Matheson, that the 1971 report that you
11 | just looked at was never received in the offices of the
12 | Attorney General's Department. Do you know anything to contradict
13 | that?

14 | A. I don't. I'm staggered that -- that it never, but I -- I can't
15 | explain it.

16 | Q. I also understand that that report was never received at the
17 | Crown Prosecutor's Office in Sydney?

18 | A. No.

19 | MR. BISSELL:

20 | I must object to that because he's really giving evidence. There's
21 | no evidence --

22 | MR. CHAIRMAN:

23 | Yes, maybe the last -- the answer before the last one was not
24 | anticipated, but I think it's very revealing.

25 | BY MR. CHAIRMAN:

Q. In any event, Judge Matheson, you're -- you say you're staggered

D. LEWIS MATHESON, by Mr. D. Pink

1 to now learn, if it is a fact, that the report of Inspector
2 Marshall was not forwarded to the Attorney General's
3 Office in Halifax?

4 A. Yes, that's correct.

5 Q. And I think you told us before that you had -- you had not
6 received it?

7 A. No, sir.

8 Q. And to your knowledge --

9 A. Other than -- Other than orally on the date that we met with
10 Marshall and Smith.

11 Q. Other than the (That's right.) the oral briefing.

12 A. Yes.

13 Q. And as far as you know it was not -- the Inspector Marshall's
14 report was not received by the Crown Prosecutor's Office in
15 Sydney?

16 A. No, sir, not to my -- not that I knew of. I'm quite sure
17 it wasn't.

18 Q. Well, based on your experience as a Crown Prosecutor, if it
19 wasn't sent to the Department of the Attorney General in
20 Halifax and it wasn't sent to the Crown Prosecutor's Office
21 in Sydney, can you think of any other place where Inspector
22 Marshall would have sent the report?

23 A. No, sir, I can't.

24 MR. CHAIRMAN:

25 Thank you.

D. LEWIS MATHESON, by Mr. D. Pink

1 BY MR. D. PINK:

2 Q. One final thing on that, Judge Matheson, did Inspector
3 Marshall indicate that he was going to speak to Mr. Anderson
4 or anybody else in the Attorney General's Department regarding
5 his investigation?

6 A. I assumed he was going to speak to somebody in the Attorney
7 General's Office in Halifax --

8 Q. Do you have any recollect --

9 A. --not to speak, report, written report.

10 Q. Do you have any recollection of him actually having said that?

11 A. Pardon?

12 Q. Do you have any recollection of him having said that?

13 A. No, I -- I don't recall the exact words. That was my impression.

14 Q. With regard to what brought the R.C.M.P. here, you indicated
15 that you called Mr. Anderson on the evening of November 15th at
16 home?

17 A. Yes.

18 Q. And as a result of your discussions with -- the Sydney Police
19 Department requested that another police force become involved?

20 A. Well, it was something that -- that occurred. I thought maybe
21 a fresh look at the whole thing would be useful. I didn't
22 mean to imply that -- that I had any doubt about what Sydney
23 had done. I just thought it might be useful and I mentioned
24 that to Mr. Anderson and the next day I was told that Inspector
25 Marshall was coming.

D. LEWIS MATHESON, by Mr. D. Pink

1 Q. There was reference to a letter of request in questioning by
2 by Mr. Bissell. Do you have any knowledge of the type of
3 request that was made of the R.C.M.P. --

4 A. No, I don't know.

5 Q. -- to bring them to Sydney?

6 A. No, I have no idea.

7 Q. And do you have any knowledge of whether the request was
8 actually made in writing?

9 A. I have no idea.

10 Q. In your experience would a written request be necessary
11 to involve a Police Department in an investigation?

12 A. I think I indicated in my direct evidence, I didn't know how
13 to go about involving another Police Department in the
14 investigation and that was one of the reasons I called
15 Halifax.

16 Q. And I take it it flows from that and I'll just -- On this point,
17 you have no knowledge of what instructions or request was made
18 of the R.C.M.P.?

