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SDS Case Number 87-312

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

VOLUME XXX

Held: November 18, 1987

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

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

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

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

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

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

Donald C. Murray: Counsel for William Urquhart

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

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

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

Al Pringle: Counsel for Correctional Services Canada

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

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

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

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

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

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

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COURT REPORTER'S CERTIFICATE AA-4

INQUIRY RECONVENED AT 9:33 o'clock in the forenoon on Wednesday, the 18th day of November, A.D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia.

1 MR. MacDONALD:

2 My Lords, the next witness will be Bruce Archibald.

3 BRUCE ARCHIBALD, being called and duly sworn, testified as follows:

4 MR. MacDONALD:

5 I've had marked My Lord as Exhibit 82 a copy of a Cirriculum Vitae
6 for Professor Archibald, and I've had marked as 83 at Volume 26 of
7 the evidence, which is an Opinion prepared by Mr. Archibald.

8 BY MR. MacDONALD:

9 Q. Just let me highlight if I can, Professor Archibald, some of
10 the contents of your C.V. You're a graduate of Dalhousie
11 University in -- with a Bachelor of Laws degree.

12 A. That's correct.

13 Q. And then a Master of Laws from Columbia University in New York.

14 A. Yes.

15 Q. Having studied comparative law.

16 A. Yes.

17 Q. And you've taken post-graduate work at University of Paris --

18 A. Yes.

19 Q. in 1975 and '76?

20 A. That's right.

21 Q. Okay. You're a member of the Bar of the Province of Nova
22 Scotia?

23 A. Yes.

24 Q. And were admitted to the Bar in 1977?

25 A. Yes.

1 Q. And during your articles, you spent three months in the
2 prosecutor's office?
3 A. That's correct.
4 Q. Correct? Tell us about your teaching career, if you will.
5 Generally. Briefly.
6 A. Well, I've been teaching at Dalhousie Law School from 1976
7 until the present. I've taught primarily criminal law, criminal
8 procedure, and related subjects including evidence, although
9 I've taught a number of other courses as well. Legal process,
10 legal development, family law, comparative law, these sorts
11 of things.
12 Q. Yes. You've been associated with the Law Reform Commission of
13 Canada?
14 A. I have been consultant to the Law Reform Commission of Canada
15 in their present Criminal Code Review.
16 Q. Yes. And you were the principal consultant in one particular
17 area, is that correct?
18 A. In the law of arrests, compelling appearance, things of that
19 nature, yes.
20 Q. Now, Professor Archibald, at my request, you've carried out some
21 work in connection with this trial -- this -- the trial of
22 Donald Marshall, is that correct?
23 A. That's correct.
24 Q. Generally, what have you done?
25 A. As you requested, I reviewed the transcript of the trial in 1971

1 to determine whether there were any errors in evidentiary rul-
2 ings, and I've also made certain recommendations, which I think
3 flow from the analysis which I made of the trial.
4 Q. Other than reading the transcript of evidence given at the trial
5 of Mr. Marshall, what other materials have you looked at?
6 A. In preparation of the formal, written Opinion, I looked at the
7 transcript and the indictment. Subsequent to preparation of
8 this Opinion, I have also examined the transcript of the
9 preliminary inquiry. But, of course, following the examination
10 of these documents, I did research on the various legal points
11 which I thought were raised in relation to the issues I identi-
12 fied as being problematic.
13 Q. Okay. Before we get to the actual rulings that were made in
14 this trial that you wish to -- to which you wish to refer, I
15 want you to just generally describe certain concepts in order
16 that people may better understand your comments on the actual
17 trial. Would you tell us what is meant in law -- in law of
18 evidence by the concept of relevance?
19 A. Well, the principle of relevance is really the first principle
20 of evidentiary law, and it has a very general defintion. The
21 idea being that a matter or a piece of evidence -- a statement
22 is relevant where it tends to prove that a given fact in issue
23 exists in the sense that it's more likely that the fact in
24 issue exists when you know this or have been told this than
25 before you were told it or knew it. That's very general, I

1 realize, and it may be useful to contrast the idea of relevance
2 with the idea of weight. You see, there may be relevant evidence,
3 which is far from being conclusive. For example -- An example
4 which I give in the Opinion is that the evidence that the gun
5 which killed a victim, for example, in a criminal trial, the
6 fact that that belonged to the accused is obviously relevant.
7 It, however, is not conclusive unless there is other evidence
8 to demonstate that the accused used the gun or had a motive to
9 kill the victim or what have you. So the simple fact that the gun
10 belonged to the accused is certainly relevant, but its weight
11 is not conclusive.
12 Q. And is it the general principle of evidence law in this country
13 that any evidence which is relevant is admissible unless other-
14 wise excluded?
15 A. That's right. The principle long ago expressed by the American
16 writer, Thayer is that only relevant evidence is admissible
17 at trial and that unless there is another exclusionary rule,
18 all evidence which is relevant is admissable at trial.
19 Q. Okay. What is hearsay evidence?
20 A. Well, I provide -- There are a number of definitions of hearsay.
21 Two which I suggest are sufficient to deal with the issues here
22 are found on page 13 of my Opinion. The first is put forward
23 by the Federal/Provincial Task Force on the Uniform Rules of
24 Evidence and it says that:
25 "'Hearsay" means a statement by a

1 person other than one made while
testifying as a witness at the
2 proceeding, that is offered in
evidence to prove the truth of the
3 matter asserted."

4 So it's not merely a statement made outside the courtroom or
5 while the person is not testifying, but in order to qualify as
6 being hearsay and, therefore, exluded under a rule which excludes
7 hearsay evidence, it must also be a statement which is asserted
8 to prove the truth of the matter contained in the statement.
9 Q. Give us an example.
10 A. Well, there are a number which we'll deal with specifically,
11 I suppose, in the trial, but a general one, which I've pointed
12 to in my Opinion, might flow out of a simple motor vehicle
13 accident. In a motor vehicle accident, it might be asserted
14 that the defendant saw a mechanic who told him that his brakes
15 were fine. All right. Now -- And he might -- The accused
16 might want to say -- or the defendant might want to say on
17 the witness stand; "The mechanic told me that my brakes were
18 all right." Now, that is an out-of-court statement by the
19 mechanic not given under oath, all these kinds of things. If
20 that statement were to be used for the purpose of proving that
21 the brake failure caused the accident, then that statement
22 would be hearsay because it would be used for the purpose of
23 asserting the truth of the matter contained in it.
24 Q. But if --
25 A. My brakes were okay or they weren't.

1 Q. If it were being used --
2 A. On the other hand, if it were being used to say that the
3 defendant was not negligent because he'd checked with a
4 mechanic to see whether or not his brakes were okay, and the
5 mechanics had told him that they were, that really goes to
6 whether the accused had been negligent or had taken care in
7 the circumstances and there it would not be hearsay.
8 Q. Hearsay --
9 MR. MacDONALD:
10 I'm sorry, My Lord?
11 BY COMMISSIONER POITRAS:
12 Q. Excuse me, I've got a small problem with that. Would it not
13 be necessary in either event to look to the mechanic to have
14 him testify in court?
15 A. It would certainly be necessary if the purpose were to use the
16 mechanic's evidence to prove the cause of the accident.
17 BY MR. MacDONALD:
18 Q. Or to prove that the brakes were okay.
19 A. That's right.
20 Q. Okay. If you were introducing it to prove that the brakes
21 were okay --
22 A. Yes.
23 Q. -- you would have to call the mechanic to give that evidence
24 himself.
25 A. That's right.

1 Q. Is that correct? But His Lordship is interested in your
2 second purpose, that you wouldn't have to call him if you
3 were using it for what purpose?
4 A. For the -- merely that the -- the question of whether or not
5 the defendant in those circumstances was negligent or had
6 taken some -- made some efforts to determine the condition of
7 his brakes.
8 BY COMMISSIONER POITRAS:
9 Q. But wouldn't the better evidence be that you bring in the
10 mechanic to testify in court that indeed the defendant had
11 looked to him for advice on the braking mechanism of his
12 vehicle?
13 A. Well, I -- Yes, it -- You might say it would be better, and you
14 would certainly say that the evidence from the mechanic, being
15 an independent witness, to the effect that, "Yes, the defen-
16 dant consulted me, and I told him his brakes were okay."; that
17 would be more weighty, but still the statement could be given
18 by the defendant, and it would be admissible. It would not
19 be hearsay. It just would not carry the same weight, but it
20 would be relevant. It would not be hearsay. It would be
21 admissible.
22 COMMISSIONER POITRAS:
23 But it would not be hearsay. Yeh.
24 MR. MacDONALD:
25 Pardon?

1 MR. RUBY:
2 It's a state of mind issue.
3 THE WITNESS:
4 Yes.
5 BY MR. MacDONALD:
6 Q. It's a state of mind issue.
7 A. Okay.
8 Q. Okay. See, we're getting complicated already.
9 A. That's right.
10 Q. Hearsay evidence obviously can be relevant. Is that correct?
11 A. If -- It must be relevant if it's to be admitted or it's even
12 discussed, let's put it that way.
13 Q. Listen to my question, now. Hearsay --
14 A. Yeh.
15 Q. Hearsay evidence is not admissible, is it?
16 A. No.
17 Q. But hearsay evidence can be relevant -- could be relevant?
18 A. Oh, sure.
19 Q. So it's being excluded for reasons other than relevance?
20 A. Yes.
21 Q. Why is it not admitted? Why can't you bring hearsay evidence
22 before the court?
23 A. There are a number of reasons which are put forward. That --
24 The oldest or one of the most traditional reasons is that the
25 evidence is not given under oath and therefore the person is

1 not under the same moral pressure to tell the truth. That's
2 one reason. I think the most often cited reason today is
3 that the out-of-court statement of the declarant -- the
4 declarant is not available to be cross-examined, and so the
5 person who made the statement cannot be challenged to see
6 whether they had an opportunity to observe the events they
7 say happened or whether their memory of the events is clear,
8 whether what they said they really meant to say. Was the
9 statement ambiguous? All of these things are thought to be
10 best challenged through cross-examination if one is to get
11 at the truth, and when you've got a witness on the witness
12 stand saying, "So and so told me that," then there's no way
13 to get at so and so to ask directly and cross-examine that
14 person.
15 Q. So that's the purpose for excluding it? Generally accepted
16 purpose?
17 A. The major purpose and the most commonly accepted purpose.
18 Q. Yeh. All right. Could you give me an example of the -- of
19 other exclusionary rules other than hearsay?
20 A. Well, I guess one could say that most of the law of evidence is
21 composed of exclusionary rules, the purpose of which is to
22 exclude relevant evidence for other reasons. Now, there are
23 a whole series of examples. I suppose one that arises fre-
24 quently in the criminal law context is the rules concerning
25 confessions. A statement made by an accused person to someone

1 in authority saying, for example, that they committed the
2 offence, is highly relevant, but there are rules to say that
3 that statement by an accused to a person in authority is only
4 admissible if it is freely and voluntarily given and so that
5 there the idea is that even though this admission is, in a
6 sense, a statement which from points of view might be hearsay,
7 and we won't perhaps -- We need not get into that. That pri-
8 mary concern is that an accused may make statements with hope
9 of gaining some advantage from the person in authority or
10 because they've been threatened in some way and that even
11 though the statement is relevant, it ought not to be admitted
12 if it can't be proved to be voluntarily given. I mean, there
13 are a whole series of other examples as well of exclusionary
14 rules. We now have in the Charter of Rights and Freedoms a
15 whole series of controversial rules about -- Charter-based
16 rights which lead to the potential for exclusion of evidence,
17 not because it's not relevant but because there's been a
18 breach of a Charter right. In the area of private litigation,
19 one can think of rules excluding statements made by parties
20 who are trying to reach a settlement, for example. They may be
21 highly relevant. They may be admitting lots of statements which
22 would be important to prove a trial, but because the statements
23 are made in the course of a bona fide effort to settle the
24 matter, we should encourage those efforts at settlement and
25 not prejudice them by later having those kinds of things

1 admissible at trial.
2 Q. Okay. Let me ask you -- In your report, you refer to something
3 that I -- I think I have the correct phrase here, "a limiting
4 instruction to a jury." What is that?
5 A. Well, it may arise that evidence which is not admissible under
6 one rule might be admitted under another rule. In other words,
7 evidence in the example of the car mechanic given earlier --
8 The evidence of the statement made by the defendant that he or she
9 saw the mechanic would be inadmissible on the issue of proving
10 the cause of the accident but admissible on the issue of whether
11 the accused had been negligent. What was the accused's state
12 of mind? And in that circumstance, the -- a jury ought to be
13 told by the judge that that statement can be taken into account
14 only for a -- for the purpose of assessing the defendant's
15 state of mind, but they can't take that statement into account
16 in determining what the cause of the accident was.
17 Q. Now, realistically, Professor Archibald, is a lay person on a
18 jury supposed to understand that I look at a piece of evidence
19 for one point of view, but I can't look at it for another point
20 of view? Is that what the law of evidence says?
21 A. The law of evidence says that, and it's invoked quite commonly
22 and limiting instructions are also used in circumstances where
23 a piece of inadmissible evidence has inadvertently been admit-
24 ted in court or a statement has been made by a witness, and a
25 judge will tell the jury to disregard that statement in coming

1 to their conclusions. Now, you're right -- At least the assump-
2 tion underlying your question -- If I can put it that way --
3 that there's a good deal of skepticism about whether or not
4 jurors are able to make those kinds of distinctions, but there's
5 some argument that in fact they do.
6 Q. Okay. In any event, that's part of the law?
7 A. That's right.
8 Q. And finally, the last phrase I want you to describe for us is
9 "adversarial trial process."
10 A. Well, the -- In the common law tradition, if I can put it that
11 way, the form of trial in both civil and criminal matters is
12 primarily adversial. And by that, we mean that the judge or
13 the trier of fact, which would be the jury in a jury trial --
14 and both of them are to remain neutral and to a certain degree
15 impassive really while the litigants, the opponents, present
16 one side of the case and then the other side of the case. The
17 idea is that the judge is to remain impartial and really to act
18 as an umpire in regulating the course of events so that the
19 jury, the trier of fact in a jury trial, can come to a decision
20 based upon the theory that two opposing sides going at one
21 another will uncover the truth most efficiently.
22 Q. Yes. If you -- In your Opinion, you refer to a quotation given
23 in 1971 by Mr. Justice Evans, and if I can just quote one part
24 of that. It said:
25 "This procedure assumes that the

1 litigants, assisted by their
counsel, will fully and dili-
2 gently present all the material
facts which have evidentiary
3 value in support of their
respective positions and that
4 these disputed facts will receive
from a trial judge a dispas-
5 sionate and impartial considera-
tion in order to arrive at the
6 truth of the matter in controversy."

7 MR. CHAIRMAN:

8 Law of Ontario.

9 BY MR. MacDONALD:

10 Q. Is that a statement -- It's the law of Ontario. Is that also
11 the law of other parts of this country?
12 A. I would say that this description of the adversarial system is
13 widely accepted by evidence writers and others in Canada as a
14 good general description of the adversarial process through a brief
15 one.
16 Q. Yes.
17 A. It is perhaps important to point out a qualification which is
18 implicit in the comment which follows the citation of that
19 passage, in my Opinion, and the qualification is that this
20 particular case involved a civil trial -- was not a criminal
21 matter, and I think it's fair to say that there are some sig-
22 nificant differences between civil trials and criminal trials
23 in this regard, and that is first, as I mentioned, that the
24 trial judge has a duty to intervene perhaps a little more
25 actively in a criminal trial where the judge thinks it's

1 necessary to do so in the interests of, what we might say in
2 old fashioned language to be the liberty of the subject. I
3 mean, in a criminal trial, somebody's liberty is at stake, and
4 in the event that counsel for the defence, for example, may not
5 be taking all the measures which are clearly necessary to give
6 a defence here, then I think criminal court judges feel a greater
7 pressure to intervene and have a duty to intervene to present --
8 to prevent the administration of justice from being brought
9 into disrepute or injustice from occurring in an individual
10 case. This may go so far as to call a witness, for example,
11 in criminal cases.
12 Q. The judge?
13 A. The judge, we're talking about.
14 Q. Let me put it from the point of view of counsel.
15 A. Yeh.
16 Q. The quotation I read to you says that it:
17 "assumes...the...counsel, will...
18 diligently present all the
material facts...in support of
their respective positions..."
19
20 Now, from a prosecutor point of view in a criminal case, is
21 it the law in this country that he is to present only the
22 facts in support of a conviction?
23 A. The ethical duties, and in fact the legal duties, of the prose-
24 cutor are not the same as the counsel for a plaintiff in a
25 civil action. The Code of Professional Conduct of the Canadian

1 Bar Association, which has been adopted here in Nova Scotia
2 and which really sets out the traditional view in its Rule 8,
3 talks about the requirement for Crown counsel in a criminal
4 proceeding to present the facts fairly and dispassionately and
5 to raise issues which may not be favorable to the prosecution --
6 if those come to the attention of the prosecutor.
7 Q. And to that extent then, the traditional view of the adversarial
8 system does not apply in a criminal case, if you consider in
9 the traditional sense the Crown Prosecutor represents the Crown
10 in seeking a conviction.
11 A. The Crown Prosecutor does not simply represent the police. The
12 Crown Prosecutor does not simply represent the victim. The
13 Crown Prosecutor represents the public interest in seeing that
14 trials are conducted fairly and that justice results.
15 Q. Thank you. And I just wanted to refer you, finally, before we
16 get into the specifics, on page 3 of your Opinion, the Summary
17 that you've noted there, that:
18 The law of evidence consists of a
19 large and sometimes confusing body
of rules which regulate the adver-
20 sarial trial process and balance a
number of competing interests in
21 this process, including: ...
22 And the interests you relate are:
23 ... the ascertainment of the true
facts at issue...assuring fairness
24 as between Crown and defence in
the presentation of evidence...
25 assuring public confidence in the

> fairness and impartiality of a criminal trial; and...the elimination of an unjustifiable expense and delay.

That is an accurate statement of the purpose of the law of evidence, but in particular in a criminal trial, is that correct?

A. Yes, I believe it is.

Q. All right. Let's to to this particular trial then and, Professor Archibald, there were certain points that you've made in your Opinion to which I wish to address your attention. I've put in front of you certain volumes of evidence, and I'm going to refer you to portions of them.

1 The first evidence that you have -- to which you refer is the
2 evidence given by a Mrs. Merle Davis and that's found in
3 volume one of the evidence at page 134. This is the evidence
4 of the trial. Now you are referring to your own copy of the
5 transcript and -- at which --please do. I'll just make sure you've
6 got the same thing. Now Ms. Davis -- Mrs. Davis, as I read
7 her evidence, was called to give evidence that she saw
8 Donald Marshall, Jr., at the hospital on the night of the
9 incident and that he had a laceration on his left forearm which
10 did not have any blood in it and that she saw him wearing a
11 jacket which she wouldn't be able to identify again. Given
12 the fact that Doctor Virick, the man who sewed that up, that
13 cut, had already given evidence that he saw the laceration
14 and no blood, was there any probative value at all to the
15 evidence of Mrs. Davis at that trial?
16 A. Well, insofar as the two proported eyewitnesses to the event
17 had observed someone wearing a yellow jacket, I would think
18 that it's -- it's relevant and has probative value to say
19 that the accused when he arrived at the hospital on the night
20 in question was wearing a yellow jacket. I don't see that
21 there would be any controversy on that. As to the nature of
22 the laceration, to the extent that they -- there might be
23 allegations that this was a self-inflicted wound, then
24 descriptions of the nature of the wound would be relevant
25 and I should think that merely because there had been another

1 witness who had described that, would not preclude one from
2 bringing a second witness to make statements about it.
3 Q. Okay. But there's another portion of her evidence that you
4 take issue with?
5 A. Yes.
6 Q. Is that correct?
7 A. That's right.
8 Q. Would you tell us about that please?
9 A. In her evidence she -- and this is on the following page. I
10 guess it's --
11 Q. That's page 134.
12 A. --page 134 (That's right.) of the transcript that you're using.
13 And she says:
14 Q. Did you notice anything else about
15 his arm?
16 This is the question in examination in chief by Mr. MacNeil.
17 She answers:
18 A. I noticed a tatoo today on his arm.
19 Q. So it's not something she saw at the hospital. Something I
20 saw today?
21 A. That would be a -- Yes, you could interpret it that way.
22 Q. Okay.
23 A. And then she is asked:
24 Q. Can you tell us what that tatoo is?
25 And she says:

1 A. "I hate cops".
2 Q. So she was pointing out that the tatoo on Marshall's arm
3 that she saw today, and I could refer you to the evidence
4 where Junior Marshall was asked to display to Doctor Virick
5 his arm earlier on that day --
6 A. Yes.
7 Q. --to show the cut. So she said, "I saw a tatoo on his arm
8 today that said, 'I hate cops'." Now what do you say about
9 that evidence?
10 A. Well, you'll notice that inadvertently I did not put the
11 word "today" in the -- when I copied it into my opinion. Maybe
12 that's a Freudian slip in that I don't think the word "today"
13 is significant, now whether she saw it the day of the trial or
14 saw it back on the day in which she looked at his arm in
15 order to give treatment. The statement, "I hate cops" is --
16 is not relevant to the proof of any matter at issue in this
17 trial. It -- At least then one -- one can say that it is
18 character evidence to the extent that it can be argued that
19 character evidence is relevant. In other words, that people
20 of bad character are likely to commit criminal offenses, there
21 is a clear rule limiting character evidence and the use of
22 character evidence. The first aspect of that rule is that
23 character evidence is inadmissible when put forward by the
24 Crown as part of their evidence in chief, and that --
25 Q. But -- I'm sorry.