19 A. No, sir.

20 MR. CHAIRMAN:

21 Well, on that point, Mr. Pink, maybe you would like to draw the
22 witness's attention to page 204, again the -- the report of --

23 MR. D. PINK:

24 On the top of page 204?

25 MR. CHAIRMAN:

No, the bottom of page 204, the last -- paragraph three.

D. LEWIS MATHESON, by Mr. D. Pink

1 The last sentence in paragraph three of Inspector Marshall's report
2 would indicate that the R.C.M.P. made a thorough review of the case.

3 BY MR. D. PINK:

4 Q. Judge Matheson, the Chairman is referring to the last sentence
5 in paragraph number three on page 204 which reads as follows:

6 At this point the Force became involved
7 and I went to Sydney on the 16 Nov. 71
8 where, together with Sgt. G.M. MacKINLEY,
9 i/c Sydney G.I.S., a thorough review of
the case was conducted with the following
results.

10 A. I'm sorry. I'm trying to -- Yes, well, that's -- that's not --
11 that's not what I recall. I recall making a call to
12 Mr. Anderson.

13 MR. CHAIRMAN:

14 Well, I wasn't suggesting that, Judge Matheson. I was simply
15 pointing out to Counsel that whatever transpired between Mr. Anderson
16 and the Royal Canadian Mounted Police, according to Inspector
17 Marshall a thorough review of the -- this case was carried out
18 by the R.C.M.P. That would be my reading it.

19 THE WITNESS:

20 Oh, yes, yes, that's what it says. Yes.

21 BY MR. CHAIRMAN:

22 Q. Can you -- Does it lend itself in your view to any other
23 interpretation?

24 A. No, sir.

25 BY MR. D. PINK:

Q. And did I understand from your testimony, that that's what you

D. LEWIS MATHESON, by Mr. D. Pink

1 | expected, Judge Matheson?

2 | A. Yes.

3 | Q. I'd like to turn from that and just talk about a couple of
4 | general areas. Can you advise the Commission as to the extent
5 | of Press coverage there was at the courts in Sydney in the
6 | early '70's on a daily or regular basis?

7 | A. There was -- I would -- I suppose there were days they wouldn't
8 | be there, but as a general rule there was always a reporter
9 | from the Halifax Herald and the Cape Breton Post and sometimes
10 | the local Weekly would have a reporter there.

11 | Q. And the Cape Breton Post is the main daily newspaper in the
12 | Industrial Cape Breton area. Is that correct?

13 | A. That's correct. Yes.

14 | Q. And it's your recollection that there was a reporter there on a
15 | regular if not a daily basis?

16 | A. Oh, more -- I would say -- I would say on a daily basis. I
17 | recall the reporters. Clayton Campbell covered the court for--
18 | and before him Shawn MacDonald, and Sandy MacDonald, and
19 | Angus MacDonald covered the court for the Cape Breton Post.

20 | Q. And did they cover the --

21 | A. The first two were from the Herald.

22 | Q. Did they cover the Magistrate's Courts, the County Courts and
23 | the Supreme Court?

24 | A. Yes, sir. Yes, sir.

25 | Q. And from reading the Post at that time it appears that there was

D. LEWIS MATHESON, by Mr. D. Pink

1 almost a daily column about what was happening at the courts
2 by way of short stories?

3 A. I believe they continue the practice today.

4 Q. Preliminary Inquiries or Preliminary Hearings that existed in
5 the early 1970's, it was the practice of the Crown at that
6 time to call all witnesses that the Crown had access to to the
7 Preliminary Inquiry. Is that correct?

8 A. That's correct.

9 Q. And that gave the defence the opportunity to cross-examine them
10 or at least know what they were going to say?

11 A. That's correct.

12 Q. Now that practice differs somewhat from the present practice
13 where today once the presiding Provincial Court Judge indicates
14 that he's heard sufficient evidence, that may be enough. Is
15 that correct?