1 A. And that character evidence in the nature of reputation
2 evidence can be put forward by the defence and then can be
3 rebutted and there again reputation evidence has to be used,
4 but individual instances of behaviour or items such as this,
5 "I hate cops" statements, and if you can say that this is a
6 statement from the accused, are not admissible in the Crown's
7 case because they really are -- if they are relevant at all
8 they go to the accused's character as the kind cf person who
9 might be likely to commit offenses.
10 Q. Was that an improper question?
11 A. Yes, in my view it was.
12 Q. Let me direct you to look at volume two of the evidence as
13 well if you would?
14 A. What page?
15 Q. Page twenty-five.
16 A. Yes.
17 Q. That is the question by Mr. MacNeil at around line ten. And
18 he is cross-examining Donald Marshall, Jr. He says:
19 Q. Let me see that arm again. Pull
20 your sleeve up. That is where you see the wound is about three inches.
21 Just let the jury have a look at that please.
22 The witness complies. And then he says:
23 Q. Would you turn your arm around and
24 see if there is any other wound on your arm?
25 Isn't that another attempt to get in the same inadmissible

1 evidence?
2 A. It may indeed be. I have not seen Mr. Marshall's arm and do
3 not know the proximity of the wound to the tatoo. So I don't
4 know whether you can cover up the tatoo and view the wound or
5 not, but --
6 Q. It's hard when you're turning your arm around to cover your
7 whole arm.
8 A. Well, as I say, I don't know, but if -- if in viewing the wound
9 the tatoo is obviously visible and necessarily visible at the
10 same time, it seems to me that you -- that the strategy from
11 the Crown Prosecutor here may be trying to get that tatoo before
12 the jury once again. I don't know. That's a matter of
13 speculation.
14 Q. Is that evidence prejudicial, the evidence about the "I hate
15 cops" prejudicial to Marshall?
16 A. Yeh, I believe it is, certainly.
17 COMMISSIONER EVANS:
18 I'll just ask you: Line 25 where the prosecutor asks, on that
19 same page, he wants to show the whole arm, (where Mr. MacNeil
20 is,) around 23, 24.
21 MR. MacDONALD:
22 Yes. Yes.
23 BY MR. MacDONALD:
24 Q. That's on volume two around line 25?
25 A. Yes. Right.

1 Q. I suggest, Professor Archibald, there's no question that what
2 he's trying to do is get that tatoo right in the eyes of the
3 jury. Now if -- if we assume that, and let's assume that, is
4 that an improper line of questioning as well?
5 A. I would say that if-- if the purpose is to display the statement,
6 "I hate cops", that that statement would be inadmissible evidence.
7 Q. Should the defence have objected the evidence being introduced
8 through Mrs. Davis about the tatoo on the arm?
9 A. Should.
10 Q. Or could. They obviously could have?
11 A. Yes, I would say that the defence counsel could have objected
12 to it. Whether or not defence counsel should have objected
13 would be a matter of -- of counsel's assessment if the -- as
14 a matter of strategy. If the arm has been viewed by the jury
15 do you want to emphasis that or de-emphasize that. To object
16 to the evidence you may be bringing attention to it and -- but
17 certainly if your view was that you want to object to that
18 evidence because it's clearly inadmissible and you think that
19 it's in your client's interest to do so, you should.
20 Q. Should the judge have intervened and prevented the evidence
21 from being introduced?
22 A. I think the judge should have, certainly he could have.
23 Q. Should the judge in his Charge to the jury have made some
24 reference to that evidence and told the jury in use of your
25 phrase, "a limiting instruction" to disregard that evidence

1 entirely?
2 A. The judge could have done that and it would have been proper
3 for the judge to do that. Here again I -- I suppose that it
4 may be -- the judge may be making an assessment of whether
5 it might be more prejudicial to the accused to highlight that
6 evidence by bringing it to the attention of the jury once
7 again. The problem is that a judge who fails to point out
8 evidence which is inadmissible, leaves open the possibility
9 that there would be a successful Appeal because of the admission
10 of that inadmissible evidence.
11 Q. Now in this case there's no question, is there, that the
12 character of Junior Marshall is important because you have a--
13 really the determination of credibility between him on one
14 hand and Chant and Pratico on the other?
15 A. Yes.
16 Q. And the Crown would know that the character of Marshall is
17 fundamentally important in this case?
18 A. Yes.
19 Q. In those circumstances --
20 A. The credibility of Mr. Marshall --
21 Q. Well, and character certainly goes to credibility, does it
22 not?
23 A. Well, character evidence is inadmissible at -- at a criminal
24 trial. It may go to credibility in a sense in -- in the eyes
25 of the general public, but from the point of view of a criminal

1 trial, character evidence is simply inadmissible because it's
2 felt to be so prejudicial that it's unfair to an accused to
3 introduce evidence which impugns the accused's character.
4 Q. Okay, and in this case, the evidence of that tatoo falls into
5 that category?
6 A. Yes, in my view it does, clearly.
7 Q. Now you've talked about an Appeal. And in your Opinion on
8 page ten you quote Section, I guess it's 613 of the Code in
9 1971?
10 A. Yes.
11 Q. And you put in quotes the phrase:
12 ..."substantial wrong or miscarriage
13 of justice"...
14 A. That's right. That's --
15 Q. Well, what does that -- Where does that quote come from and why
16 is it -- why is that of importance?
17 A. It comes from Criminal Code Section 613 (1) (b) (iii) of the
18 Criminal Code, and that section provides that an Appeal can
19 be dismissed by a Court of Appeal even when there's been a
20 wrong ruling on a matter of law, such as, a wrong evidentiary
21 ruling, if the Court is of the opinion that there is no
22 substantial wrong or miscarriage of justice resulting from
23 that error. Now that has been intrepreted by the Supreme
24 Court of Canada to really mean that if there is any possibility
25 that a jury would have a reasonable doubt in the event that there

had not been this wrong ruling on a matter of law, then the Court should not affirm the conviction.

Q. You've read the Appeal Decision in the Junior Marshall case, have you?

A. Yes, I have.

Q. And there is no reference in that opinion at all to this evidence of the tatoo, is there?

A. No.

Q. Okay. Next you in your Opinion make reference to evidence called through Mr. and Mrs. Oscar Seale. Their evidence, as I understand it, was called only for the purpose of proving the continuity of the clothing worn by their son on the night of the -- of this incident. Is that correct?

A. That's the inference which I draw from the kind of testimony which they gave and the brief reference that Mr. MacNeil made in his summation or in his --

Q. Now was the clothing worn by Sandy Seale on the night of the incident of any relevance at all here?

A. I don't see how it is relevant. There was no issue as to the identity of the victim here in this case so far as I can see. The victim had been identified by doctors and so on; by other witnesses. I don't see that this evidence is -- is necessary or relevant to any matter.

Q. Okay. Now what issue do you take with the fact that they were called to give evidence?

1 A. Well, if the evidence is not relevant then it's not admissible.
2 And it seems to me that what one has is -- is the calling of
3 two people whose son has been the victim of a gruesome homicide
4 and that the effect may be to garner the sympathy of the jury
5 for the parents of the victim without putting forward any
6 relevance for that testimony whatsoever, so that in essence
7 without being relevant the -- that evidence may have caused
8 some emotional response from the jury which would be prejudicial
9 to the accused.
10 Q. You've also in your report raised the calling of evidence of
11 Patricia Harriss and Mr. Gushue but conclude, as I understand
12 it, that that was proper evidence to be called in the
13 circumstances of this case?
14 A. Yes, I do. I -- From what I understand from merely reading
15 press reports of what occurred while -- here in this Inquiry.
16 From the evidence of Ms. Harriss it -- it may appear that the--
17 the evidence that came out in trial was not the evidence which
18 she gave here, but the manner in which that evidence was
19 elicited at the trial seemed to me to be entirely proper and
20 there were no wrong evidentiary rulings made in relation to
21 it.
22 Q. Okay. Now we come to the question of hearsay, and the general
23 approach at the trial to that subject. Let me just ask you
24 a couple of specific questions on that. Is it a fact or is
25 it the law in this country that any statement which is made out

1 of Court not in the presence of the accused is hearsay?
2 A. No. Hearsay is a statement made by a person other than the
3 witness who is testifying which is put forward to prove the
4 truth of the matter asserted in the statement and the presence
5 of the accused is not relevant to the definition of what is
6 hearsay and what is not.
7 Q. So the presence of the accused has no bearing on the matter
8 at all?
9 A. No.
10 Q. Is that the view in this case of counsel and the trial judge?
11 A. It was certainly not the view of Crown Counsel. Mr. MacNeil
12 asserted on numerous occasions that a statement made out of
13 court which was not made in the presence of the accused was
14 inadmissible. Now it seems -- The basis for his assertion
15 is unclear. I know of no such rule and he doesn't explain
16 why that is the case, although the general discussion during
17 the course of the examination and cross-examination of a number
18 of witnesses would lead one to believe that both Mr. MacNeil
19 and ultimately the trial judge were of the view that such
20 evidence was hearsay.
21 Q. And if I could just quote to you from what the trial judge
22 said at one part of the trial, that's on page 202 of the
23 volume one and continuing on to page 203.
24 A. Now what is it in my transcript?
25 Q. It's at page 169 and 170.

1 A. Yes.

2 Q. Where the trial judge on the top of page 203 said:

3 That is the law, Mr. Khattar. Now
then, he cannot tell in court what
4 somebody said to him because it was
not in the presence of the accused.

5

6 There's the trial judge saying that is the law.

7 COMMISSIONER POITRAS:

8 Which page?

9 MR. MacDONALD:

10 The top of page 203, My Lord.

11 BY THE WITNESS:

12 A. Yes, this statement is made at that point and it appears to

13 be a ruling based on a hearsay concept here. That is not the

14 ruling that the trial judge, however, made on page 153 of

15 my transcript.

16 BY MR. MacDONALD:

17 Q. Let me get that now. That's on page 186, My Lords, of volume

18 one. What ruling are you talking about there?

19 A. Line 19 would be the judge's statement beginning at page -- line

20 19:

21 Mr. MacNeil, it is absolutely proper
for the witness to be cross-examined
22 on a previous statement made by him
irrespective, irrespective of where
23 he made it. This is not hearsay.
This is going basically and essentially
24 to the credibility of the witness...

25 This is a truthful witness.

BY COMMISSIONER POITRAS:

Q. Of course, at that time the evidence was being adduced by Mr. MacNeil, whereas on page 203 the attempt was being made by Mr. Khattar?

A. Yes, although, you see, when the matter of the hearsay rule initially arises the argument is put forward by Mr. Rosenblum and it's in relation to the cross-examination of Sergeant MacDonald, and at that time Mr. MacNeil raises this argument about matters not being -- statements -- out-of-court statements not made in the presence of the accused are hearsay. Gosh, I don't have, but what --

BY MR. MacDONALD:

Q. I'll get it for you.

A. There is a rejection of that approach by Mr. Rosenblum. What's interesting, however, is that at page 161 of my original volume and I don't know now what it is in the numbering system.

Q. That would be 194.

A. Yes. If we've got the page, at line eleven Mr. Khattar says:

> The ruling, Your Lordship has made with respect to conversations in the absence of the accused, statements made by others --

So at that point Mr. Khattar invokes this, what I would call non-existent Rule of Evidence in his favour so that at one point the judge rejects the rule as do -- as does Mr. Rosenblum for the defence when we're at the stage of Mr. MacDonald's

1 testimony. At this -- at a subsequent stage the rule is
2 rejected by the judge in the examination of Mr. Pratico.
3 Further on in the re-direct examination of Mr. Pratico, defence
4 counsel invoke this rule which they see that the Court is
5 now apparently using and they stuck with it. And then there's
6 what seems to me at the end of the re-direct examination of
7 Mr. Pratico, we have the final capitulation of the judge to
8 what I view as the non-existent rule.
9 Q. Do you have any sense at the end of all this, Professor
10 Archibald, whether the judge and counsel in that courtroom
11 had any idea of the concept of hearsay evidence at all?
12 A. I think that there was a fundamental misapprehension of the
13 nature of what is hearsay -- what are hearsay words and non-
14 hearsay words if I can put it that way. They -- The general
15 view seemed to be that any out-of-court statement made by
16 someone other than the witness and even by the witness was
17 thought to be hearsay, regardless of the purpose for which
18 it was put forward, and, of course, it is the purpose for
19 which the out-of-court statements are put forward which
20 determines ultimately whether they are hearsay or not.
21 Q. Let's talk about the evidence of Sergeant MacDonald. Now
22 Segeant MacDonald, My Lords, you may recall is the Investigating
23 Officer on the night in question who was at the hospital when
24 Maynard Chant was either brought to the hospital or not. It
25 is hard to know that from what we've heard, but that's what was

1 understood at the trial. Now what is it about the evidence
2 of MacDonald or the attempt to get evidence from MacDonald
3 that you take issue with, Professor Archibald?
4 A. Well, Sergeant MacDonald was really called by the Crown for
5 the purpose of proving the continuity of -- of exhibits.
6 But, of course, when a witness is called for a particular
7 purpose by the Crown, this does not limit the kind of cross-
8 examination which is engaged in by the defence counsel. Our
9 rule, for example, is unlike what I understand the American
10 Rule to be where there is that sort of limitation. In other
11 words, that cross-examination is only in relation to the
12 evidence given by that particular witness. In our system
13 cross-examination is very broad ranging and the purpose of --
14 there are two purposes of cross-examination, one is to elicit
15 from the opposing witness statements or evidence which are
16 favourable to your case, the substance of your case, whether
17 or not the witness saw the crime being committed or not; or
18 whether or not the witness observed some aspect of an accused
19 which would provide a defence. So the first purpose of
20 cross-examination then is to elicit from the opponent's witness
21 matters which are directly relevant to the case to be proved.
22 The second purpose in cross-examination, however, and a very
23 important purpose is to -- to sap the credibility of that
24 person as a witness, to indicate that that witness's testimony
25 is not as credible as it might have appeared from the way in

which it was put forward in the direct examination by the Crown Prosecutor.

Q. Okay. Now it was MacDonald we're dealing with first. We're trying to get something out of him, or Rosenblum is, something out of him that would be of benefit to his defence, isn't that correct?

A. What Mr. Rosenblum really is doing here is questioning Sergeant MacDonald about whether or not Mr. Chant implicated the accused when Sergeant MacDonald met Chant at the hospital. Now the purpose for doing that can -- the admissible purpose for doing that is to really challenge Chant's credibility by demonstrating that Chant did not make an accusation against the accused, Mr. Marshall, when he had the first opportunity to do so.

gmr.

1 Q. Okay, let me direct you to the transcript. It's on page --
2 of your copy, if you like, page 58.
3 MR. MacDONALD:
4 It's page 138H of our transcript, My Lords, volume one.
5 BY MR. MacDONALD:
6 Q. And down at the bottom of that page Mr. Rosenblum is in
7 conversation with the Court and the other counsel during
8 a voir dire, he's saying I want to ask him:
9 ...what he didn't
10 say. I'm asking what he didn't
say...not what he said.
11 And if you go over to the next page, here is Mr. MacNeil's
12 objection:
13 I'm saying, of course, he is
making it with the word
14 "accusation" that he is asking
what the witness said. And I am
15 submitting to you that it is
completely inadmissible unless
16 the accused was present. And
I know of no rule that would
17 allow a conversation to go in
that may work to the detriment
18 of the accused when he wasn't
present.
19
Now that's what you've talked about before. That's the basis
20
for the objection. There is no such rule, is there?
21
22 A. No, as I have stated I know of no such rule.
23 Q. And even if there were such a rule, would it be -- would
24 the Crown be able to raise it saying that the accused is being
25 prejudiced here? If counsel for the accused want to ask a

1 question that's prejudicial to the accused, what business does
2 the Crown have interfering?
3 A. In terms of our normal understanding of the dominately
4 adversarial nature of a criminal trial, none.
5 Q. The judge upheld that ruling, didn't he? He would not
6 permit the question?
7 A. Yes, that's right.
8 Q. Now this is why I had a little problem with what you said
9 earlier that it wasn't until later on in the trial that the
10 judge sort of indicated his misconception of the rule?
11 A. Well, it's not clear to me why the judge excludes it. The
12 judge-- the judge upheld -- upholds the objection.
13 Q. Well, there's the objection?
14 A. Yeh, there's the -- I know what the objection is but the
15 reasoning is rather difficult to fathom. And I think one
16 has to assume that -- that it's being excluded because it's
17 being characterized as hearsay. I think that's the most
18 plausible explanation of -- of why the ruling is made.
19 MR. CHAIRMAN:
20 And-- and not the traditional fear that trial judges have of
21 Appeal Courts as referred to in 138I by Mr. MacNeil.
22 MR. MacDONALD:
23 138 which, I?
24 MR. CHAIRMAN:
25 138I.

1 MR. MacDONALD:

2 Oh, yes, he refers to the -- that the Appellate Division may

3 very quickly overturn this.

4 MR. CHAIRMAN:

5 That strikes terror into the hearts of every trial judge.

6 MR. MacDONALD:

7 Does it? You speak with experience, My Lord, I'm sure.

8 MR. CHAIRMAN:

9 Oh, yes.

10 COMMISSIONER EVANS:

11 Just new ones.

12 BY MR. MacDONALD:

13 Q. Now if you go to page 138J and which is page 60 in your

14 transcript.

15 A. Yes.

16 Q. The line 13 or so, you can see where the judge again is --

17 is adopting that practice or that non-rule. Anything that

18 has to do with the conversation inasmuch as the accused

19 man was not there. He's adopting that. It's -- it's

20 inescapable that that's the reason he would not permit that

21 evidence to be called? Isn't that correct?

22 A. Yes, but to character -- I don't know if that's hearsay.

23 I don't know what the basis of that rule is. You see, it's

24 not a rule and I don't know what it's-- what it's all about.

25 It's just --

1 Q. I understand that but I'm merely having you agree that relying
2 on the non-rule, the judge wouldn't allow the evidence to
3 be called?
4 A. Yes, yes.
5 Q. Thank you. But what about that, wouldn't that type of ruling --
6 and that wasn't a singular ruling throughout the trial, was it?
7 That was -- that application of a non-rule occurred on more
8 than one occasion?
9 A. Yes.
10 Q. What about that in the Appeal? Wouldn't that be the
11 substantial miscarriage of justice test that you talked about?
12 A. Well, the -- I would argue, yes, that the consistent use --
13 exclusion of evidence or the failure to allow cross-examination
14 on matters of credibility, in my view is an error and one
15 can't say that it's not a substantial wrong or a miscarriage
16 of justice. I think that it--indeed it would be characterized
17 as such by a Court of Appeal. The problem, of course, is the
18 reluctance of Courts of Appeal to -- to raise issues arising
19 out of a transcript when these matters are not raised in the
20 grounds of Appeal or argued before them.
21 Q. Okay, and we'll come to that. Let's go to the examination of
22 Maynard Chant. You make comment of the evidence given by
23 Maynard Chant and I want to direct your attention to page 22
24 of your Opinion and this is the -- where he's talking about
25 the fact that Mr. Chant had given inconsistent statements to

1 the police, is that -- that's correct isn't it, where Mr.
2 Rosenblum's cross-examining him?
3 A. Yes.
4 Q. What I want to direct your attention to, Professor Archibald,
5 is the bottom of that page where you say:
6 However, Mr. Rosenblum asked no
7 questions about what the police said to Maynard Chant in their
8 interrogation. This may be because of a fear that the hearsay rule
9 would apply.
10 Now are you talking about the real hearsay rule or this
11 non-rule?
12 A. I guess I'm really referring to the non-rule there that the
13 prevailing understanding of the hearsay rule which seemed
14 to dominate the proceedings, would be applied and that Mr.
15 Rosenblum, therefore, was constrained not to make a searching
16 cross-examination to get at the kinds of things which may
17 have been said to Maynard Chant either by the police or by
18 others before he gave this statement.
19 Q. Let me ask you to look at another document and I would suggest that
20 there may have been another reason that Maynard -- that Mr.
21 Rosenblum didn't want to do that. In volume one which is before
22 you, and you wouldn't have seen this document before, just
23 turn to page 79, volume one yes. You've not seen that document
24 before, Professor Archibald?
25 A. No, I have not.

1 Q. That is a Statement of Facts which we are advised is the
2 document that would be prepared by the Crown and used by
3 the trial judge in instructing the Grand Jury, you're
4 familiar with that type of document?
5 A. Yes, I am.
6 Q. It was in use in Nova Scotia?
7 A. It was in common use in Nova Scotia during the period prior
8 to the abolition of the Grand Jury, that's right.
9 Q. I want to direct you to page 80 and it's the last couple of
10 sentences before --
11 A. Page -- what page?
12 Q. Page 80.
13 A. Eighty.
14 Q. 8 - 0. The last couple of sentences before the reference to
15 Doctor Gaum, do you see where it says, that paragraph:

16 The accused showed Mr. Chant
17 his forearm that was injured
but no blood was in appearance.
18 These two men stopped a passing
automobile, the operator unknown,
19 and were taken back to the scene
where Mr. Seale was still alive,
20 but beyond reasonable senses.
Help was then summoned.

21 Now this is the point:

22 Mr. Chant at first related to the
police the story the accused gave
23 him but later advised that he
related the false story because of
24 fear of the accused.

25 Now if you assume that Mr. Rosenblum was aware of that

1 statement, I suggest that's a good reason not to go on and
2 ask Mr. Chant on the witness stand why he made the
3 inconsistent statement? Would you agree with that?
4 A. Yes, that may have -- that would be -- if Mr. Rosenblum
5 believed that that would be the kind of answer that he
6 would get, it would be imprudent for him as defense counsel
7 to -- to intentionally bring that out.
8 Q. But in any event, it's your opinion, as I understand it, that
9 if Mr. Rosenblum had tried to question Chant as to what the
10 police said to him when they were interrogating him, it would
11 have been inadmissible because the accused wasn't there?
12 A. Yes.
13 Q. Ruled inadmissible?
14 A. Based -- based on the ruling which had been made concerning
15 Mr. Justice or Sergeant MacDonald's testimony, then yes, I
16 think that the defense counsel here would have been prevented
17 from examining -- cross-examining fully on the matters of --
18 of how the police had dealt with Mr. Chant.
19 Q. And do you think they would have been permitted to call the
20 police and ask them what they said to Chant?
21 A. That would have been inconsistent with the approach taken by
22 the trial judge and by Crown Counsel as well. And apparently
23 ultimately acquiesced in by defense counsel.
24 Q. Now let's go to the evidence of Mr. Pratico and that starts
25 on page 25 of your Opinion and it relates to the statement

1 that was made by Mr. Pratico out-of-court.
2 A. Yes.
3 Q. And that is in the afternoon prior to his giving evidence.
4 Now just in general terms advise the Commissioners, if you
5 will, what problems you have with the way that was handled
6 in the courtroom?
7 A. Well, clearly the evidence of John Pratico was essential
8 and key to the prosecution's case. He was one of the two
9 eyewitnesses. As such, defense counsel clearly has the
10 right to be able to fully cross-examine such a witness in
11 order to, not only as I suggested before, try to elicit
12 statements about the offence which are favourable to the
13 defense case; but to fully explore why the accused has
14 stated the things he has in evidence. What opportunity
15 there was for the accused to observe the events which
16 he now relates to the Court. What is the accused's
17 mental capacity. Is he -- all these kinds of things.
18 Q. You mean Mr. Pratico's mental capacity not --
19 A. I'm sorry. I beg your pardon, indeed.
20 Q. Yes.
21 A. Yes.
22 Q. The judge limited and limited very much the cross-examination
23 of Pratico on this statement that was made in the court --
24 outside of court the afternoon prior, isn't that a fact?
25 A. Could you repeat that?

1 Q. The judge limited the extent of cross-examination of Pratico
2 on -- with respect to the statement that was made out-of-
3 court?
4 A. Yes, and in other areas as well. In particular in relation
5 to that statement made to the group of people outside the
6 courtroom prior to his giving evidence.
7 Q. Okay, and he did so with respect to that statement he made in
8 the hall the afternoon before by the wrong application of
9 the provisions of the Canada Evidence Act, isn't that correct?
10 A. Yes, that's my view.
11 Q. In page -- on page 26 of your Opinion you quote from a section
12 of the Canada Evidence Act. Does that section have anything
13 at all to do with the questioning of Pratico with respect to
14 the statement he made in the hall the afternoon before he
15 took the witness stand?
16 A. To explain that fully I think I have to explain the ways in
17 which you get at the credibility of witnesses. There are two
18 ways in which to challenge the credibility of witnesses, one
19 is through cross-examination and the other is by bringing in
20 another witness who says the first witness' testimony is
21 wrong. In other words, that second situation would be the
22 case if somebody was called to say that Pratico here was
23 lying, for example. Now the difficulty is that in criminal
24 trials the person who is on trial in -- is the accused and
25 not witnesses so that there is a rule against bringing in

1 all sorts of other people to challenge a witness when the
2 testimony is not relevant to the facts in issue, not relevant
3 to the case; but only relevant to the credibility of the --
4 of that witness. So you couldn't have large numbers of
5 people testify that Pratico is not credible if their testimony
6 didn't relate at all to the events on the night in question
7 of the murder. Now, so that gives us -- but nevertheless,
8 we have two technics, the cross-examine technic -- cross-
9 examination technic and the possibility of bringing in other
10 witnesses. Now what Section 11 of the Canada Evidence Act
11 deals with is -- is to allow other witnesses to challenge
12 the -- the principal witness, if I can call him that,
13 and -- under certain circumstances and that is where that
14 witness under cross-examination gives a prior inconsistent
15 statement and denies having made that prior inconsistent
16 statement. You can bring in other witnesses to say, "Yes,
17 the witness did made that statement". But you see that's
18 creating a whole trial of the witness and the argument is
19 that that's not necessary where the accused admits to having
20 made that statement. And so that if the accused admits --
21 admits to having made the statement, you just carry on and
22 can cross-examine fully.
23 Q. Let me bring it to the facts of this case. In the afternnon
24 prior to his giving evidence, John Pratico in the hall and
25 later in the barrister's room, is reported to have said to

1 Simon Khattar and then Sheriff MacKillop and then in the
2 presence of Donald MacNeil and I think, Chief MacIntyre and
3 Lewis Matheson; he said to all of them, "I did not see
4 Donald Marshall stab Seale. And when I said that before,
5 I was lying". Yeh, that's what happened. Now if Pratico
6 went on the witness stand and denied saying that out in the
7 hall and you wanted to call Sheriff MacKillop to prove that
8 he did say it, that is what Section 11 provides for, isn't
9 it?
10 A. Yes, that's right.
11 Q. It's got nothing at all to do with the questioning of Pratico?
12 A. No, and it -- it indeed is intended to allow the calling of
13 those witnesses who heard the statement out in the hall in
14 order to get around this restriction on those kinds of
15 collateral witnesses or witnesses on collateral issues.
16 Q. But the judge used that section to say, "You're not allowed
17 to examine Pratico other than with respect to the time,
18 place, and manner in which he gave that statement". Isn't
19 that correct?
20 A. That's right.
21 Q. And that's totally wrong?
22 A. The trial judge used this provision of the Canada Evidence
23 Act to limit cross-examination.
24 Q. And that's wrong?
25 A. And this section has nothing to do with limiting cross-

1 examination. It has to do with allowing evidence to be
2 brought in from other witness to -- other witnesses to
3 impeach the person who's on the stand.
4 Q. Okay, now one of the questions that's arisen and it's not
5 dealt with in your report and I'd like to have you comment --
6 comment on it if you would. Immediately Mr. Pratico was
7 put on the witness stand. The Crown Prosecutor attempted to
8 get into the evidence of what was said by Pratico the
9 afternoon before and he was stopped by the trial judge.
10 A. Yes.
11 Q. Who told him, "I'm not interested in what happened yesterday.
12 I want to hear about the night of the crime". Is that
13 an improper ruling by the trial judge?
14 A. No, in my view, it is not. The trial judge -- the trial
15 judge's duty is to ensure that evidence is given on the
16 matters in issue from the witnesses. The trial judge took
17 the view that he was not interested in what happened
18 yesterday outside the courtroom; what he was interested in
19 was what happened on May 28th, the night of the murder.
20 That strikes me as being entirely proper. That -- that
21 what-and that Mr. MacNeil ought to have presumably asked
22 questions -- begun his questioning about the night in
23 question. Now then, if Mr. MacNeil, however, was -- received
24 answers, the same answer that happened -- that was given by
25 Pratico outside the courtroom door, then Mr. MacNeil would

1 have been faced with a problem in the sense that he either
2 has to believe that evidence, this new evidence, this
3 statement consistent with the one outside the courtroom
4 door or he has to say that there is some sort of inconsistency
5 and perhaps get into the problem if he -- if he, Mr. MacNeil,
6 believes the story that was given at the Preliminary Inquiry
7 and the story that he had -- was building his case on; then
8 he would have the opportunity to challenge Pratico perhaps
9 by having him declared as an adverse witness. But it
10 strikes me that what Mr. MacNeil was doing was trying to
11 get around that problem and try to roll that process up into
12 one by getting at what happened out in the courtroom first
13 rather than getting a statement from the witness as to what
14 happened on the night in question and then see if it was
15 contrary to what was said outside the courtroom. You see,
16 the statement made outside the courtroom, and here we come
17 back to the hearsay rule, is in the eyes of some, hearsay.
18 It's -- it's a statement made by a witness out in the hallway
19 it has nothing to do with that witness's evidence as to --
20 of--the events on the night in question.
21 Q. But the witness is on the witness stand?
22 A. Yeh, I know, and there's a great disagreement in among writers
23 as to whether or not that kind of situation should come under
24 the hearsay rule or not.
25 Q. I want to read to you some of the evidence that's been given

1 here at trial with respect to what took place in the hall
2 and the intention of the various persons. First from the
3 evidence of Lewis Matheson who was Co-Prosecutor with
4 Donald MacNeil. And this is found on page 5002 of the
5 evidence. And he's talking here, Professor Archibald,
6 about the discussion with Pratico in the barristers' room
7 where all of the counsel and Sergeant MacIntyre and the
8 Sheriff were present. And he said:

9 ...it was communicated to Pratico
10 that he was -- that it was a very
11 important matter, that we all
12 realized he was young and that the
13 burden -- that every -- the burden
14 on him and what everybody expected
15 of him was to tell the truth so far
16 as he could recall it, and if he
17 couldn't recall it to say nothing,
18 and...to tell the truth. And there
19 may have been a reference to perjury
20 because I remember the last thing
21 that was said in the room, Mr. MacNeil
22 said, "About the perjury and about
23 anything you've said before", he said,
24 "forget about that; you don't have to
25 worry about it".

Later Matheson said he questioned MacNeil on that. He said, "I hope you can made that stick because somebody else may -- may have different views on the question of perjury." And then Simon Khattar in his evidence, and I'm referring to page 4744, so -- this is a question:

So you weren't able to ask him ---

And he answered:

Any of the questions other than the

1 two statements that "Marshall didn't
stab Seale", and "The statement is
2 not true".

3 Q. You wouldn't have been able to say, for
example, you told me (you being Pratico)
4 you told me that Marshall didn't stab
Seale?
5

A. That's right.
6

Q. And when you told the Court that you
7 ...were lying? ...when you (Pratico)
told the Court that you...were lying?
8

A. That's right.
9

Q. And that you (Pratico) never saw that
10 at all? You weren't even in the park
that night?
11

A. Right.
12

Q. You weren't allowed to ask him any of
13 those questions?

14 A. Those are questions which you -- that
(you) would probably...put to him if I
15 had been permitted.

16 Q. If you had been permitted you would
have put all those questions to him?
17

And the answer was:
18

Yes, certainly.
19

And then from the evidence of John Pratico and this is found
20

on page 2102:
21

I told my story that I gave to the police
22 because I was afraid and I figured --
Well, if Mr. Khattar had went about it
23 the right way and questioned me, the
truth would have come out and we wouldn't
24 be here today.

25 Q. Did you want to tell Mr. Khattar the truth?

A. Yes, sir.

Now that's evidence that you've not heard before and you wouldn't have had it when you made -- gave your Opinion. I want to direct you to page 29 where you give a conclusion with respect to the ruling on the Pratico matter. In your last sentence in the final paragraph of Pratico you say:

> Given that the trial rested on the credibility of witnesses, it cannot be said that this curtailment of the cross-examination and re-examination of John Pratico might not have contributed significantly to "a substantial wrong or miscarriage of justice".

Now given the evidence that I've just read to you, would you agree with this statement that it is, in fact, an inescapable conclusion:

> that this curtailment of the cross-examination and re-examination of John Pratico ...contributed...

directly to the conviction of Donald Marshall, Junior, and that it was

> "a substantial wrong or miscarriage of justice".?

JMR

1 A. Well, I think that in the -- with regard to the kinds of
2 standards which we've mentioned employed by Courts of Appeal,
3 in relation to criminal matters, that the Court of Appeal
4 before whom this matter had been raised would inevitably
5 have had to grant a new trial on the basis that there had
6 been an erroneous ruling and it could not be said that there
7 was no possibility that this did not lead to a substantial
8 wrong or a miscarriage of justice --
9 Q. Given that --
10 A. -- so that there's a low threshold as a test for whether or
11 not the matter should be -- conviction should be confirmed
12 or not.
13 Q. Given that Mr. Pratico wanted to tell the truth and given
14 that Simon Khattar wanted to ask him questions that supposedly
15 would have elicited the truth: that he didn't see Marshall
16 stab Seale, isn't it just an inescapable conclusion that
17 that wrong ruling by the judge which prohibited that evidence
18 from being called lead directly to the conviction?
19 A. No, I think there's no question that it was -- significantly
20 contributed to the conviction, Yeh.
21 Q. Thank you. When you read this transcript did it not just
22 jump out at you that this is a wrong application of section
23 11 of the criminal -- of the Canada Evidence Act? It's
24 not buried, it jumps out at you.
25 A. I think that one can say that as you read through it it's

1 clear that section 11 of the Canada Evidence Act is being
2 applied in a matter for which it was not intended, for a
3 purpose for which it was not intended.
4 Q. Would you classify this as a serious blunder?
5 A. It's clearly an erroneous ruling on a matter of evidentiary
6 law and I've stated that I think it significantly contributed
7 to the wrongful conviction.
8 Q. Why wouldn't that be commented on or dealt with by the
9 Appeal Court?
10 A. An Appeal Court just as a Trial Court operates on the basis
11 of an adversarial system. Just as a Trial Court has a duty
12 to ensure in criminal matters that the adversarial system
13 does not -- operates properly and does not lead to injustice
14 so I think an Appeal Court has to be aware of that kind of
15 problem so that certainly an Appeal Court could comment on
16 such a matter, that there had been an erroneous ruling but
17 I think that quite rightly there is a reticence of Appeal
18 Courts to decide cases on the basis of issues which are not
19 argued before them or which are not found in the grounds
20 for appeal and my reading of the appeal decision from the
21 Appeal Division of the Supreme Court of Nova Scotia would
22 lead me to the conclusion that this matter was not raised
23 on appeal and faced with that kind of situation, in fact
24 there is some authority to say that the courts have a
25 not to hear matters which are not raised in the grounds of appeal.

1 Now it would be, I would think, in situations where an
2 obvious injustice would result in a court -- court would not
3 do that. But it seems to me quite normal for a court to say:
4 here is an error made but I -- it was not argued by counsel
5 on the appeal. I guess the error can't be significant in the
6 eyes of counsel for the Appeal. Now, on the other hand
7 if the matter were thought to be significant an Appeal
8 Court has the discretion to allow new evidence to be heard
9 so that more evidence could have been taken on appeal if the
10 matter were thought to have be significant.
11 Q. Okay.
12 BY COMMISSIONER POITRAS:
13 Q. I just have one question, if I may. On the premise that the
14 exclusion of this testimony significantly contributed to the
15 wrongful conviction of the accused was there an obligation
16 on the part of anybody to draw this to the attention of the
17 Court of Appeal?
18 A. My view would be that it's certainly the obligation of defense
19 counsel and it would be my view that it is also the obligation
20 of crown counsel.
21 BY MR. CHAIRMAN:
22 Q. May I take that a step further? Given the fact that defense
23 counsel and counsel for the Crown did not draw it to the
24 attention of the Court of Appeal and given the fact that the
25 exclusion of this evidence, even in the kindest words, may have

1 contributed to the wrongful conviction of the accused. Do you--
2 don't you feel it is then -- would be an obligation on the
3 Court of Appeal to go, not simply to comment on it, but to
4 allow the Appeal and set aside the conviction --
5 COMMISSIONER EVANS:
6 And direct a new trial.
7 BY MR. CHAIRMAN:
8 and -- that's right -- and direct an new trial?
9 A. Certainly it would be within the discretion of the Court
10 of Appeal to do that and I would view it as an appropriate
11 exercise of discretion. I would say it's the right thing
12 to do. I -- But insofar as the matter was not argued, no
13 factual matters were, as I understand it, brought to the
14 attention of the Court of Appeal to suggest that the testimony
15 from the eye witnesses was -- had been obtained in improper
16 ways then I hesitate to say that there is a duty on the
17 part of the Court of Appeal to do that. It certainly
18 is within their discretion and I would think it a proper
19 exercise of discretion but when the parties have not raised
20 it I'm reluctant to call it a duty.
21 BY COMMISSIONER EVANS:
22 Q. Professor, we're dealing with a murder trial.
23 A. Yes.
24 Q. And even if the matter is not argued before the Court of
25 Appeal and not raised in the factum, that does not foreclose,

1 I suggest to you, the right of the Court of Appeal to
2 review the matter.
3 A. I agree with that and I think I've stated that.
4 Q. What we are differing in --
5 A. Yes.
6 Q. -- is whether there is a duty about it?
7 A. That's right.
8 Q. But if in reading the transcript and there are two or three
9 serious rulings -- evidentiary rulings and if they practically
10 jump out at you would that not change the right to a duty?
11 I'm assuming when they read it, they couldn't miss it or
12 shouldn't miss it.
13 A. Look, I think that there may have been, what I would call,
14 a moral duty for the Court of Appeal to so that. I think
15 that the Court of Appeal should have done that. I think
16 it was wrong for the Court of Appeal not to have done that
17 but I'm not willing to say that there is a legal duty that
18 they have to even though the matter has not been thought
19 to be significant by -- I guess I -- The adversarial system
20 is in there as important in my view.
21 Q. Adversarial system, I grant you that it's very important, but
22 there is an overriding duty too, isn't there?
23 A. Yes.
24 Q. And the more serious a case, I suppose, the more serious one
25 has to look at the matter.