16 A. That's correct.

17 Q. And at the end of the Preliminary was there any normal proviso
18 that the Crown made in case additional evidence or additional
19 witnesses came forward?

20 A. Well, we would -- we would indicate that that was the end of
21 the Inquiry and if any new evidence came forward we might be
22 calling them at the trial and we would give notice to the
23 defence of or what they might say, but we always kind of
24 covered ourselves in the event that evidence occurred
25 between the completion of the Preliminary and the trial.

D. LEWIS MATHESON, by Mr. D. Pink

1 Q. And if the new witnesses came forward, the intention of the
2 Crown would be to add their names to the indictment?

3 A. That's right.

4 Q. That would be preferred prior to the trial?

5 A. Yes.

6 Q. The final area I'd like to ask you about, Judge Matheson,
7 deals with the disclosure of Crown information to the defence.
8 You indicated in your testimony on questioning from Commission
9 Counsel that you felt there was a duty on Crown to disclose
10 evidence to the defence?

11 A. Yes.

12 Q. What is your view of what the responsibility or the onus was
13 on defence counsel regarding information in the Crown's file?

14 A. I didn't quite --

15 Q. What onus in that procedure was there on defence counsel to get
16 information?

17 A. Well, to come forward and -- and to -- and to make a request
18 depending on the nature of the evidence, of course, but it
19 was -- it was routine when we were prosecuting that the defence
20 counsel would come and ask us, "Well, you know, what have you
21 got in this case before we...". They would do it to shorten
22 the trial if nothing else.

23 Q. Is it fair to say that the disclosure of Crown information would
24 be initiated by a request from the defence?

25 A. Most often.

D. LEWIS MATHESON, by Mr. D. Pink

- 1 Q. And that's -- I take it for practical reasons you might not
2 know who defence counsel is?
- 3 A. I'm --
- 4 Q. You couldn't disclose unless you knew who defence counsel was?
- 5 A. That's correct.
- 6 Q. And often defence counsel could change prior to an initial
7 contact in the trial or Preliminary, whatever the case may be?
- 8 A. That's correct.
- 9 Q. You told us last week that there -- you had a letter from
10 I believe it was Mr. Jones at the Attorney General's Department
11 regarding disclosure?
- 12 A. That's correct.
- 13 Q. And that letter came about as a result of your having turned
14 over a complete release file to a defence attorney?
- 15 A. That's correct.
- 16 Q. You've made efforts to find that letter in your house?
- 17 A. Yes. Yes.
- 18 Q. You believe it's there but have not been able to locate it?
- 19 A. That's right.
- 20 Q. I've provided you with a letter that pre-dates that one which
21 deals with the issue of disclosure?
- 22 A. Yes.
- 23 Q. And you've indicated--And I'm going to put the letter before you
24 in just a second, but you've indicated that the letter is of
25 the same import as the one that Mr. Jones wrote to you?

D. LEWIS MATHESON, by Mr. D. Pink

1 | A. Yes, I've read the letter you're referring to. It might -- it
2 | might even be -- I indicated that the letter I received was a--
3 | was an individual letter to which was attached what I thought
4 | was a brief. It may very well have been a copy of that very
5 | letter, but I don't know.

6 | Q. Judge Matheson, I'm showing you what's been marked as Exhibit 81.
7 | Now I know, of course, that you can't speak to that letter
8 | directly because that's not the very letter that you've referred
9 | to, but it is my understanding that that letter gives the
10 | same message as the letter that you received from Mr. Jones, as
11 | that letter is also authored by Mr. Jones?

12 | A. Yes, sir.

13 | Q. And at that point Mr. Jones is identified as the -- as a
14 | senior solicitor in the Attorney General's Department?

15 | A. Yes, sir.

16 | Q. I should note just for the record that there is a reference in
17 | the Re: line to a name. I -- I have taken the name off just
18 | for the sake of protecting the identity of the individual that
19 | was referred to in that particular investigation.