1 A. And the question would be just as the trial judge has the
2 discretion to call a witness where there is some matter which
3 is clearly problematic and it hasn't been raised by crown or
4 defense counsel it may be that the Court of Appeal could have
5 exercised the discretion to hear evidence on this issue.
6 Q. Yes.
7 A. Or send it back for a new trial, either one and I would argue
8 should have.
9 Q. Both of those options were available?
10 A. Yes. I mean it would be my opinion that they should have. I --
11 Q. They should not?
12 A. They should have.
13 Q. Should have.
14 A. Yes.
15 BY MR. CHAIRMAN:
16 Q. Are you imposing a heavier duty on a trial judge than on
17 the Appeal of Courts on a case of this kind because you've
18 suggested that if a -- that a trial judge should exclude
19 evidence that's clearly prejudicial to an accused even though
20 crown counsel and counsel for the accused doesn't object. Why
21 shouldn't that same responsibility apply to a Court of Appeal?
22 A. I think perhaps it should. The question is I'm not convinced
23 that it does on the basis of the law but I think it should.
24 BY COMMISSIONER EVANS:
25 Q. If for no other reason and there are at least three of them

1 instead of one.
2 A. Yes.
3 MR. CHAIRMAN:
4 Numbers --
5 COMMISSIONER EVANS:
6 Sometimes count.
7 MR. CHAIRMAN:
8 Yes, I suppose.
9 BY MR. MacDONALD:
10 Q. Professor Archibald, just to finish up sir; you have made
11 a couple of recommendations in your report. For the
12 consideration of the Commission would you just like to
13 summerize what those are, please, and why you were making
14 those recommendations?
15 A. Well, as you read the transcript of this trial, it seems --
16 it seemed to me as I read it that this is a dramatic illustration
17 of the need for the reform and the clarification of the
18 law of evidence in this country. We have three experienced
19 lawyers who are obviously unclear about important doctrines
20 in the law of evidence. We know that the Law Reform Commission
21 of Canada has stated that there is a need for what they call
22 available, clear and flexible evidentiary rules. We know
23 that there has been a Federal/ Provincial Task Force into the
24 law of evidence following upon Law Reform Commission reports.
25 We know that as a result of a long process of public debate

1 and public consultation there is available now a text of
2 a uniform evidence act which is the result of the work of
3 not only the Department of Justice but activities or representatio
4 from Provincial Ministers of Justice. I think it's important
5 that the law of evidence be simplified so that it can be
6 understood and applied not just by the cream of ligation
7 counsel, not just by the high-flyers, the people who are
8 the specialists but by people who are lawyers trying to
9 do their best for clients in the trenches and I don't think
10 that the law of evidence as it stands serves that purpose
11 and I think that the Commission could properly within it's
12 mandate recommend that the efforts of those involved in
13 putting forward this uniform evidence legislation be brought
14 to fruition. In other words, that the federal government
15 ought to adopt the uniform act for use in federal matters,
16 including criminal trials and the provincial government ought
17 to adopt it for use in provincial matters so that we would
18 have a unified and simplified law of evidence which can
19 be understood and operated by the ordinary lawyers of this
20 country, the lawyers to whom most people go when they seek
21 legal advise.
22 MR. MacDONALD:
23 Thank you.
24 BY COMMISSIONER EVANS:
25 Q. Professor, are you referring to the proposed evidence act

1 that was -- came out of the Dominion Law Reform
2 Commission when Mr. Justice Hart was chairman?
3 A. No, I'm not referring to the Law Reform Commissions code.
4 I'm referring to the Uniform Evidence Act which followed
5 consultations, and -- It was originally introduced
6 as Bill S-33 and then went through a process of public
7 consultation with representatives of the federal government,
8 provincial governments and the Canadian Bar Association.
9 And it strikes me that we've spent literally hundreds of
10 thousands of dollars, I should think, in this country trying
11 to come with a workable reform of evidence.We've got something
12 which may be less then perfect in the eyes of many but a
13 great improvement on the present law and I think it would
14 be appropriate for the Commission to advocate it's adoption.
15 BY MR. CHAIRMAN:
16 Q. Just before we recess, there is one thing I want to bring out
17 if I may before I forget to. If you would turn to volume one
18 page 194 Professor Archibald? You see where what you referred
19 to as the capitulation by Mr. Khattar to the ruling of the
20 trial judge. May I direct your attention to what flows there
21 immediately thereafter. Questions by the Court.
22 A. Yes.
23 Q. Did you -- Does that leave any impression with you as to
24 possibly raising an extraneous issue that again might be
25 prejudicial to the accused?

A. It does not, in formal terms, raise any problems but it does in terms of the impression left. This is the kind of matter which I think is properly explored in cross-examination and would have been properly explored by counsel in cross-examination. However when it is -- when the Court has limited cross-examination and then engages in those kinds of issues subsequently it--and particularly in the kinds of questions asked which may leave the impression that there was some impropriety on the part of Donald Marshall Senior, for example. I think it's unfortunate that those questions were not asked, as they should have been, by counsel but they were asked by the Court. But in and out of themselves I don't think that they are wrong questions because they go to the credibility of Pratico and they're the kind of questions that should or can be asked in a criminal court.

Q. Except for one fact, that originally counsel for the Crown had attempted to introduce evidence as it related to what had transpired in the corridor of the court house the day before and was not allowed --

A. Yes.

Q. -- so to do but the jury had heard something about it.

A. Yes.

Q. This seems to me that to leave a jury with the inevitable conclusion that whatever it was that they were not permitted to hear, that that evidence had been obtained as a result of

1 undue pressure being brought upon this witness.
2 A. That's right.
3 Q. By counsel -- by the father of the accused?
4 A. Yes. Yes, I agree with that and I think I mentioned that
5 in my written opinion. It didn't come out in our discussion
6 today but that -- that is my view.
7 Q. All right.
8 A. But it's because of the, in a sense, the failure of the judge
9 to allow the play of the adversarial process to get that
10 kind of -- all of the evidence, pro and con, out on the
11 table on that issue that those questions are improper, in
12 my view. They're not improper in or of themselves but they
13 become improper in the context because of the limitation
14 of the give and play on cross-examination and re-examination
15 which proceeded them.
16 MR. CHAIRMAN:
17 All right. We'll take a short recess.
18 INQUIRY ADJOURNED: 11:16 a.m.
19 INQUIRY RECONVENED AT 11:33 a.m.
20 BY MR. RUBY:
21 Q. Professor Archibald, let me thank you first of all for your
22 thoughtful and very interesting opinion which I've enjoyed
23 very much and I know you put a great deal of work into it
24 and I want to just indicate that at the outset that I very
25 much enjoyed it. One of the things you didn't do, and I gather

it's because at page one of -- If you look at page one on the first paragraph you, line four, you say:

> ...I review the transcript of the trial in order to comment on the various rulings on evidentiary points and also on objections which might have been made but were not.

You don't appear to have spent a substantial time looking at, or any time for that matter, the address to the jury by Mr. MacNeil. I'm wondering --

A. That's correct.

Q. It's unfair to ask you questions about it since instant opinions are what trial counsel get paid for but not for Professor's of Law.

MR. RUBY:

I was wondering whether I can get some guidance from the Commission. I have some questions about that. I could put them on record now so that they're here or I can give them in a letter to Commission counsel or but some point I should be able to raise this. Maybe something should come in argument at the end. I'm not sure of how you want to deal with it.

MR. CHAIRMAN:

Well, maybe you can submit them to Commission counsel and if appropriate they in turn could refer them to Professor Archibald.

MR. RUBY:

That sounds like a fair way of doing it.

1 MR. CHAIRMAN:

2 He's doing a great deal of research for the Commission in
3 other areas of criminal law.

4 BY MR. RUBY:

5 Q. The other question I had was that you said that you didn't
6 examine the judgement of the Court of Appeal?

7 A. It was -- No. I looked at it in order to have a better
8 rounded sense of what had occurred but I did not -- I was
9 not asked and did not do a critical analysis of the Court
10 of Appeal decision.

11 Q. Okay. We've not general been respecters of persons
12 here be they judges of the Court of Appeal or anything else.
13 Have you formed a view on whether or not that judgement is
14 full of errors or that it's correct judgement or otherwise or
15 have you just not looked at it?

16 A. Other than the matters which we discussed here I -- my general
17 sense was that in relation to the matters raised the issues
18 were dealt properly by the Court of Appeal. The difficulty
19 was that these significant issues which we discussed this
20 morning were not raised in argument by counsel or by the
21 Court of Appeal in it's decision.

22 MR. RUBY:

23 If I might make a suggestion to the Commission at this point.
24 It would seem to me that we ought not to be excluding from
25 purview the rulings of the appellate judges anymore than we

excluded the trial judge because of their correctness.

BY MR. RUBY:

Q. I don't wish to raise anything with you now but perhaps you might be good enough to take a look at that and let us know whether or not you have any considered opinion on the correctness of that judgement on the issues raised and dealt with there.

MR.RUBY:

Would that be acceptable to you?

MR. MacDONALD:

Well, My Lords, I'm subject to your direction, I didn't consider that the Appeal Court made any rulings as such on evidence or whatever. They have filed the decision and I have always taken it as accepted, that once their decision is filed and if you don't appeal it and that would be a burden on somebody who filed the appeal as opposed to what I did ask Mr. Archibald to do, to look at actual rulings that were made in the course the trial and perhaps could have been raised and were not. I'm quite happy to do whatever you direct me to do but I don't know that that solves or serves any useful purpose to have a critical analysis of the actual decision of the Appeal Court but I'm open to --

MR. RUBY:

Perhaps the best thing for me to do is now that I've raised the -- let me think about it over lunch hour and we'll come back at it.

1 MR. CHAIRMAN:
2 But also it may be a matter, Mr. Ruby, that you would -- that you
3 may decide to at least seek to raise in argument and it would
4 be an unusual position for us to be in and to review the decision
5 of the Court of Appeal.
6 MR. RUBY:
7 True. But in any event, now, let me just -- now that I've heard
8 Commission counsel's position, indicate that I would like some
9 time to think about it and I will come back on the matter again
10 at a later time.
11 BY MR. RUBY:
12 Q. At page five of your judgement-- you judgement -- your
13 opinion, in the middle of the page you site the "Wray" case in
14 the rule on "Wray". See that passage?
15 A. Yes.
16 Q. You don't make clear that the "Wray" rule only applies to
17 evidence offered by the Crown and that there is no such
18 discretion for defense evidence. Do you agree with that?
19 COMMISSIONER EVANS:
20 Would you go over that again?
21 BY MR. RUBY:
22 Q. That the rule on "Wray" limits the Crown and it's a rule
23 of exclusion that can be applied to crown evidence but cannot
24 be applied to evidence offered by the defense. You cannot
25 exclude defense evidence on the ground that its probative value,

1 though real, is trifling.
2 A. That would --
3 Q. Justice Govern in the Court of Appeal.
4 A. As a matter of principle I think you're correct on that
5 I've never thought of the "Wray" case in that way but I think
6 you must be right on it but --
7 Q. I've forgotten the name of the case but Justice Govern wrote a
8 judgement to that effect in the Court of Appeal about 5 years ago,
9 but "Wray" itself only applies in its terms to Crown
10 evidence obviously. The limiting instruction rule that
11 you talked about where a judge says, look this is admissible
12 for this purpose and you can consider it for that purpose but
13 you mustn't consider it for another. Would you agree with
14 me when I suggest broadly that that's largely of fiction,
15 that juries in fact don't follow such instruction?
16 A. I guess I wouldn't. I don't know the answer to that question.
17 I have been told by some people who have experience with
18 jury trials and seem to have somehow broken the secrecy
19 of supposed secrecy of jury deliberations that some juries
20 in fact do make those kinds of distinctions but I think it's
21 the general opinion by large numbers of the legal profession
22 that these limiting instructions are not effective.
23 Q. Are there not American studies to that effect, criminological
24 studies?
25 A. I believe there are, yes.

1 Q. Now the more damning the prejudice created by the evidence
2 the less likely a jury is to follow a limiting instruction?
3 A. That seems on the face of it to have some validity but I'm
4 not aware of the precise studies that would make that statement
5 in that way.
6 Q. Are you familiar with the rule of evidence that any rule
7 of evidence which would prevent the defense from adducing
8 material which, if not adduced would work an injustice to
9 the accused in a criminal trial are to be relaxed, not
10 waived but relaxed? Are you familiar with that rule?
11 A. State the rule again. What is it?
12 Q. Certainly. That if the exclusionary rules would prevent
13 the accused from raising a matter which would, if you were
14 prevented, cause him substantial injustice; that the rule
15 of evidence permits that rule to be relaxed, not waived but
16 relaxed in order to allow the accused to bring forward a
17 matter which might tend to show that he was innocent?
18 A. I guess I'd have to say that I'm not aware of that as a particular
19 rule. It sounds like the kind of practise which may occur.
20 Q. All right. You focused at one point about Mr. MacNeil
21 being prevented from telling the jury at the outset that
22 Pratico had told a different story. As I read the passage
23 of the judge's instruction there what he was telling him
24 was; I wanted to hear first about the night and then later
25 if you want to, you can bring out this. Is that your

1 understanding as well?
2 A. That would be my understanding of how the matter should
3 be carried out. Now, I don't -- My reading of the transcript
4 is -- perhaps I don't draw that inference but that would
5 be consistent with what ought to be done in the circumstances.
6 Perhaps we can look at that --
7 Q. I thought that's what was done?
8 A. -- passage.
9 Q. Can you remember Mr. --
10 COMMISSIONER POITRAS:
11 Yes, page 156 and the Court says, "That may come later."
12 BY MR. RUBY:
13 Q. That's what I thought was happening.
14 A. Yeh.
15 Q. I'll give you a moment to find that. Can you find that
16 passage?
17
18
19
20
21
22
23
24
25

1 A. What is the little number up in the corner there? 119?
2 Okay, yes, at line 31. I think that your inference from
3 that statement is a reasonable one.
4 Q. Okay, and I think I'd be fair in suggesting to you that while
5 now judges are more restricted in dictating the order of
6 evidence that is to be called; in those days judges at trial were
7 much more free about telling counsel how they were to present
8 their case. Is that fair? In terms of the order of evidence,
9 not what evidence to lead.
10 A. I'm in no position to make a judgement on that, Mr. Ruby.
11 Q. All right.
12 MR. CHAIRMAN:
13 Would you refer to the last paragraph?
14 COMMISSIONER EVANS:
15 Mr. Ruby, on page 156 to which you were referring a few minutes
16 ago, the last paragraph also indicates that -- well, the Court
17 said:
18 That may come later. I don't know. I think, Mr.
19 MacNeil, for the moment you better confine yourself
to the evidence concerning the events on May 28,
20 1971.
21 MR. RUBY:
22 Yes, he's directing the order of evidence.
23 COMMISSIONER EVANS:
24 Then later if for any good reason you have for
bringing up the events of today, we will go into
25 it.

1 BY MR. RUBY:
2 Q. And to be fair to Mr. MacNeil --
3 A. But that -- that surely -- Now if that's what you are raising,
4 if that's the point you are trying to make (Pardon me, I
5 don't mean to be critical.) then, I think that it's more than
6 a practice of directing when evidence would be admissible and
7 when it would not be. It strikes me that the evidence of what
8 was said yesterday may be argued to be inadmissible. It's not
9 just a question of ordering the presentation of the evidence.
10 What was said yesterday may be inadmissible until there is
11 some question of getting from the witness the direct testimony
12 about the events.
13 Q. And I heard you as treating that passage as being a direction
14 to that effect and discussing whether it was appropriate.
15 A. Yes.
16 Q. But I'm just simply drawing attention that that doesn't appear
17 to be what happened. No, Mr. MacNeil understood. He seemed
18 to understand, as I read it, that he could raise it later.
19 He was merely directing the order of evidence and not the
20 admissibility of it.
21 A. Well, it -- it seems to me that the outcome here ought to be
22 that if evidence is given by Pratico,as in fact it was which
23 is inconsistent with the statements made outside the court
24 room, that puts Mr. MacNeil in the position where he has a
25 dilemma and he has what one might call to be an ethical problem.

1 If he believes the evidence which was -- the statements made
2 outside, then surely he's faced with an adverse witness, and
3 ought to bring before the Court some sort of testimony from
4 the others who heard the statement and ensure that what he
5 believes to be the right evidence comes out. On the other
6 hand if he does not believe what -- the statement made by the
7 witness out in the hallway, then one can say that it falls to
8 defense counsel to raise that as a matter of the credibility
9 of the witness.
10 Q. But to be fair to Mr. MacNeil, let me raise a third alternative
11 which is that he might say as many Crown counsel I suggest
12 would; "Look, I'm not here to judge the truthfulness of Pratico.
13 That's the jury's job. My job is to make sure that this jury
14 knows what went on in that hallway and he might well have chosen
15 (Would you agree with me?) the order of evidence that he did;
16 that is, first the hall statement and then the substantive
17 events so the jury would know when they heard the account of
18 what happened that night that this was a man who had just
19 recently said it wasn't true, if he decided to give that
20 account. And so he's being really fair here. He wants the
21 jury to have all the information he has right at the beginning
22 so that when they hear the substantive account, they can
23 evaluate it properly. And since counsel for the defense seems
24 to concur on that proposal, there would not seem to be any bar
25 to doing it that way. Would you agree?

1 A. I would think if counsel agree that it could be done that way,
2 yeh.
3 Q. All right. There's a maxim in evidence and I'm coming back to
4 the question of the duty on appellate courts or indeed any
5 court to prevent a miscarriage of justice; I'm going to act
6 in a way that sees that no miscarriage of justice is taking
7 place in the court. The maxim, ex debito justiciae, and would
8 you agree with me that that has been used (I can think of a case
9 that I argued.) to see a relaxation of limiting rules on time,
10 time limits, to extend the time within which appeal can be
11 brought, to permit fresh evidence to be called when the ordinary
12 rules of fresh evidence would not permit the evidence to be
13 adduced. The ex debito justiciae principle as a matter of a
14 debt owing by the justice system is used to relax various rules
15 that might operate against an accused in a criminal trial.
16 A. I think that's true.
17 Q. It does not however appear to have been a rule that's applied
18 at the trial or appellate level in this case.
19 A. No, that's right.
20 Q. You're quite -- excuse me just a moment, My Lords. At page
21 21 you make a statement that I want to challenge if I may,
22 about one-quarter of the way down page 21:
23 In the trial of Mr. Marshall, the presiding judge
24 was faced with the relatively rare circumstance
of ruling on the admissibility of a question which
would elicit an answer barred by the hearsay rule
25 if offered for the truth of its contents, but

1 justifiable if accepted as a challenge to an
2 important Crown witness who had yet to testify.
3 With respect, isn't that really a rather common place occurrence,
4 occurring every day across this Country in criminal trials?
5 A. It's not as common as challenging the witness who is there.
6 It seems to me that it's -- the statistically more prevalent
7 situation is you're challenging the credibility of the
8 witness who's on the stand and probably most easily a witness
9 who has already testified but when you're challenging the
10 credibility of somebody who is yet to testify, you -- that's
11 the situation which I guess is governed by the joint sense
12 of trial tactics, the understanding that the Crown is going
13 to call that witness. You know that to be the case.
14 Q. Doesn't that happen every day?
15 A. I think it does, yes.
16 Q. So it's not rare. I just inviting you to take back the word
17 "rare".
18 A. I see that "rare" may be an over-statement but it certainly
19 it's not as prevalent as challenging the witness who is there
20 or the witness who has already testified. That's what I meant
21 by the statement or the word "rare". I can see it has
22 connotations which you perhaps rightly reject.
23 Q. Thank you. The suggestion is made at page 23 among other
24 places, just about the half-way mark, that Mr. Rosenblum
25 seems to have concurred in the hearsay ruling or the creation

1 of the new rule about the presence of the accused being
2 required for statements being admissible; the out-of-
3 court statements. Is it not fairer to say that Mr. Khattar
4 and Mr. Rosenblum having argued correctly the law in each of
5 these instances and having been over-ruled in each of these
6 instances whereby our law required to accept the ruling of the trial
7 judge or bound by it as we use the phrase, and had to insist
8 that it be applied fairly throughout the trial?
9 A. It seems to me that the word "acquiesced" may be one which I
10 could have used and would perhaps describe more accurately the
11 general tenor of what occurred but they did invoke the rule
12 in their favour; at least, Mr. Khattar did.
13 Q. And they would have been remiss, would they not, had they
14 failed to do so on behalf of an accused once the trial judge
15 had made his ruling clear?
16 A. That's an interesting question.
17 Q. Okay. The -- Let me just tell you, trial judges get very
18 angry when you keep on making the same objection again, and
19 again, and again.
20 A. Oh, in practical terms there's no doubt that, you know, if
21 you keep on making the same objection again and again you
22 may get yourself in trouble in pratical terms, yeh.
23 MR. CHAIRMAN:
24 I take we are entitled to assume, or I am, that the practice in
25 Ontario is that in a criminal trial when a -- if early in a trial,

1 the trial judge makes a ruling and counsel for the accused accepts
2 it without further comment.
3 MR. RUBY:
4 That's correct unless there's something new that you wish to argue
5 that you haven't already raised and think Justice Evans will confirm
6 that -- that well as to rules --
7 COMMISSIONER EVANS:
8 I was going to.
9 MR. RUBY:
10 -- they have been breached from time to time.
11 COMMISSIONER EVANS:
12 Breached. Occasionally is.
13 BY THE WITNESS:
14 You notice, however, that Mr. MacNeil did not do that. He did not
15 acquiesce --
16 BY MR. RUBY:
17 Q. No, Mr. MacNeil was not very good at that sort of --
18 A. -- in rulings against him on these matters.
19 Q. The point that I'm making I suppose is here that of the three
20 parties, the judge, defense counsel, and crown counsel, you
21 said that all three of them seem to have misapprehensions
22 about the law of evidence and really it's not fair. Mr.
23 Khattar and Mr. Rosenblum don't ever where -- anywhere betray
24 a misunderstanding of the law of evidence other than
25 acquiescence to rulings already given. It's the crown

1 prosecutor and the judge who share this erroneous view of the
2 evidence.
3 A. Well, it's -- I -- in part perhaps that's an inference that
4 I draw and perhaps this is unfair and goes beyond what I say
5 I have done in the opinion and that is the failure to raise
6 these issues on appeal.
7 Q. Yes.
8 A. And it seems -- And I guess I draw from that that they must
9 have agreed with the rulings or thought them insignificant.
10 Q. Let me take you up on that. Defense counsel quite often look
11 at a case and say, "Well, you know, I was right about this
12 evidentiary ruling but I'm not going to get past the no-
13 substantial wrong hurdle on this." And courts of appeal then
14 and as now were very free with that proviso. I think you'll
15 agree with that? Yes?
16 A. Yes, "the patch", it's called.
17 Q. The patch. Could not a court of appeal have very easily said
18 in this case and could not defense counsel have thought (I
19 don't know if they did or didn't.) yes, there was an error of
20 law here, (but not knowing what we now know about the false
21 evidence and the perjury), but Chant wasn't successfully
22 attacked. He was an eye witness. The defense evidence was
23 contradicted by Miss Harriss as to how many people there were.
24 Quite clearly the jury would not have come to any other
25 conclusion because the evidence apart from that of Mr. Pratico

for example was overwhelming. You heard that line -- that line of reasoning in a number of cases. Do you agree that it might have been applied here by the court of appeal?

A. It's a matter of speculation but I certainly wouldn't exclude it.

MR. CHAIRMAN:

While you're still on that page, Mr. Ruby, maybe Professor Archibald would let us have the benefit of his -- an expansion of his views on that -- on the evidence, the examination -- the re-direct examination of Mr. MacNeil who seemed to me to be embarking, albeit somewhat limited, upon a line of examination that would go to the credibility of Chant, and then Mr. Rosenblum intervened and seemed to object to that line of questioning.

MR. RUBY:

Yes.

BY MR. CHAIRMAN:

Q. I'm not sure that my interpretation is correct but you --

A. See, I would say that is the -- yeh, that's the interpretation that I make of that passage as well. And in the context it seems understandable in that Mr. Rosenblum has just had his cross-examination limited and now there's full scope given to the re-examination and in a sense of fair-play would say; "Well if you're going to limit the cross-examination, shouldn't you limit the re-examination as well?" The problem of course is that one shouldn't have limited the cross-examination in

the first place.

Q. But the re-examination seemed to be heading in the direction that Mr. Rosenblum had attempted to achieve on cross-examination.

A. Exactly, that's right. Yes, I agree with that and so that I think it's a problem because I think I point that out in a brief paragraph later on that -- Yes, on page 28. You see where I say on that first paragraph after the citation from the transcript:

> The reasoning is flawed. It begins from the premise that Mr. Khattar had exercised a "right to bring out the inconsistent statement"...

for which he did but in a limited way. He was only able to bring out the fact that the statement had been made but not to explore the reasons why it had been made and the facts behind it because cross-examination had been improperly limited on that one. Then it goes on, you see:

> ...to declare inadmissible out of court conversation which might explain the motive for making the prior inconsistent statement, on...(this)...incorrect interpretation of the hearsay rule...

or what we've begun to call here today the "non-rule" on the hearsay problem, and it adopts the, you know, the fact that the accused is not present as the basis, (the rationale) for the rule which is equally wrong. And after having done all that, then it accords Crown counsel his full right of re-examination which normally would be proper but seems unfair in the context given the restriction on cross-examination.

1 BY COMMISSIONER EVANS:
2 Q. Having shut the door for the defense, he now opens it on the
3 re-examination.
4 A. Exactly, yes.
5 Q. And that's the unfair part of it.
6 A. Yes.
7 BY MR. RUBY:
8 Q. Let me deal with the area of hearsay evidence first of all.
9 The hearsay rule, I think you'll agree, has a number of
10 exotic exceptions.
11 A. Yes.
12 Q. And as I remember you spend a month or two of those or so
13 in law school learning these rule and its exceptions.
14 A. About six weeks in my course on evidence, yes.
15 Q. And students have difficulty with them because they're a bit
16 arcane. But the hearsay rule itself is very simple. Not
17 the exceptions but the rule.
18 A. The rule -- the statement of the rule is simple. The
19 application in fact as I think I mention that in the book
20 Phipson, which was -- which the trial judge used, there is
21 a definition of the hearsay rule and right after the passage
22 cited by the judge, there is the statement that the most
23 significant problem with the hearsay rule is understanding
24 what is hearsay and what is not. That is the problem that
25 the court had here, that counsel were wrestling with here, and

1 it's that passage which was omitted in the judge's citation
2 of it and I thought that was significant perhaps.
3 Q. The purpose of codification is to set out the rules clearly;
4 correct?
5 A. Yes.
6 Q. And you'll agree with me that the rule itself is clear. It's
7 the application of it that's difficult. Correct?
8 A. By and large that's true.
9 Q. Then codification, it follows logically, would not assist the
10 problems of this trial where the problem was not with the rule
11 itself but with the application of it.
12 A. Well, that's a matter of judgement and I guess I would disagree
13 to the extent that the various proposed codifications that we've
14 seen have attempted to state the law of hearsay and its
15 exceptions in one convenient statutory area. Instead of having
16 to scurry through hundreds and hundreds of cases to learn the
17 law, there you have it on a page. You can figure it out and
18 in a sense you're not scared of it and this is -- this is what
19 -- and here we're draw -- we're speculating or I'm speculating
20 even more. My sense of it is that the whole hearsay area was
21 one which the court dealt with in a kind of global way. Any
22 time there was an out-of-court statement, it was hearsay and
23 sort of took a hands-off attitude whenever there was an out-
24 of-court statement on because they were afraid it might be
25 hearsay. I think that arises not only from the definition/

1 application problem but from the complexity of the whole area
2 of law including not only the definition and application of
3 hearsay but its exceptions and how they are applied as well.
4 Q. But the problem is that none of the exceptions were relevant
5 here.
6 A. Oh, that's -- yes.
7 Q. All you needed was the simple basic rule that any person could
8 understand who reads and understands English, especially after
9 your six weeks in law school.
10 A. Well, but -- But this is why I here again engage in some degree
11 of speculation about the possible origins of Mr. MacNeil's
12 "non-rule" and it seems to me that the "non-rule" arises out of
13 a twisting of certain exceptions to the hearsay rule. And
14 for example, the case of "Christie" which you're probably
15 familiar with, --
16 Q. Yes.
17 A. -- the notion of adoptive admissions, for example, statements
18 made in the presence of an accused which are not denied are
19 said to be his or her statements and can be attributed to the
20 accused because they're admissions which are adopted, it is
21 said. Now --
22 Q. But the point I'm making is this is that Mr. MacNeil understood
23 the rule that he thought he was applying, if it was the
24 "Christie" rule. The rule was clear in his mind. He just
25 didn't know where to apply it. The problems here are problems

1 of application, not of lack of clarity in the statment of the
2 rules. And codification, I put it to you, is a solution not
3 for problems of application but for problems in not understanding
4 the rules clearly.
5 A. No, the problem here is not merely the question of application.
6 It was a question of understanding the rule, figuring out what
7 the rule was and applying it. I mean the "non-rule" --
8 Q. As you would apply it.
9 A. The "non-rule" was not a rule but it was the one that was applied
10 if I can put it that way.
11 Q. Okay.
12 A. I realize that may sound a little silly but it's a question of
13 knowing the rules and applying them. It's not a question of
14 clear rules that were improperly applied in my view.
15 Q. This judge had the benefit of Phipson which is a leading
16 textbook on the law of evidence.
17 A. At the time it certainly would have been viewed as the leading
18 textbook on the law of evidence, yes.
19 Q. I meant a leading textbook and certainly then it was a leading
20 textbook as well.
21 A. Yeh
22 Q. And it contains clear statements of these rules. Do you agree?
23 A. Yes, I do.
24 Q. It's a well-written text.
25 A. It contains clear statements of the rule, yes.

1 Q. If you codify the rules, aren't you really just doing what
2 Phipson has already done for you? Set them out clearly in
3 language that anyone can understand? And why would codification
4 help you beyond the work of that learned text writer or anyone
5 of a dozen other texts you could have chosen?
6 A. I shouldn't argue with you, Mr. Ruby. I mean it seems to me --
7 Q. I'm inviting it so feel free.
8 A. -- that this -- This is a misapprehension that the -- The
9 Attorney General of Ontario seems to me to be in the same
10 camp as you on this --
11 Q. I think we're together.
12 A. -- issue and that is that really codification and reform of
13 the law is not really necessary. The rules are really there
14 to be found in the books and people can apply them without
15 any difficulty if they just, you know, apply themselves and
16 learn the rules. I just think that's not true. I think that
17 it may be that you can apply the rules and it may be that many
18 of the leading counsel in this Province can apply the rules
19 but I think there are large numbers of lawyers who have
20 difficulty with law of evidence because it's so complex and
21 would benefit from a codification.
22 Q. But if these lawyers and this judge were too stupid to under-
23 stand the language of Phipson, why would they be better off
24 with a codification? The language is exactly the same.
25 A. No, it's not exaclty the same. I -- and you will recall that

1 I did not agree that I thought that Phipson was a well-written
2 text. I think --
3 Q. Or another text that you choose.
4 A. -- that a codification would improve significantly over Phipson.
5 Q. And yet in the case of Section 11 of the Canada Evidence Act --
6 First of all you agree with me that that is a codification of
7 the common law?
8 A. Yes.
9 Q. It's precisely what you're calling for as a solution to this
10 kind of problem, yes, a codification for common law?
11 A. What one has in the Canada Evidence Act and the problem with
12 the present Canada Evidence Act, it is a partial codification
13 of the common law.
14 Q. Is --
15 A. So what one has is the codification of an exception to the
16 rule but not the codification of the rule itself so that it's
17 -- it seems to me that there is no general statement in the
18 Canada Evidence Act of the scope of cross-examination but I --
19 Q. The scope of cross-examination as you stated it was you can
20 cross-examine on anything that's relevant.
21 A. That's right.
22 Q. All you need are the exceptions. The rule itself is simple
23 beyond belief.
24 A. But the uniform evidence act provision which I cite in my
25 recommendation at the end, cites the general rule and then is

followed in the text by the exceptions and it strikes me that when you set out the full law that people are less likely to make mistakes than when you highlight in a Statute the exceptions but don't talk about the general rule.

Q. You'll agree with me that the partial codification that was used in this trial, Section 11 of the Canada Evidence Act, was of no assistance in getting the law straight in this case.

A. It was positively misleading in the way in which it was applied by the judge. I'm not saying the Statute is misleading but the way it was applied.

Q. Yes, and --

MR. RUBY:

I've done as well as I can do?

MR. CHAIRMAN:

One thing you've done is you've answered a question that I'm sure is puzzling Mr. Archibald as to why it is whenever recommendations come from uniform -- the uniformity commission and others for great improvements in the law that the objections to it always seems to come from Upper Canada.

1 MR. RUBY:
2 I must say that I was, and I think Justice Evans was -- I think we
3 were both at the meetings, the consultations in Ontario about the
4 proposed Canada Evidence Act reviews, and I recollect there was
5 one judge and one judge only who thought they were a good idea
6 and one lawyer -- and no lawyers at all who thought that.
7 COMMISSIONER EVANS:
8 I think they may have changed their minds, some of them, now.
9 They learn, but slowly.
10 MR. RUBY:
11 You've been very patient with me, Chief Justice, and thank you,
12 Mr. Archibald.
13 MR. PUGSLEY:
14 I have no questions, My Lord, thank you.
15 MR. MURRAY:
16 No questions, My Lord.
17 MR. ELMAN:
18 I had several questions but I don't think I have any any more.
19 BY MR. SAUNDERS:
20 Q. Only one area, Professor Archibald, and that is with respect
21 to the -- The only area I have a question for you, Professor
22 Archibald, is with respect to the drawing of the Court of Appeals
23 attention to the fact that John Pratico had given inconsistent
24 statements in the corridor compared to what he had said both
25 at the preliminary hearing and at the trial. We

1 do not have a transcript of the arguments made by Mr. Rosenblum
2 and Mr. Veniot in the Court of Appeal in 1972; so we have
3 nothing with which to refer as to the thoroughness of the argu-
4 ments presented. In preparing your opinion, Professor, did
5 you have regard to the Crown factum filed by Mr. Veniot on
6 behalf of the Attorney General's Office?
7 A. No, I did not.
8 Q. You did not?
9 A. No.
10 Q. I would refer you, sir, to Volume 2 of the evidence at page 155,
11 and this, Professor Archibald, is the factum filed by Crown
12 counsel and the argument of the appeal before the Court of
13 Appeal in 1972, and I draw your attention to the second-to-
14 last paragraph at page 155 in the factum and in particular the
15 statement:
16 There followed immediately an
17 accurate summary of the evidence
on cross examination...
18 A. Hold it.
19 ...bringing to the attention
20 of the jury...
21 Are you with me?
22 A. I am not with you on this.
23 Q. Okay. Page 155 --
24 A. Yeh. In Volume 2?
25 Q. Volume 2.

1 A. Yeh, okay. What line?

2 Q. The sentence that begins:

3 There followed immediately...

4 A. Oh, yes, here we go.

5 Q. Yes.

6 A. Okay.

7 Q. You're with me now?

8 A. Yes, sir.

9 Q. All right.

10 There followed immediately an
11 accurate summary of the evidence
on cross examination, bringing
12 to the attention of the jury the
condition of the witness at the
13 material times...

14 And this is the portion I draw your attention to:

15 ...his statements subsequent to the
event, some of which were incon-
16 sistent with his testimony before
the Court, and the necessity for
17 jury to come to their own decision
with respect to the credibility
18 of the witness.

19 And I take it, sir, that you have not seen that comment by

20 the Crown in the factum filed with the Court of Appeal before

21 today?

22 A. That's correct.

23 Q. And it's obvious from the written record that I've just put

24 to you that certainly Crown counsel in the factum addressed

25 that bit of evidence in its written submission to the Court of

1 Appeal, correct?
2 A. Yes.
3 Q. All right. Thank you, Professor.
4 A. Well, it depends on what the "that" is. It doesn't --
5 MR. CHAIRMAN:
6 Yes, but if you would only look at first sentence in that paragraph.
7 MR. SAUNDERS:
8 Yes, My Lord.
9 MR. CHAIRMAN:
10 Maybe --
11 THE WITNESS:
12 It doesn't -- It seems to me it doesn't identify the various state-
13 ments made by Pratico after the event. There are a number of state-
14 ments to which that could refer.
15 BY MR. SAUNDERS:
16 Q. Precisely. And -- But at least -- would you agree with me that
17 the record discloses that the attention of the Court of Appeal
18 was drawn to the fact that there were a number of statements
19 given by Pratico? Because you will see that in the factum:
20 ...his statements subsequent to
21 the event, some of which were inconsistent with his testimony before the Court...
22
23 So I suggest to you that that is at least a written indication
24 by Crown counsel to the Court of Appeal that there were incon-
25 sistent statements made by the witness, Pratico.

1 A. It's that.

2 Q. Pardon me?

3 A. It's that.

4 Q. It is that?

5 MR. CHAIRMAN:

6 Well, would you read into the record the first sentence in that

7 paragraph --

8 MR. SAUNDERS:

9 Yes, My Lord.

10 MR. CHAIRMAN:

11 -- Mr. Saunders.

12 MR. SAUNDERS:

13 With respect to the evidence of
the witness Pratico, it is sub-
14 mitted that the trial judge's
Charge was unexceptionable in
15 law.

16 MR. CHAIRMAN:

17 Yes.

18 MR. SAUNDERS:

19 Yes.

20 MR. CHAIRMAN:

21 That having been said, the relevancy of the rest of it is certainly

22 diluted, wouldn't you say?

23 MR. SAUNDERS:

24 A point for argument, My Lord, but I did wish to find out from this

25 witness whether he had in fact referred to the written factum filed

1 by the Crown and whether he knew that this kind of submission
2 had been made to the Court of Appeal.
3 BY MR. CHAIRMAN:
4 Q. Well, I guess the answer is, you hadn't seen the --
5 BY MR. SAUNDERS:
6 Q. The answer is no?
7 A. No.
8 BY MR. CHAIRMAN:
9 Q. Do you agree with that first sentence, Mr. Archibald?
10 A. I don't know that I would use the word, "unexceptionable," but
11 I have not addressed the Charge to the jury. I haven't thought
12 about the Charge to the jury, quite frankly, for some time,
13 and I'm unwilling to --
14 Q. Look at it.
15 A. -- say things which I haven't thought out and was not directing
16 my Opinion to when I wrote it.
17 MR. SAUNDERS:
18 Fair enough. It may be then, My Lords, that the best thing for
19 me to do would be to join with my friend, Mr. Ruby in submitting
20 certain questions to Professor Archibald on this point if he hasn't
21 taken the opportunity to review the Judge's Charge on the matter,
22 and obviously hasn't referred previously to the Crown factum on
23 the point. I'd be quite happy to do that.
24 MR. CHAIRMAN:
25 Yes, that -- But that doesn't -- You know, the -- That question

1 there -- that first sentence, I suspect, could be answered with-
2 out having read the Charge to the jury at all. But anyway, that's
3 a matter of argument, I guess. You're right.
4 COMMISSIONER POITRAS:
5 There's something else, Mr. Saunders, If I can
6
7 draw it to your attention, in that same paragraph.
8 There follow immediately an
accurate summary of the evidence
9 on cross examination, bringing to
the attention of the jury the
10 condition of the witness at the
material times, his statements
11 subsequent to the event, some of
which were inconsistent...
12
13 But his statements subsequent to the event were never revealed to
14 the court. The court prevented such statements from being dis-
15 closed to the court; that is to say, the statements that were made
16 outside the courtroom.
17 MR. SAUNDERS:
18 Yes.
19 COMMISSIONER POITRAS:
20 And I wonder if whether that constitutes an accurate summary of
21 the evidence because in point of fact, there is a part of the
22 evidence which was excluded as not having been revealed or dis-
23 closed before the court.
24 MR. SAUNDERS:
25 It's impossible to answer, My Lord. Presumably, the writer of the

1 portion of the factum to which I quote will be here at a later
2 date and can explain what was meant by it -- by that. I did
3 wish to find out from the Professor whether he had addressed him-
4 self to the written submission filed by the Crown.
5 COMMISSIONER POITRAS:
6 Okay.
7 MR. SAUNDERS:
8 No further more questions. Thanks, sir.
9 MR. ROSS:
10 Just one question, My Lord.
11 BY MR. ROSS:
12 Q. Professor Archibald, in your evidence this morning, you indicated
13 to Mr. MacDonald, as I write, that there was no legal duty to
14 your knowledge on the Court of Appeal to address matters
15 not raised in the grounds for appeal and I take it for them
16 even to suggest that there were not any grounds for appeal,
17 it is unlikely there'd be any factum. Does this mean
18 that the concept of the liberty of the subject would end at
19 the first trial level?
20 A. I would think that would be an exaggeration to say that.
21 Q. Well then, how would it get before the Appeal? What -- Are
22 you suggesting then that although there's no legal duty on
23 the Appeal Court, there might be a moral duty to address such
24 matters?
25 A. Well, I -- In my brief research on the issue, which is not

1 included in the Opinion, which I -- And it goes beyond --
2 outside the scope of the Opinion which I was asked to pre-
3 pare, I was unable to find a clear statement of a duty of
4 the Court of Appeal either than the most general term such
5 as -- Well, Mr. Ruby refers to general duties to ensure that
6 there is no miscarriage of justice. And I think that we might
7 all agree on that level of principle, that there would be a
8 duty on a Court of Appeal to try to ensure that there is no
9 miscarriage of justice. On the other hand, to then interpret
10 that principle to mean that a Court of Appeal must send the
11 matter back for re-trial or hear new evidence when it per-
12 ceives that there has been an error but where this error has
13 not been the subject of argument by -- particularly by defence
14 counsel, I think that that's pushing that principle too far
15 in the sense that I may agree that that might be a good thing
16 but I've not been able to find any statements which hold that
17 as the law.
18 Q. Well, in light of the case that's now under review and led to
19 the subject of this Inquiry, don't you agree that it might
20 be appropriate that a broad statement be made as to the duty
21 of the Appeal Court in matters of review of -- particularly
22 of a criminal nature as opposed to trying to find a difference
23 between a legal and moral duty -- just a general duty to
24 review?
25 A. Well, the problem is that -- What I suppose what you're doing

1 is taking issue with the present wording of Section 613 of
2 the Criminal Code and the issue of what Courts of Appeal should
3 do when they find that there are errors but when they don't
4 find that these are sufficiently substantial to overturn a
5 trial. And the question -- It's a matter of judgment, I
6 guess, when the Court of Appeal perceives that there had been
7 no substantial wrong or miscarriage of justice and they can
8 say, "We'll ignore that error," and when they find that there
9 is an error which does represent a substantial wrong and
10 therefore a miscarriage of justice. I mean, it strikes me
11 that to have a rule which is drawn so tightly that every
12 trial in which there is an error of law made and an evidentiary
13 ruling must be overturned would creat chaos.
14 Q. Absolutely. But on the other hand, wouldn't you agree that
15 had there been a new trial back in 1971, 1972, you might not
16 be here today? Based on what you've read?
17 A. That's entirely possible, yes.
18 Q. Okay.
19 MR. ROSS:
20 Thank you very much. That's the extent of my questions.
21 BY MR. WILDSMITH:
22 Q. I do have a few questions, Professor Archibald, but perhaps
23 before I start, I'd just like to clarify that you and I haven't
24 spoken about your evidence here today. Yes, this is correct?
25 A. This is true, yes.