20 | MR. D. PINK:

21 | Those are all my questions. Thank you, Judge Matheson.

22 | MR. RUBY:

23 | Could we have a moment to read this? There may be questions
24 | that I will ask arising out of this.

25 | COMMISSIONER EVANS:

This a letter to the R.C.M.P.

D. LEWIS MATHESON, by Mr. Chairman

1 BY MR. CHAIRMAN:

2 Q. From Malachi C. Jones which this witness believes may have been
3 the summary that was attached to a letter I understand,
4 Judge Matheson, that you received from --

5 A. Yeh. Let me say, the heading wouldn't be on it. All I'm--

6 Q. No.

7 A. What I'm -- What I'm saying is that the -- the tenure of -- of
8 the brief part of what was communicated to me is very similar
9 in content to -- to what's outlined here. Now I can't be more
10 specific than that.

11 Q. I think you indicated last week that when you received the letter
12 you felt that or you interpreted it as being an admonition of --

13 A. Yes.

14 Q. Because you had turned over the files to the counsel for the
15 accused?

16 A. Yes.

17 Q. All right.

18 A. And I think I also made the comment that at the end of the
19 hunt I knew where I fit.

20 Q. All right. The end of the hunt.

21 MR. MacDONALD:

22 Should I proceed, My Lord? I understood my friend Mr. Ruby
23 indicated he may want to have a moment to look at that.

24 MR. RUBY:

25 Why don't you go ahead and I'll listen to you and read at the same
time.

D. LEWIS MATHESON, by Mr. MacDonald

1 MR. MacDONALD:

2 Oh.

3 BY MR MacDONALD:

4 Q. You've had the opportunity recently then I take it, Judge
5 Matheson, to read what has now been introduced as Exhibit 81?

6 A. Yes.

7 Q. And does that reflect the practice that was followed by the
8 Crown Prosecutor's Office during your time in that office?

9 A. As far as I'm aware, yes.

10 Q. And it certainly was your intention to follow that. Is that
11 correct?

12 A. Yes, that's -- that's what we should have been doing.

13 Q. Yeh. Let me direct you to page three in particular. I've just
14 had the opportunity to quickly scan this myself, but on page
15 three I want to direct you to a couple of comments. After those
16 long quotations you'll see the paragraph starting with reference
17 to a case in the Privy Council where it says that tribunal:

18 ...ordered a new trial where the Crown
19 failed to give defence counsel statements
20 of witnesses which varied from oral
21 testimony.

21 And it says:

22 ...it is clear that the Crown must either
23 introduce evidence which is material to the
24 charge whether for or against the Crown
25 or else make the same available to the
defence.

Is that the practice followed by your Department while you were

D. LEWIS MATHESON, by Mr. MacDonald

1 Prosecutor?

2 A. Yes, sir, I understood and I think I testified already. I
3 understood that the defence had the material that we had. Now
4 it was not my case. I was not present when material was
5 passed. I don't know. But my understanding at the time was
6 that the defence had the information that we had.

7 Q. Forgetting that for a moment, if you can though, Your Honour,
8 I understood your evidence to be, and in fact confirmed to
9 Mr. Pink this morning that the burden was on the defence to
10 come and ask for it?

11 A. Well -- Well --

12 Q. Did you not say that this morning?

13 A. Yes, I did.

14 Q. I read this statement, however, to put the burden differently?

15 A. Yes. Yes. Then that would be correct.

16 Q. So the burden would have been according to the -- to the
17 dictate from your superiors the burden would have been on the
18 Crown to provide to defence -- to seek out the defence counsel
19 and to give to them copies of those inconsistent statements?

20 A. Yes.

21 Q. Thank you. The next paragraph, would you just take a moment to
22 read that because that refers to statements made by an accused
23 himself, and well I'm not going to ask you if that is -- Was
24 that the practice? Is that a statement of the principal that
25 was, in fact, followed?