1 MR. CHAIRMAN:
2 Now, Mr. Wildsmith, I'm not going to be imprudent enough to ask
3 you to define seniorities between you and Professor Archibald,
4 but in your capacity as counsel for the Union of Indians, you may
5 wish to ask Mr. Archibald to decide whether the rule of relevancy
6 applies.
7 MR. WILDSMITH:
8 With respect to my questions.
9 MR. CHAIRMAN:
10 With respect -- Yeh, I -- Could you give us some indication,
11 seriously, at to the questions that are -- the line of
12 questioning?
13 MR. WILDSMITH:
14 I'm sorry, you'd like to know the line of my questioning?
15 MR. CHAIRMAN:
16 Yes.
17 MR. WILDSMITH:
18 I propose to ask him a series of questions directed at the con-
19 nection of Tom Christmas and Artie Paul to the -- ultimately to
20 the instructions given by the trial judge to the jury and by the
21 prosecutor in his address to the jury.
22 MR. CHAIRMAN:
23 Yeh, that's relevant. With the caveat that Professor Archibald said
24 he hasn't directed his research or attention to the Charge to the
25 jury.

1 MR. WILDSMITH:

2 Yes, and there are only a couple of passages I'd like to direct his
3 attention to.

4 MR. CHAIRMAN:

5 All right. Fine.

6 BY MR. WILDSMITH:

7 Q. I'd like to start, Professor Archibald, by leading into this
8 by directing your attention to page 194 in Volume 1. At the
9 bottom of page 194, about line 25, you see a reference to
10 Mr. MacNeil, to Mr. MacNeil asking a question, and in the con-
11 text of that question you see the name of Tom Christmas and a
12 reference to a conversation with Tom Christmas.

13 A. Yes.

14 Q. Do you see that portion?

15 A. Yes.

16 Q. And immediately after that, you see the Court suggesting, "Do
17 not answer that question," and at that point, the trial breaks
18 into a voir dire, is that correct?

19 A. Yes.

20 Q. And can you clarify for us -- I'm sure we all know the answer
21 to this, but put it on record -- what the purpose of a voir dire
22 is?

23 A. The purpose of a voir dire in general is to determine the admis-
24 sibility of evidence which is sought to be adduced by one or
25 other of the parties and over which there is a controversy

1 about its admissibility.

2 Q. And is it fair to say that with respect to that voir dire, the
3 ultimate ruling of the trial judge -- looking at page 203, now --
4 with respect to Tom Christmas, Artie Paul, Theresa Paul, and
5 Donald Marshall, Sr., is given in about the fourth line, which
6 says:

7 He cannot say what Donald
8 Marshall...said to him or
...Theresa Paul -- Mary
Theresa Paul or Tom Christmas.

9

10 A. Yes.

11 Q. In other words, the ruling on the voir dire was that no elements
12 of the conversation should be related to the jury.

13 A. Yes.

14 Q. And if you review the testimony on the earlier pages in the
15 voir dire, you will see -- I'm correct, I think, in suggest-
16 ing this -- that there is some evidence given in front of the
17 trial judge on the voir dire about the nature of those statements.

18 A. Yes.

19 Q. And your understanding of the thrust of this ruling is that
20 the content of those conversations and statements are not to
21 be related to the jury?

22 A. That's right. My view of that is based on the -- an erroneous
23 understanding of the proper --

24 Q. Yes.

25 A. -- scope of cross-examination --

1 Q. Yes, and if I understood --
2 A. -- and re-examination based upon it, yes.
3 Q. If I understood your evidence correctly and your opinion,
4 what you're suggesting is that conversation should've come
5 out.
6 A. Yes.
7 Q. Okay, but -- Accepting the ruling in the way in which it was
8 made for the purposes of this trial, the ruling of the trial
9 judge was that none of that information was to go to the jury.
10 A. Yes.
11 Q. Now, I'd like to direct your attention to page 207 and 8. This
12 is now out of the voir dire and in the presence of the jury.
13 And at the bottom of page 207, you see some reference to --
14 by the Court, now -- by Mr. Justice Dubinsky taking over the
15 conduct of this re-direct examination. The question by the
16 Court:
17 Q. Mr. Pratico,
18 Mr. MacNeil asked you why
you made the statement out-
19 side yesterday to Mr. Khattar,
to the sheriff.
20 A. Sorry, Mr. Wildsmith, I've lost you. Where are you?
21 Q. 207.
22 A. Okay.
23 Q. Bottom of 207, about line 24.
24 A. Yes.
25 Q. It says:

BY THE COURT:

A. Yes.

Q. And the question is -- posed by the court:

> Q. Mr. Pratico, Mr. MacNeil asked you why you made the statement outside yesterday to Mr. Khattar, to the sheriff. You now say you made it because you were scared of your life.
>
> A. Yes.

Next question:

> Q. Now, your being scared of your life, is that because of anything the accused said to you at any time?

And the answer is:

> A. No.

And that line of questioning, would you agree, is consistent with the trial judge's ruling? There's nothing improper about asking the question of whether the accused had threatened the --

A. That's right. There's -- This kind of questioning from counsel would be proper, and one should go on and explore it further would be my view, but having limited the exploration of it --

Q. Yes.

A. -- then the problem is --

Q. And indeed it --

A. It causes a problem of fairness in my view, the Court having said this when it had restricted examination and -- cross-

1 examination and re-examiration on that very issue.

2 Q. Okay. Well, let me take you a little farther along in the

3 same direction. You see that Mr. MacNeil, the prosecutor,

4 says:

5 I take it that concludes that
6 line of questioning on that
meeting on Saturday.

7 And if you continue on to page 208, now, and I'm going about

8 halfway down again to line 20 and to what the Court says.

9 Perhaps I could back up to what Mr. MacNeil says in the line

10 above.

11 The question, My Lord, would be
12 to the witness, what is the basis
for this fear. He said that he
had fear.

13

14 And again consistent with the ruling of the trial judge, he

15 is saying:

16 We ought not to get into the
17 basis for that fear. We ought
not to have threats given to the
witness related to the jury.

18

19 And you'll agree that this discussion is now taking place in

20 front of the jury between Court and counsel?

21 A. Yes.

22 Q. And if we go down then to the Court, the Court says:

23 He answered not due to anything
24 the accused said. Now if anybody
else said anything to him, I'm
not interested.

25

1 Again, that's consistent with the Court's ruling.

2 A. Yes, and it's bound up with this whole business of statements
3 made in the presence of the accused and so on, which we've
4 said was problematic.

5 Q. Yes. And then there's a discussion that follows that by
6 Mr. MacNeil, which it says he was:

7 ...pursuing the matter just on the
basis of whether his fear was
8 justified...but I accept your
Lordship's ruling. That's all.
9

10 And then the Court says:

11 Q. That man's name was Tom Christmas,
was it?
12

A. Yes.
13

14 Mr. Rosenblum adds:

15 And Mary Theresa Paul.

16 And the witness adds:

17 Artie Paul.

18 A. Yes.

19 Q. Now, I'm going to suggest to you that the Court ought not to
20 have asked those questions in light of its ruling on the voir
21 dire.

22 A. It's inconsistent for the court to have, in my view, gotten
23 into those issues where it's limited cross-examination. Those
24 would be proper subjects for cross-examination and
25 re-examination but having restricted cross-examination and

1 re-examination on those very issues, it now seems unfair for
2 the Court to explore them.
3 Q. And I put it to you even further than that that there was no
4 reason to bring out the meeting with any of the individuals
5 mentioned or the names of any of those individuals except to
6 leave the impression with the jury that the reason Mr. Pratico
7 was scared for his life was because of the contact with those
8 named individuals.
9 A. I think that that's an obvious inference to draw, and it's --
10 Q. Okay.
11 A. I think it's a real problem, and I state so in my Opinion.
12 Q. Yes, and in fact I wanted to draw your attention to that. On
13 page 29 in your Opinion -- after going through some of the
14 material that I've just gone through with you -- page 29.
15 You say:
16 In the result, the jury might
17 draw the conclusion that the
witness had been threatened, and
in all likelihood by acquaintances
18 of the accused...
19 A. Yes.
20 Q. And indeed I'm suggesting to you that there is no other reason
21 that any of us can think of as to why to bring up the
22 individual's names and the fact of the meeting except to lend
23 credence to the drawing of that inference.
24 A. Well, certainly that phrase:
25 ...and in all likelihood by

1 acquaintances of the accused...
2 is -- My reason for making that statement is based primarily
3 on that passage from the transcript that you -- to which you
4 drew my attention.
5 Q. Yes. And in fact the only suggestion that they were acquaint-
6 ances of the accused would appear in the voir dire and not in
7 the evidence in front of the jury.
8 A. I think that's right, but I --
9 Q. Okay. Now, I'd like to draw your attention to the Charge to
10 the jury on page 98 in Volume 2. Page 98, about halfway down.
11 I suppose it's about line 16. The sentence starts:
12 I may say that he was a nervous
witness...
13
14 referring to John Pratico.
15 That's my opinion. You don't
have to accept that. He was a
16 nervous witness. There's no
doubt about that in my mind.
17 And he explained why at times
he had told the story that
18 Donald Marshall did not stab
Sandy Seale. His explanation
19 was, "I was scared of my life;
I was scared of my life." He had
20 spoken to a man by the name of
Christmas he told you. He had
21 spoken to a man by name of Paul -
Artie or Arnie, I don't know;
22 I've just forgotten, Artie Paul.
He spoke to a woman too but he
23 did say that there was nothing
as far as this woman was concerned.
24 He had spoken to Christmas, to
Artie Paul and the day of the
25 incident, he spoke to Donald

> Marshall, Sr., the father of the accused, after which he approached Mr. Khattar one of the defence counsel who very properly and correctly in accordance with the best tradition, would not talk to him unless there was somebody there as a witness. He told Mr. Khattar, brought the sheriff out, that Donald Marshall did not stab Sandy Seale. Why did he tell that story? He said, "I was scared, scared of my life. I was scared, scared of my life." That's what the witness tells you here in this court.

Now, would you agree with me that the trial judge, in his Charge to the jury is in fact drawing for the jury the very inference you fear may be drawn on page 29 of your Opinion?

A. Yes, I would agree with that.

Q. Thank you. And that it was improper for the trial judge to have done that?

A. Insofar as the -- some of those matters not being in evidence, that's right, it is improper.

Q. And insofar as -- It is inconsistent with his ruling on voir dire as well?

A. Yeh.

Q. Now, with respect to that voir dire that I referred you to, I'd like to direct your attention now back to page 197.

A. This is in Volume 1?

Q. Yes. And it's in the course of the voir dire and in the

1 course of an exchange between Mr. MacNeil and the Court and in
2 about the second or third line, the Court says:

> 3 Mr. MacNeil, I would agree with
> you that it is vitally disturb-
> 4 ing and may very well be the
> subject of another proceeding.
> 5

6 And this is with respect to the threats. I might --

> 7 I would think it amazing if a
> witness's life was threatened or
> 8 his well being, and the Crown did
> not take steps against the person
> 9 who made these threats.

10 And I direct your attention particularly then to Mr. MacNeil's
11 response, which is to say:

> 12 An information was laid, My Lord.

13 Now, we have evidence in front of the Commission, Professor
14 Archibald, that by the time this statement was made
15 by the prosecutor, a charge and information had in fact been
16 laid against Tom Christmas, only one of the people mentioned,
17 and that that information was in fact -- that charge was dis-
18 missed because no evidence was offered by the Crown. Now, I'm
19 going to ask you about your view about the role of a prosecutor
20 in providing information to a trial judge, and I'm going to
21 suggest to you that it was improper for Mr. MacNeil to have
22 stated the little bit of information he did and not to have
23 gone the extra distance of clarifying that in fact the charge
24 had been laid and was dismissed.
25 A. It seems to me that it's not proper to raise the matter at
all, let alone go into explaining it.

1 Q. Yes. Assuming that Mr. MacNeil chose to respond, would you
2 not think that it's his role as a prosecutor to be full and
3 candid with the Court and to provide all of the information?
4 A. If, indeed it -- the matter had been dropped for want of
5 prosecution by the time the statement was made --
6 Q. No evidence was offered.
7 A. No evidence was offered? I find it surprising that that would
8 not be stated there.
9 Q. And in light of the passage in the Judge's Charge to the jury
10 that I've just shown to you, would you not agree that this --
11 a full and proper response at this point might have caused
12 the trial judge to take a different perspective?
13 A. That's possible, yes.
14 Q. Thank you. Something a little different than what we've talked
15 about so far in Mr. Rosenblum's address to the jury, one of
16 the first points that he makes is about the order of arguments
17 of counsel. Now I'm wondering if in your experience in teaching
18 evidence and in criminal law whether you have any views about
19 whether it is a better course of conduct for the accused to
20 always have, as opposed to the Crown, the last word to the
21 jury?
22 A. I have no views on that.
23 Q. Okay.
24 MR. WILDSMITH:
25 I've got a couple of other passages, My Lords, in the address by

1 Mr. MacNeil to the jury on this issue of Tom Christmas and
2 Artie Paul. Would you prefer that I followed the same mode that
3 Mr. Ruby and perhaps Mr. Saunders have adopted. I mean my
4 preference would be just to put the passages out and get his
5 comments and get it over with.
6 BY MR. WILDSMITH:
7 Q. I would like to direct your attention now to page 56 in volume
8 two. And if you could start at the -- towards the bottom of
9 page 56, you see that in Mr. MacNeil's Charge to the jury
10 he's -- This is about line 28. It starts out:

11 But gentlemen, my learned friend
12 Mr. Rosenblum forgot to mention to you a little conference that
13 Pratico had with Donald Marshall, Sr.! Now what was that conference? What
14 was that conference? Immediately thereafter, defence counsel was sent
15 for. And then, gentlemen, this is when the statement was made. You heard
16 Pratico on the stand, himself - and remember his age too, gentlemen. A man
17 who is trying to match wits with Mr. Rosenblum and Mr. Khattar - remember
18 his age when he said, "I said that. I made that statement or those statements I
19 have made that are inconsistent with my evidence". He didn't use these words and
20 I can't give you the words that he said but I can give you his meaning. "I made
21 those statements simply because I was scared of my life!" "I was scared of my
22 life!" And he also said to you the names of the people whom he spoke to or spoke to
23 him before this trial and before the Preliminary Hearing. I believe their names
24 to be, if my notes serve me correctly, a Mr. Thomas Christmas, Miss Paul and another
25 man whose name escapes me...I didn't write it down in my notes. Gentlemen, these two

1 young youths were scared to death.
2 He admitted he was scared. He admitted that is why he told the
3 statement.

4 Now would you again agree with me that it was improper for
5 the prosecutor to link the names of Christmas and Paul to being
6 scared of your life when no evidence of that fact came out in
7 front of the jury?
8 A. Yes, I would agree with that and I would -- I would go farther
9 and say that this passage exemplifies the problem with not
10 allowing full cross-examination and re-examination on these
11 issues. What the Court allowed was some -- it allowed there
12 to be put in evidence the fact that statements were made
13 without finding the circumstances, and so in -- and, in fact,
14 encouraged this kind of speculative approach to what might
15 have been the motivation behind making these statements
16 without allowing counsel to bring out in evidence what those
17 motivations or factors were.
18 Q. Okay, and you've also told Commission Counsel that it was the
19 prosecutor's role, the role of the Crown to present if my
20 quotation is right, "present facts fairly and dispassionately"?
21 A. Yes.
22 Q. Is this an example of presenting facts fair and dispassionately?
23 A. It's an example of -- of -- it seems to me, drawing inferences
24 which are not supported by the evidence before the Court.
25 Q. And is that fair?

1 A. No.

2 Q. And is the degree of emphasis in there about Artie Paul and
3 Tom Christmas and being scared for your life dispassionate?

4 A. Yeh, I would say it's not, but there are -- but this -- the
5 degree to which tone of voice and all of these things can be
6 controlled or ought to be controlled is a difficult issue. The
7 Crown Counsel should present the case for the Crown it seems
8 to me vigorously, but not unfairly. And the line between
9 vigor and unfairness is one that may be difficult to draw from
10 time to time.

11 Q. Let me draw your attention to another passage then and see if
12 that might reinforce the first one. Looking at page 64 now.
13 On the second line of page 64:

14 And what would give Mr. Pratico the
impression as he told you the
15 explanation for that remark yesterday
after consultation with Donald
16 Marshall, Sr., that he was...

17 And the transcript underlines this word for emphasis.

18 ...<u>scared</u> for his life!

19 That was his explanation.

20 Now gentlemen if you believe that,
if you believe that this young youth
21 was in fear of his life and there is
no reason to dispute that because he
22 has said it - there's been no arguments
against it - he was scared for his life.
23 I don't blame him one bit for trying to
do what he could to get off the proverbial
24 hook.

25 That's an unfair characterization of Donald Marshall, Sr., is

1 it not?
2 A. There's no basis in evidence for it and--yes, that's right.
3 Q. And the linkage of consultation with Donald Marshall, Sr., and
4 being scared for your life is pretty apparent there?
5 A. Yes.
6 Q. This is blatantly unfair and prejudicial to the accused in that
7 it was his father?
8 A. There's no doubt in my mind that it's prejudicial to the
9 accused.
10 Q. I'd also like your comments on the balance of that passage
11 which is on a different issue, in which Mr. MacNeil appears to
12 be relating to the Court what happened in the corridor. In
13 other words, he appears to be giving extra information, shall
14 we say, or evidence not under oath to the Court as part of his
15 representations on the meeting outside the courtroom. Do you
16 have any comments on whether that is proper?
17 A. It's improper to -- to present to the Court matters which are --
18 in that way matters which are not admissible in evidence.
19 Q. And finally, and again just to reinforce, but I'll draw your
20 attention to page 65. The tenth line or so, the new
21 paragraph starts:
22 Then you have the other men that
23 were named and girl that was named,
coming to Pratico and seeing
24 Pratico. And after these people
had spoken to Pratico, Pratico
25 told you on the stand yesterday
that he was scared of his life.