D. LEWIS MATHESON, by Mr. MacDonald

1 | A. The withholding of an accused's statement from the defence?

2 | Q. Yes.

3 | A. Yeh, we always considered statements of the accused to be the
4 | property of the Crown and to be disclosed at the discretion
5 | of the Crown.

6 | Q. So that the defence counsel doesn't have an absolute right to
7 | statements made by the accused himself?

8 | A. I wouldn't think so.

9 | Q. You would not think so?

10 | A. No.

11 | Q. Thank you. So again what is contained in that paragraph on
12 | page three would accurately reflect the practice followed by
13 | the Crown Prosecutor's Office in your experience?

14 | A. I think so, sir. Yes.

15 | Q. Did I understand you to say to Mr. Pink that the current practice
16 | in Preliminary Inquiries is that the Judge will -- when he
17 | feels he has heard enough will interrupt the Prosecutor and
18 | say, "I've heard enough". "This..." --

19 | A. Oh, I don't say that's the current practice in that it
20 | happens in every case but there have been times on a busy
21 | day when a Preliminary is proceeding, if I reach a certain
22 | point in the course of that Preliminary where I'm
23 | satisfied there is before me evidence upon which a jury
24 | properly instructed could convict. I will stop the
25 | proceeding at that point and say to the Prosecutor or say

D. LEWIS MATHESON, by Mr. MacDonald

1 to the defence that I'm satisfied that there is sufficient
2 evidence. I will ask them if they want to continue and
3 particularly to ask the defence if they would like to hear
4 any particular witness.

5 Q. I see. You've been referred several times to the report from
6 Inspector Marshall. I believe it's still opened in volume 16
7 in front of you?

8 A. Yes.

9 Q. When did you first see that report, Judge Matheson?

10 A. This morning.

11 Q. You had not had the opportunity to read that prior to coming?

12 A. No, I haven't read it yet.

13 Q. Okay. You did say earlier you were aware of the polygraph
14 results but not the report?

15 A. Yes, that's right. I read the -- And I haven't read that report
16 in full yet either. I saw -- I saw this report in John
17 MacIntyre's Office and I read it only to the point that -- that
18 it said that the polygraph test was in error or was inaccurate
19 rather than -- or unreliable, I'm sorry, rather than the
20 evidence of MacNeil himself.

21 Q. There's just one final point. When you were cross-examined
22 last week by Mr. Ruby, and he asked you why the Crown wouldn't
23 have brought out in direct examination of John Pratico, the
24 fact that he had been drinking an excessive amount of
25 liquor on the night in question and there was reference to

1 | the transcripts where, in fact, Mr. Pratico on one occasion
2 | only said he had stopped behind the bush to have a drink of
3 | beer?

4 | A. Yes.

5 | Q. The same reference in the Preliminary and the trial. And you
6 | in your evidence, and this was found on page 5088, said that --
7 | said this in response to Mr. Ruby:

8 | I read the transcript. I never realized
9 | until Pratico gave the evidence at the
10 | trial that he did in cross-examination,
11 | that his degree of impairment was anywhere
12 | near -- that he was drinking, I knew,
13 | the quantity of liquor I didn't know.

14 | Now my difficulty arises because of the evidence you gave the
15 | day before and I want to read this to you as well and perhaps you
16 | can explain the -- what appears to be a little inconsistency. You
17 | were asked by Mr. Orsborn if you had any concerns leading into this
18 | Preliminary and you listed some of the concerns, and particularly
19 | on page 4943 you said:

20 | In the case of Pratico we were aware,
21 | and I'm not saying I derived this from
22 | what I read, but we were aware that at
23 | the time he made his observations he
24 | was very intoxicated...

25 | So I have a little difficulty between the two references.

A. It's a matter of degree I suppose. The amount of liquor that--
I knew that Pratico was drinking and was probably intoxicated
when he observed what he saw. Again I don't recall the
transcript that carefully but he did describe consuming an

D. LEWIS MATHESON, by Mr. MacDonald

1 inordinate amount of liquor and one would wonder that he could
2 see anything.

3 Q. But my point is I had that impression when you gave evidence
4 to Mr. Orsborn and your reference to the fact that you knew
5 he was very intoxicated, that that was one of the concerns
6 you had going into the Preliminary?

7 A. Yeh.

8 Q. Now -- And that's correct, isn't it?

9 A. That's correct.

10 Q. Then may I put to you again the question that Mr. Ruby addressed
11 to you, knowing that and knowing that that would be a material
12 point, why wouldn't the Crown have lead evidence to show that
13 Mr. Pratico was very intoxicated rather than relying on the
14 defence to bring that out?

15 A. Well, it was -- Maybe we couldn't rely on Pratico to tell us.
16 I don't know. It was inevitable that the defence would bring
17 it out, and we -- we -- I don't know really but I'm conjecturing
18 and Pratico -- Pratico waffled somewhat in his story and we
19 left it to him to tell what he had had to drink.

20 Q. Why would it be inevitable that the defence would bring it out?
21 Why would the defence necessarily know or why would you assume
22 the defence would necessarily know that Pratico was very
23 intoxicated. We know there was a lot of other things they didn't
24 know.

25 A. Well, sir, I presumed they knew.

D. LEWIS MATHESON, by Mr. MacDonald, by Commissioner Evans

1 MR. MacDONALD:

2 That's all I have, My Lord.

3 BY COMMISSIONER EVANS:

4 Q. Would that be because you assumed that they would interview
5 Pratico?

6 A. Yes.

7 MR. CHAIRMAN:

8 That's all, Judge Matheson.

9 THE WITNESS:

10 Thank you, My Lord.

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(WITNESS WITHDREW)

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DISCUSSION BETWEEN COMMISSION AND COUNSEL

1 MR. MURRAY:

2 My Lords, perhaps before the next witness is called I could
3 bring the Commission and the public up-to-date. This morning
4 I was speaking to Mr. Urquhart, who is still in hospital
5 after suffering a heart attack complicated by pneumonia,
6 he will under doctor's orders not be available to testify
7 at the Sydney sittings of the Inquiry. He may be in a
8 position to testify at the Halifax sittings later on in
9 the new year. Mr. Urquhart did make one request to me
10 that I -- I make it known publicly that he'd rather not
11 be receiving -- than have the hospital receiving a number
12 of phone calls that have been coming into the hospital
13 about his condition. And that was why he preferred that
14 I make a public statement this morning.

15 MR. CHAIRMAN:

16 The last part of your comment somewhat escapes me. This
17 Commission has no control over telephone calls --

18 MR. MURRAY:

19 I appreciate that.

20 MR. CHAIRMAN:

21 -- that may have been made to the hospital.

22 MR. MURRAY:

23 The last part of the remark referred more to persons sitting --
24
25

DISCUSSION BETWEEN COMMISSION AND COUNSEL

1 MR. CHAIRMAN:

2 Nor, indeed, am I aware of the fact that there -- there have
3 been any calls made; but I'm sure that no one would knowingly
4 do anything to jeopardize the speedy recovery of any -- of Mr.
5 Urquhart. In the event -- I take it that you will keep Commission
6 Counsel advised as to when Mr. Urquhart is in a position or his
7 physicians feel he's in a position to testify. If it should
8 occur that he is unable to travel to Halifax, then there is
9 a very good possibility that the Commission will be back in
10 Sydney in any event after. We just can't leave Sydney, so we'll
11 be back again. Now --

12 MR. SPICER:

13 Thank you, my Lord. The next witness is John F. McDonald.

14 MR. CHAIRMAN:

15 Maybe we should --

16 MR. SPICER:

17 Break?

18 MR. CHAIRMAN:

19 Why don't we take a break now so we can go right through.

20 INQUIRY ADJOURNED: 10:34 a.m.

21 INQUIRY RECONVENED: 10:48 a.m.

22

23

24

25