1 He was fear -- I think he used
2 the word "fear" or "scared".
3 I won't continue with the rest of that passage but would you
4 agree that the same comments apply that this is not a fair
5 comment?
6 A. To the extent that these comments are based on matters which
7 are not properly in evidence it is unfair.
8 Q. Yes.
9 A. Let's be clear though that in Canada, unlike other jurisdictions
10 it is deemed to be proper for the judge to express his or her
11 opinion on the evidence --
12 Q. This is the Crown.
13 A. Oh, this is the Crown. Oh, I'm sorry. All right. Sorry.
14 So it's the question then of the degree to which the Crown
15 must be dispassionate and we've addressed this already.
16 Q. And the degree to which it's proper and fair to leave these
17 innuendos of threats without any evidence in front of the
18 jury?
19 A. Oh, yeh.
20 Q. In other words, the jury has no way of knowing what was
21 said in the conversations except the representations that
22 the Crown and in the other passage the judge made to the
23 jury?
24 A. Well, it's unfair and it's improper.
25 Q. Thank you. Do you think that it would meet the test under the

1 Criminal Code for overturning an Appeal -- overturning the
2 conviction on Appeal?
3 A. If you're asking me how I would act as a -- as a member of
4 the Court of Appeal, I guess I would think that this kind
5 of thing would lead me to say that there ought to be a new
6 trial.
7 MR. WILDSMITH:
8 Thank you. Those are my questions.
9 MR. MacDONALD:
10 No re-direct for this witness.
11 MR. CHAIRMAN:
12 Thank you very much, Professor Archibald. You've been very helpful.
13 We'll adjourn until two o'clock.
14
15
16 (WITNESS WITHDREW)
17
18
19
20
21 INQUIRY ADJOURNED AT: 12:49 p.m.
22
23
24
25

1 INQUIRY RECONVENED: 2:08 p.m.

2 MR. MacDONALD:

3 Before we proceed with Inspector Marshall, yesterday Mr. Ross
4 requested that Keith Beaver be located and called to give
5 evidence and Mr. Beaver has been kind enough to come from, I
6 think, Liverpool, and he's here now. So I propose putting him
7 on and dealing with his evidence now. Mr. Beaver please.

8 KEITH BEAVER, being called and duly sworn, testified as follows:

9 BY MR. MacDONALD:

10 Q. Your name is Keith Beaver?

11 A. Known as Keith Beaver.

12 Q. And at the moment, Mr. Beaver, you're a member of the
13 R. C. M. P., are you?

14 A. That's correct.

15 Q. And stationed where, sir?

16 A. Liverpool, Queen's County, Nova Scotia.

17 Q. You were a resident of Sydney in 1971?

18 A. Yes, I was.

19 Q. How old were you then?

20 A. I was fifteen years old.

21 Q. And on the night of May 28th, 1971, were you at the dance
22 at St. Joseph's Hall?

23 A. Yes, I was.

24 Q. And that -- do you have any recollection of that dance at this
25 time?

A. I attended the dance up until about eleven thirty p.m. on that date. And at that time I left the dance with Alana Dixon and Karen MacDonald and we walked down through the Park and I walked home from there.

Q. Did you have any contact on that evening with Sandy Seale?

A. Yes, I spoke to Sandy at the dance several times throughout the night and just before we left, Sandy Seale left the dance and walked ahead of us and he was walking to catch the bus home.

Q. Okay, did you have any conversation with Mr. Seale?

A. I did at the dance and on the way home I asked him if he wanted to come up to my house for a while and he said that no, he wanted to catch the bus and he wanted to make sure that he did because it was the last one going to Westmount that night. And we split up at the Park and that's the last time I saw him.

Q. Did you hear of -- of the stabbing of Mr. Seale?

A. The next day.

Q. Okay, and did you attend at the Sydney Police Station?

A. Yes, I did. I'm not sure if it was the next day or the day after next. But it was shortly thereafter.

Q. Did you go down on your own?

A. Yes, I did.

Q. And do you recall who you spoke to?

A. No, I do not.

1 Q. Do you recall anything about the visit to the police station?
2 A. It wasn't very long. Probably fifteen or twenty minutes.
3 Apparently it wasn't one of the investigators involved.
4 It was just another Sydney City Policeman. I spoke with
5 him for a while.
6 Q. Do you know what time you left the dance that night?
7 A. In the vicinity of eleven thirty p.m. I'm not sure of the
8 time.
9 Q. Did you give any statement to the Sydney Police?
10 A. I don't believe I did -- a written statement, I --
11 Q. A written statement?
12 A. -- don't believe I did.
13 Q. And you were contacted by the R. C. M. P. in 1982, is that
14 correct?
15 A. That's correct.
16 Q. And at that time you did give a statement?
17 A. Yes.
18 Q. Yeh, I want to show you volume 21 of the exhibits of this
19 Inquiry, Mr. Beaver, page 190. That's a typewritten copy
20 of the statement that you gave the R. C. M. P. at that time,
21 is that correct?
22 A. That's correct.
23 Q. Have you ever seen the statement that was given to the Sydney
24 Police by Alana Dixon?
25 A. No, sir.

1 Q. I want to show you exhibit 84, which is a copy of an
2 affidavit that you gave -- that you swore on the 11th day
3 of August, of 1982, do you have any recollection of signing
4 that statement or that affidavit?
5 A. I would have signed this affidavit on the 11th day of
6 August, 1982, at Whycocomagh, Inverness County, in the
7 Province of Nova Scotia.
8 Q. And you don't have any recollection of signing that, do you?
9 A. No, I do not. I remember seeing the affidavit on that date
10 but I just don't recall signing it.
11 Q. Okay.
12 A. But that is my signature on the -- on the affidavit.
13 Q. Do you recall who prepared the affidavit?
14 A. No, I do not.
15 Q. Were you interviewed by someone before -- in order that you
16 could give the information from which the affidavit would
17 be prepared?
18 A. As the result of a phone call from a lawyer -- I -- I
19 received this affidavit in the mail shortly thereafter and
20 I looked it over and would have signed it after that.
21 Q. Okay, now attached, it's not attached to this copy, but the
22 affidavit in paragraph 5 makes reference to your statement
23 given to the R. C. M. P. on March the 2nd of 1982, and that's
24 the statement I just showed you that's in volume one at page
25 190 ?

A. Yes.

Q. And the only thing I want to point out to you, Mr. Beaver, on this affidavit or in the affidavit is in paragraph one, where it says, you the dance at approximately:

> ...twelve o'clock midnight.

I understood you to say a few moments ago that you thought it was around eleven-thirty?

A. Yes, but the dance was pretty well over at the time and I didn't have a watch, so it would have been in that vicinity --

Q. Of?

A. Of eleven -- between eleven-thirty and twelve. I'm not --

Q. Is that the best you can say "between eleven-thirty and twelve"?

A. Yes, yes.

Q. That's all the questions I have Mr. Beaver, thank you.

MS. DERRICK:

I don't believe I have any questions, My Lord, but I'd just like to skim the R. C. M. P. statement. I haven't looked at it recently. It's in volume 21 at page 190. Thank you, I have no questions.

BY MR. PUGSLEY:

Q. Constable Beaver, my name is Ron Pugsley. I act for John MacIntyre. Did you know Donald Marshall, Junior, in May of 1971?

A. I knew him to see him. I didn't -- I've never spoken to him.

1 I didn't know him.
2 Q. What did you know about him? Did you know anything about him
3 at that time?
4 A. I knew that he hung around a lot of dances and stuff that
5 some of us would go to. And he was pointed out to me one
6 time as someone not to fool with type of thing.
7 Q. Did you see him on the evening of May 28th at the dance?
8 A. No, I did not.
9 Q. Thank you.
10 MR. MURRAY:
11 No questions on behalf of William Urquhart.
12 MR. ELMAN:
13 No questions.
14 MR. SAUNDERS:
15 No questions.
16 BY MR. ROSS:
17 Q. Mr. Beaver, my name is Anthony Ross and I will ask you one
18 or two questions and behalf of Oscar Seale. First I'd like
19 to thank you for coming on such short notice. Now back in
20 1971, I take it that you knew Sandy Seale prior to the dance
21 on the 28th of May?
22 A. Yes.
23 Q. How long would you have known him prior to that dance?
24 A. Approx -- approximately a year. I would see him at dances
25 and would speak to him briefly. I never spent any amount of

1 time with him, but I knew of him. I spoke to him. I knew
2 him by name.
3 Q. I see, and as a matter of fact that night you even invited
4 him back to your house?
5 A. That's correct.
6 Q. Yes. Now I take it that as far as your knowledge of Sandy Seale
7 is concerned, you never knew him to -- to be involved
8 in bumming money, did you?
9 A. No, sir.
10 Q. And did you ever know him to be involved in any form of
11 criminal activity?
12 A. No, sir.
13 Q. Is is fair to say that you would have had quite a good general
14 knowledge of the young people in the Sydney area of perhaps
15 in your group?
16 A. Yes.
17 Q. Was he a part of your group?
18 A. No, sir.
19 Q. Did you know a young lady by the name of Gail Rudderham?
20 A. Yes.
21 Q. Her evidence, she gave evidence here, I think it was yesterday
22 or the day before, to the effect that at around twelve --
23 around twenty minutes to twelve is when Sandy was leaving the
24 dance proportedly to catch a bus. Does this help you as far
25 as pinning down a time is concerned or is it still the best

1 you can give us "between eleven-thirty and twelve"?
2 A. That's still the best.
3 Q. And you specifically remember him indicating that he was
4 leaving and he did not come to your house because he wanted
5 to catch his bus for Westmount?
6 A. That's correct.
7 Q. And that was the last bus going to Westmount?
8 A. According to him.
9 Q. According to him?
10 A. Yes.
11 Q. At the dance itself, were you aware of any difficulties with
12 Sandy and anybody?
13 A. No, I wasn't.
14 Q. Did you -- did you see Sandy before the time that you were
15 leaving the dance?
16 A. Yes.
17 Q. Thank you very much. No more questions, Mr. Beaver.
18 BY MR. WILDSMITH:
19 Q. Constable Beaver, I'd like to ask you just a couple of questions
20 related not to what you've been testifying about so far. I'm
21 wondering if you are the same Constable Beaver who was
22 involved in a situation involving the seizure of a deer
23 carcass in Queen's County belonging to some individuals
24 by the name of Whynot?
25 A. Yes.

1 MR. PRINGLE:
2 Your Honour, I wonder how this is relevant?
3 MR. CHAIRMAN:
4 Anything that's for the Inquiry. I'm listening.
5 MR. WILDSMITH:
6 Perhaps I could try the three or four questions and I believe
7 that it's relevant to a couple of general issues related to
8 Indians in this Province and related to policing activities
9 and related to the Attorney General's Department. I didn't
10 realize that he would be here, but since he's come all the
11 way from Queen's County, we might as well take five minutes
12 to ask him a couple of more.
13 MR. CHAIRMAN:
14 Carry on, carry on.
15 BY MR. WILDSMITH:
16 Q. So you seized this deer carcass that belonged to some people
17 by the name of Whynots?
18 A. Yes.
19 Q. Yes, and you know the Whynots to be Indians?
20 A. Not at that time.
21 Q. You do now today?
22 A. I don't know for a fact they're Indians or not.
23 Q. Did they identify themselves to you as Indians at the
24 time you seized the deer carcass?
25 A. Yes.

1 Q. And that matter was the subject of legal proceedings in the
2 Supreme Court of Nova Scotia?
3 A. Yes.
4 Q. Resulting in a recovery order of being issued to release that
5 carcass?
6 A. Yes.
7 Q. I'm wondering to you -- my real question to you is this, what
8 instructions have you received as a member of the R. C. M. P.
9 at about that time and even to today, about special hunting
10 rights of Indians in Nova Scotia?
11 A. None up un -- up to the time of the seizure.
12 Q. Yes, and what was the date of the seizure to the best of your
13 recollection?
14 A. It was a year ago last fall or a year ago -- just about a
15 year ago.
16 Q. About a year ago, sometime in the fall of '86?
17 A. It would have been the latter part of October.
18 Q. Of 1986?
19 A. That's correct.
20 Q. And were you aware of a case called "Simon" decided in the
21 Supreme Court of Canada coming from Nova Scotia in November
22 of 1985?
23 A. Yes.
24 Q. And were you aware of that case at the time you seized the
25 deer carcass?

1 A. Yes.
2 Q. And yet you had received no instructions from your superiors
3 or from the Attorney General's Office about what to do with
4 Indian hunting deer in Nova Scotia?
5 A. Yes.
6 Q. What were the instructions?
7 A. You're to process the -- process these people as you would
8 anyone else and you would ask the Attorney General's Department in
9 Halifax on directions of proceeding.
10 Q. I see, and so acting under those instructions you seized this
11 deer carcass?
12 A. Yes.
13 Q. It was shot out of season?
14 A. Yes.
15 Q. Okay, and why was it released to the best of your knowledge?
16 A. I was given direction from my office in Halifax to return the
17 deer.
18 Q. Yes, and do you now operate under instructions not to seize
19 deer carcass' from Indians?
20 A. That's correct.
21 Q. And when did those instructions come to you?
22 A. Sometime in '87. I don't recall the date. This year.
23 Q. Six months after the seizure?
24 A. Probably only two or three months ago.
25 Q. Just in advance of the present deer season?

A. Yes.

Q. Do your instructions only relate to deer or to other wildlife as well?

A. I don't recall. They did specify deer. I think they specified the Wildlife Act which would encompass most.

Q. Thank you, that's the end of my questions.

MR. MacDONALD:

I have no questions arising.

MR. CHAIRMAN:

Thank you, Mr. Beaver.

(WITNESS WITHDREW)

1 MR. SPICER:

2 The next witness is Alan Marshall.

3 ERNEST ALAN MARSHALL, being called and duly sworn, testified as

4 follows:

5 BY MR. SPICER:

6 Q. Mr. Marshall, what is your full name?

7 A. Ernest Alan Marshall.

8 Q. And you're retired from the R. C. M. P.?

9 A. I retired in May of 1983, yes.

10 Q. And where do you currently reside, sir?

11 A. Granville Center, Annapolis County, Nova Scotia.

12 Q. When did you join the R. C. M. P.?

13 A. On May the 10th, 1948, at Toronto.

14 Q. And how old were you at that time, sir?

15 A. Eighteen.

16 Q. Can you briefly describe to us your career through the ranks

17 in the R. C. M. P.?

18 A. Yes, sir. I trained in Ottawa and Regina, Saskatchewan, and

19 was transferred to Nova Scotia; Windsor, Nova Scotia, in

20 January of 1949.

21 Q. What is your rank at this time?

22 A. Third-class constable.

23 Q. Okay.

24 A. I spent approximately two years in Windsor and was transferred

25 to Amherst, Nova Scotia. I was promoted to Second-class

1 constable. In 1952, I was transferred to Northern Baffin
2 Island at my request, volunteer. And I spent the next
3 three years there until 1955 when I was transferred to
4 Halifax to the Customs and Excise Section. In 19 --
5 in January of 1958, I was transferred to Sydney Detachment.
6 Q. Sydney?
7 A. Sydney, Nova Scotia, Detachment. And in the fall of '58
8 promoted to corporal.
9 Q. So did you arrive then in Sydney as a -- shortly after you
10 arrived in Sydney you became a corporal?
11 A. Yes, sir. In 1959, I was transferred to New Waterford
12 Detachment. And in 1962, I was transferred back to Sydney,
13 only this time in the General Investigation Section. In
14 1964, I was transferred to Halifax Detachment. In the
15 fall of that year promoted to sergeant. Now we're up to
16 '64.
17 Q. '64 is where you are?
18 A. Oh, yeh. I believe it was in 1967, I could be out a year
19 on this, I was transferred to Halifax General Investigation
20 Section. And in the fall either '66 or '67 promoted to
21 Staff-sergeant. In the next year or two, which would bring
22 us to '68 or '69, I was transferred to the Halifax Sub-
23 Division Headquarters office as Sub-Division N. C. O. In
24 July of 1970, I was commissioned as Sub-inspector and
25 transferred to the post of Detective Inspector H-Division.

1 Q. And is that the designation Sub-inspector that you held in
2 1971?
3 A. That's correct. The Sub-inspector being the rank. The
4 Detective Inspector being the job description.
5 Q. I see.
6 A. And I served in that position until, I think, early 1973
7 when I was transferred to -- either late '72 or early '73,
8 transferred to the position of Assistant Officer Halifax
9 Sub-Division. In the summer of '73 I was transferred to
10 Headquarters, Ottawa, and the position was Officer in Charge
11 Federal Policing Branch. In the spring of 1974, for a short
12 space of five or six months, I was the Officer in Charge of
13 an Operational Audit Unit. And shortly thereafter transferred
14 as Officer in Charge Contract Policing Branch. And after
15 spending, I think, until early '77, I was transferred back
16 as Officer in Charge Federal Policing Branch. And on
17 November the 17th, 1977, I was transferred as Officer in
18 Charge Operational Task Force which was a Task Force set up
19 to provide research capability to the MacDonald Royal
20 Commission of Inquiry. And I stayed in that position until
21 1981, possibly '82, because when that Commission of Inquiry
22 was over, there was some follow-up work to do. And I stayed
23 there, as I say, until late '81 or '82. And then I was
24 transferred to the Office of the Deputy Commissioner of
25 Criminal Operations as Officer in Charge of Special Projects.

1 And in, as I say, May -- May the 9th, 1983, discharged to
2 pension.
3 Q. The rank of Sub-inspector would that be considered to be
4 a commissioned officer?
5 A. Yes, sir.
6 Q. And is -- would that be the first commissioned officer rank?
7 A. Yes, sir, it doesn't exist any longer.
8 Q. We've heard some evidence, I think a few days ago, that it
9 only existed for a short time, do you know this?
10 A. Yes.
11 Q. Over the course of your career with the R. C. M. P. and
12 in particular up until 1971, had you -- I take it you had
13 occasion to investigate crimes of one sort or another?
14 A. Yes, sir.
15 Q. Had you taken courses in investigative technics over the
16 years?
17 A. In 1958, I took a six or eight week intermediate training
18 course in Ottawa which covered criminal investigations and
19 in 1968, I attend Canadian Police College for a period of
20 about eleven or twelve weeks, when again where there was a
21 broad range of police -- police work.
22 Q. And would you have been a person, sir, in 1971, who would
23 have been in the R. C. M. P. considered to be competent
24 to handle an investigation?
25 A. Yes, sir.

1 Q. Yes, and in fact, you had done so?
2 A. Yes, sir.
3 Q. You indicated to us that there were two occasions prior to
4 1971, in 1958 and 1962, when you had been in Sydney, Nova
5 Scotia?
6 A. Yes. I was transferred to Sydney in January of 1958.
7 Q. During your posting in 1958, did -- did you know John
8 MacIntyre?
9 A. Yes, I did.
10 Q. In what context?
11 A. Only casually. You know, I believe the Sydney City Police at
12 that time were lacking in Identi -- Identification Services,
13 facilities, and I would see Detective MacIntyre at our office
14 where he utilized the services of the Identification Branch,
15 our Identification Branch.
16 Q. And what kinds of occasions would he come to you to use --
17 utilize the services of your Identification Branch?
18 A. Well, if he had scenes of crimes that he wanted examined
19 by the examiner and generally it was photographing prisoners,
20 fingerprinting them.
21 Q. During that -- during that time, sir, did you come to know
22 John MacIntyre at all?
23 A. Only casually at that time. It was when I was transferred
24 back from New Waterford in 1962, that I had closer -- much
25 closer contact with him and in fact, worked on a number of

1 cases together with him.
2 Q. And what sorts of situations in the -- in the later time
3 would you have worked together with Sergeant MacIntyre?
4 A. Well, I can -- I can recall a couple of cases if you wish
5 me to site them.
6 Q. I don't necessarily mean the names, I'd like to know the
7 types of work that you were doing with him?
8 A. Yeh, I had forgotten the names anyway. As I recall at
9 that time there were only two detectives on the Halifax -- on
10 the Sydney City Police Department. And when one went away
11 they'd be rather short-handed. And I recall in one instance
12 Detective MacIntyre coming to me and asking me if I would
13 help him investigate or apprehend a person who he suspected
14 of stealing money from a tavern.
15 Q. And would that tavern have been in the City of Sydney?
16 A. Yes, sir. The other -- the case that sticks in my mind was
17 the theft of a Volkswagen car.
18 Q. Where did that theft take place?
19 A. As I recall in the Ashby district but we recovered parts of
20 the automobile in an attic down in Big Pond. The perpetrators
21 had taken it apart -- all apart and stashed it here, there
22 and the next place. And put the engine in the water and
23 I can recall getting the fenders out of the attic and the
24 hood someplace else. Those are the two cases that stick out
25 in my mind.

1 Q. What sort of opportunity did you have then to observe John
2 MacIntyre's investigative technics during -- with respect
3 to those two occasions?
4 A. Well, we worked side by side.
5 Q. And what was your impression of him?
6 A. My impression?
7 Q. Yes.
8 A. Well, my total impression was that here was a man who was
9 a very dedicated policeman. Very energetic. Always ready
10 to help, you know, if I wanted help. He impressed me as
11 being reliable and besides that, a good fellow to work for or
12 work with.
13 Q. Good fellow to work with in what sense?
14 A. Well, he was easy to get along with.
15 Q. What sort of guy --
16 A. His enthusiasm was sort of infectious. His enthusiasm was
17 infectious and he was always anxious to get on with the job.
18
19
20
21
22 JMR.
23
24
25

1 Q. Did you find him easy to relate to?
2 A. Yes, sir.
3 Q. Did you consider it a usual sort of thing to be called by him
4 and asked, look, can you give me a hand with a particular
5 investigation?
6 A. It didn't happen that often but it happened.
7 Q. And you were quite willing to go ahead and give him a hand?
8 A. Yes, sir.
9 Q. Did you also have an opportunity during either of these
10 two tenures in Sydney to have any dealings with Detective
11 Urquhart?
12 A. Not really. I -- You know, the most I can recall is seeing
13 him around the police station. You know, I don't really
14 recall working closely with -- at all with Billy Urquhart.
15 Q. And during those two times in Sydney, sir, did you also
16 have any opportunity to observe Donald C. MacNeil?
17 A. Yes. Yes, in his capacity both as a prosecutor because
18 he would at one point prosecute our federal statutes cases, yes --
19 our excise cases federally and I think at that time he was
20 defending -- he was acting as defense and not in the -- as
21 a Crown and so the majority of the cases that I had before
22 him, he was defending except for the federal statutes cases
23 which he was prosecuting for us.
24 Q. And would you work with him in that context when he was
25 working as a prosecutor?

1 A. In the federal excise cases? Well, how it worked, you know,
2 we'd apprehend a violator of the excise act and if he
3 pleaded not guilty, we were obliged to seek counsel at that
4 time and I would go to him with the evidence that we'd have
5 and he would prosecute the case.
6 Q. And in that context then would you have -- you've had an
7 opportunity to observe Donald C. MacNeil in the courtroom
8 for instance?
9 A. Yes.
10 Q. And what was your impression of the way in which he conducted
11 himself?
12 A. Well, he was a tenacious prosecutor and a defender. Very
13 competent, I thought. He did a good job prosecuting for us
14 and he did a good job defending his clients when need may be.
15 Q. Again, during this time in Sydney did you have an opportunity
16 to observe Mr. Rosenblum?
17 A. Yes, I did.
18 Q. And in what context?
19 A. Only in the context of him defending -- him acting as defense
20 counsel and it was usually liquor act cases, bootlegging.
21 Q. And as a result of those observations did you form any
22 opinion as to Mr. Rosenblum's capability?
23 A. Yes, I thought he was very capable.
24 Q. And Mr. Khattar?
25 A. Not so much Simon Khattar. I -- you know, I'd -- I, of course

1 knew him by sight. I don't believe I had any cases. I
2 could be mistaken but I don't think he defended anybody
3 of any of the cases I had.
4 Q. Up until 1971, had you had any -- had you been called upon
5 ever to go in and look at an investigation that had been
6 carried out by another police force?
7 A. By another police force?
8 Q. Yes.
9 A. No, I hadn't.
10 Q. And do know whether or not from your own experience in the
11 R.C.M.P. whether or not that would have been unusual to
12 be called in to look at the work of another Force?
13 A. I think you could put it in the realm of being unusual. Now,
14 we did, as I recall, when I was in Halifax about the mid-sixties
15 there were some problems with the New Waterford Town Police
16 Department and our Force, in fact, provided an N.C.O. in
17 charge for -- I can't recall how long, for three or four
18 months -- to sort of run that police department. And I
19 cannot recall any cases where the Force was brought in to
20 look at other investigation -- conducted -- sorry --
21 investigations conducted by other police departments but
22 that's only my recall. There could have been cases.
23 Q. There is a report of yours, sir, in Volume 16 at page 204.
24 Since we're going to be referring to it a fair amount, I've
25 got a clean copy of it here which I'll just hand to you.

1 A. Thank you.
2 Q. If you -- Do you recognize that as a report that you filed?
3 A. Yes, sir.
4 Q. Can you tell us, sir, how it was that you came to be involved
5 in the situation giving rise to that report?
6 A. In November of 1971 while I was Detective Inspector in
7 Halifax and around November the 16th the -- my immediate
8 superior, Superintendant Wardrop called me to his office
9 and to the best of my recollections said, there's been a
10 murder investigation -- murder case in Sydney were a young
11 fellow has been in -- just convicted of murder and subsequent
12 to his conviction a man, Jimmy MacNeil, had come forward
13 and said that the wrong man had been convicted and I should
14 -- should have prefaced that statement by saying he, Wardrop,
15 said to me, I've had a call from the Attorney General's
16 Department wondering --
17 Q. Did he indicate from whom he'd had the call?
18 A. No, sir. Well, if he did I certainly don't remember.
19 So, okay, here's this murder case in Sydney handled by the
20 Sydney City Police where after the conviction a man by the
21 name, MacNeil, had come forward and said the wrong man had
22 been -- the wrong man had been convicted. He said, -- excuse me --
23 He said, I want you to go to Sydney, go down to Sydney, and
24 determine if there's any substance to this man's allegations.
25 Now, I, to the best of my recall, I believe that was November

1 the 16th and I say that from looking at this report as
2 opposed to having the actual recall in my head. In any
3 event I went directly to Sydney --
4 Q. Before you get there --
5 A. Yes.
6 Q. What was it that you understood that you were supposed to
7 be doing when you came to Sydney from that -- from what
8 you've been told by Inspector Wardrop?
9 A. Well,to the best of my recollection and there were no
10 written instructions I was to determine if there was any
11 substance to what MacNeil had said.
12 Q. And would that mean getting to the bottom of it, trying
13 to figure out what, in fact, had happened?
14 A. Eventually yes.
15 Q. Eventually yes. I've indicated to you before and I'll just
16 suggest this -- mention this to you now. We had spoken
17 to Wardrop who's not yet testified but it indicated to us
18 that the direction that he gave to you and I'm reading
19 from my notes on a telephone conversation with him,
20 Marshall was asked to look into it in depth and not
21 just from MacNeil's perspective. I agreed to him looking
22 into it in depth. Would you agree with that characterization
23 of what you were supposed to be doing?
24 A. That's not my recall. My -- I -- What I recall is that
25 we were to look at what MacNeil had said.

1 Q. And your intention though, I think you told me a couple of
2 minutes ago, was to get to the bottom of it, was it not?
3 A. Yes. Yes.
4 Q. And indeed later on, if you look at your own report, you say
5 in your own report that -- the end of paragraph three of
6 that report on the first page of it.
7 ... I went to Sydney on the 16 Nov.
8 where, together with Sgt. McKINLEY...
a thorough review of the case was
conducted with the following results.
9
10 Is that what you eventually thought you had done, "a thorough
11 review of the case"?
12 A. When I wrote this report I had already done a number of things.
13 I had gone over the investigation with Detective MacIntyre,
14 with Sergeant McKinley. I'd looked at the evidence adduced
15 at preliminary hearing which was provided to me by Detective
16 MacIntyre and some statements and because of this I had -- I
17 used the term "review", "thorough review".
18 Q. That's what you thought you were doing, I take it, from
19 your report, sir?
20 A. Yes, to review it.
21 Q. And would it be the case that when you left Halifax to go
22 to Sydney that nobody had placed any restrictions on what
23 it was you were supposed to be doing when you got there?
24 A. There was no restrictions but the reason I think I'm right
25 in recalling that there wasn't -- there was not an instruction

1 to the effect that if the case was to be re-investigated
2 is because of the fact that I went there alone. Had the
3 instruction been, I want the case re-investigated, then there
4 is no way in the world that I would go there alone without
5 -- without taking at least two teams of investigators
6 with me.
7 Q. When you left Halifax to go to Sydney if there were no
8 restrictions on what it was that you were to do with
9 respect to what you call a review, if when you got to
10 Sydney you'd seen things that had -- you thought looked
11 a little awry would you not then have gone farther?
12 A. Yes.
13 Q. You would have?
14 A. Yes.
15 Q. And in coming to try and decide whether or not Jimmy MacNeil
16 had told the truth would it be the case, sir, that you
17 would expect to do more than just talk to Jimmy MacNeil and
18 ask him whether or not he told the truth?
19 A. Yes.
20 Q. And indeed you did speak to people and you did review
21 documents other than Jimmy MacNeil's statement?
22 A. Yes, that's right.
23 Q. So when you got to Sydney you did, indeed, do things other
24 than reviewing the statement which I believe you got of
25 Jimmy MacNeil?

A. Yes.

Q. With the intention, as you say in your report, to do a thorough review?

A. Yes.

Q. Okay. Was it your understanding, sir, when you left for Sydney that you were the person that was in charge? When you got up here you were to decide what was to be done?

A. Yes, that's correct.

Q. And you were to do that independently of the Sydney Police Department?

A. Yes.

Q. Independent of any direction from the Sydney Police Department?

A. Yes.

Q. Would I be correct, sir, in taking from your report on the first page where you indicated 17 November 1971, would the paragraphs that follow over to 23 November '71 on the last page of your report constitute the things that you did on the 17th of November '71 insofar as they relate to facts and things that were done?

A. Yes.

Q. Do I understand then that you arrived in Sydney on November 17th?

A. I don't recall whether it was the morning of the 17th or the afternoon or evening of the 16th.

Q. Okay. When you got to Sydney did you get in touch with Sergeant

MacIntyre?

A. Yes.

Q. Did you go and meet with him?

A. Yes.

Q. Was there anybody else at the meeting other than yourself and Sergeant MacIntyre?

A. Not that I recall.

Q. Can you tell us today what the substance of that conversation was that you had with Sergeant MacIntyre?

A. Well, the substance of the conversation was that he knew I -- why I was there. He had a transcript and some statements for me and I, you know, I'm having -- I have difficulty recalling what it -- you know -- the exact words we spoke or what we said.

Q. Did you have an impression from that conversation as to whether or not -- what Sergeant MacIntyre's view was of the case?

A. Yes, my impression is that he was very confident that he had the right man.

Q. Can you recollect in any way how it was that he expressed that confidence to you? What --

A. I'm -- You know, I'd be guessing sir really. I can't -- but that's the clear impression that I have, is that he was convinced that he had the right man.

Q. And you indicated to me a minute or so ago that you were given

1 certain material and I know now you've had an opportunity
2 to try and think about what it was that you were given.
3 Do you think at that meeting you were given, as you do indicate
4 in your report in paragraph five in the last three or four
5 lines, that you'd been given some statements?
6 A. Yes.
7 Q. Now, is it your recollection now that the statements you
8 were given would have been the June 4 statement of John
9 Pratico which is in volume 16 at page 41?
10 A. Yes.
11 Q. The June 17 statement of Terrance Patrick Gushue which is
12 in the same volume at page 69.
13 MR. PUGSLEY:
14 I think, My Lord, if you wish evidence from the recollection
15 of the witness as to what he was given, it would be best not to
16 lead him through this. Put these statements in front of him.
17 It may save time as far as my friend is concerned but if we're
18 interested in bringing out whether it's the witness's recollection
19 rather than my friend leading on him, I think it would be
20 appropriate not to lead.
21 MR. CHAIRMAN:
22 He told us that he received some statements from -- presumably
23 from people who had given statements during the investigation
24 of this crime. I seriously doubt if he could remember at this
25 time, if you could expect him to remember the names.

1 MR. PUGSLEY:
2 But I have serious doubts as well and so it's my friend's
3 recollection that's getting on the record rather than the
4 witness's.
5 MR. SPICER:
6 I thought -- think there will be subsequent evidences from his
7 own report as to why he thinks these statements that he has here --
8 MR. CHAIRMAN:
9 This -- I interpret this as being a method of this witness deciding
10 whether or not these were the statements as opposed to whether
11 it came from John Jones or William Smith and I see nothing wrong
12 with the approach being used by Commission counsel.
13 BY MR. SPICER:
14 Q. And the last statement is, are you able to tell us whether
15 or not you would have received the June 4, 1971 statement
16 of Maynard Chant?
17 A. I feel sure that I did, certain I did.
18 Q. You indicate in your report, sir, that you--on page two in paragr ph
19 five, you perused "transcripts of evidence given
20 at the preliminary hearing". Are you able to tell us today
21 whether or not you were given the transcript of the preliminary
22 hearing?
23 A. To the best of my recollection I did receive the transcript. Yes.
24 Q. You also say that you received "some transcripts of evidence
25 given in high court during the trial". Do you have any

recollection of what those -- what that material might have been?

A. I think I did but I've forgotten about it for a moment. I think Judge Dubinsky quoted some evidence -- some of the evidence in his direction to the jury and I think I got some of that.

Q. That material is contained, for the benefit of counsel, in Volume two, pages 88, 89, 90, 91, 92, 95, 96, 97, 101 and 102. I'll show you this material, sir, and ask you, do you have any recollection of receiving anything from Sergeant MacIntyre that would have contained these transcriptions of the testimony that was given at trial?

A. I'm on thin ice. I'm on thin ice about this one.

Q. Okay, well if you don't remember then just set it aside if you have no recollection of getting it. Did you ask Sergeant MacIntyre for the entire file?

MR. CHAIRMAN:

Q. What your saying is that you recall receiving a portion of-- a transcript of a portion of Mr. Justice Dubinsky's Charge to the jury which contained quotations from some of the evidence. Is that what your saying?

A. Yes, sir.

Q. But you can't identify what's been shown to you as being the--

A. The one that I got.

Q. -- the one that you received?

1 A. Yes, My Lord.
2 Q. Okay.
3 BY MR. SPICER:
4 Q. Do you recollect, sir, whether or not you asked Sergeant
5 MacIntyre for the entire file that he had?
6 A. No, at that time I did not.
7 Q. And why did you not ask him for the file?
8 A. Well, at that point in time I was seeking his co-operation.
9 I was treading very gently and he had this dossier of
10 papers prepared for me.
11 Q. When he handed that dossier to you, sir, did he say anything
12 about what it was that he was giving you?
13 A. Yes, to the best of my recollection he was saying -- Oh --
14 these are the crucial pieces of evidence adduced by witnesses
15 surrounding the eye witness accounts of the murder. Now
16 I must tell you that this is -- this was not my style of
17 doing investigations and I'm really half at a loss as to
18 why I was going so slowly at that time.
19 Q. Going so slowly in what sense?
20 A. In the investigation. Instead of going full-bore
21 and saying give me this, give me that or I'll get a --
22 you know, I'll get a subpeona or -- and to the best of my
23 recollection the reason that I wasn't being more forceful
24 at that time was because of the mandate that was given to
25 me to look just at the -- into the aspect of MacNeil making--

1 that is Jimmy MacNeil making a statement. So for whatever
2 reason I was treading very lightly at this stage of the game.
3 Q. What possible connection would there be between your
4 coming to see whether or not Jimmy MacNeil was telling the
5 truth and your failure to ask for the entire file?
6 A. Well, you know, my memory's hazy. It's 16 years ago and the
7 long and the short of it is I didn't ask at that time, you
8 know, and I think --
9 Q. And my question still is what connection is there between those
10 two things? I'm struggling to understand what it is that
11 would connect your failure to ask for the file with your
12 mandate, as you've explained it, to come and see whether
13 Jimmy MacNeil was telling the truth?
14 A. Well, I think really that I'd had it in my mind at that time
15 to use the polygraph and that rather than go full-bore into
16 a total review of the case, everything that MacIntyre had,
17 I was content to say, Okay how do we go about this thing.
18 Let's try the polygraph.
19 Q. You wouldn't have been at the -- Would you have been of the
20 view at that time, sir, that you could use the polygraph to
21 the exclusion of getting the full story as may have been
22 revealed by the file at the Sydney Police Department?
23 A. I thought that by using the polygraph it would knock the
24 thing on the head pretty quick.
25 Q. Did you think that you could do that in the absence of

1 understanding what the whole story was as might have been
2 gleaned from the entire file?
3 A. Well, I go back to what I say before, that I thought the
4 polygraph would get to the heart of the matter very quickly.
5 Q. Without having to look at the entire file?
6 A. Without having to re-investigate or look at -- yeh, even
7 look at the whole file.
8 Q. Without having a look at everything that was available?
9 A. Yep. Yes, sir.
10 Q. Is it fair to say that at the time that you accepted the
11 materials from Sergeant MacIntyre that you accepted his
12 word for what he was giving you as the crucial material
13 related to the eye witnesses?
14 A. Yes, absolutely.
15 Q. Do you think, sir, that in going to look at the work of
16 another police force on reflection that it's good practise
17 to accept the word of the original investigating officer?
18 A. Well, let me put it this way. Probably not and probably
19 I didn't go there, you know, initially with the intention
20 of just listening to MacNeil -- I'm sorry -- to Detective
21 MacIntyre and accepting his word carte blanche but I tell
22 you this, that if you work with a man over the years and
23 grown to respect him as a policeman, as an honest man that
24 I think that preys on your mind whether you want to believe it
25 or not, in other words subliminally.

1 Q. You would agree with me though that it's not good practise
2 to accept the word of the original investigating officer?
3 A. Today I would, yes.
4 Q. Are you able to tell us, sir, whether or not you received
5 any conflicting statements, written statements from Sergeant
6 MacIntyre at the time you received the package of material?
7 A. No, to the best of my recollection when we were having
8 the discussion about what transpired he said, look, I had
9 -- initially I had some difficulty with Chant and Pratico
10 but they soon, sort of, came around and I got the right
11 words out of him or -- I'm not -- Sorry, that's not what
12 he said. That's not what he said.
13 Q. What was it that he did say?
14 A. Well, what he said was, I had some difficulty with these
15 witnesses at first and -- but then they came around and told
16 the truth pretty quickly, in that context.
17 Q. And having been told that you asked no further questions
18 at that time?
19 A. No, because, you know, that is a relatively common experience.
20 At least it has been my relatively common experience --
21 relative common experience, to experience people who initially
22 who are not forthcoming or not ingenuous and as a matter
23 of fact I think it was not more than two years before this
24 that Corporal Smith and I were involved in a murder case
25 when the exact same thing happened where one man, one witness
was reluctant.

1 Q. Is this the same Corporal Smith who we're --
2 A. Yeh.
3 Q. -- going to hear about later?
4 A. Yes, sir.
5 Q. The polygraphist?
6 A. Yep.
7 Q. The material that you took away from that meeting, sir, I take
8 it that you carefully reviewed the material that was handed
9 over to you by Sergeant MacIntyre?
10 A. Well, I thought I did. I went over it with Corporal --
11 Sergeant McKinley and I went over parts of it with Donnie
12 MacNeil. And I went over parts of it with myself or
13 studied it when I got back to Halifax.
14 Q. You indicate in your report that--that at least insofar as
15 November the 17th is concerned, sir, on page 2 in paragraph 5,
16 about half way down:
17 Rather, a number of hours were
18 spent by Sgt. McKINLEY and myself going over statements given by various witnesses to the police during the
19 initial investigation.
20 A. Yes.
21 Q. And later --
22 A. But don't ask me whose office or where or, you know, that's
23 my report. I wrote that. Of that there is no doubt. But
24 when you try to pin me -- if you try to pin me down about
25 where or why or how long, I'm sorry, it's been too long. I --

1 Q. No, I was only --
2 A. I can't recall.
3 Q. The question was merely directed to finding out whether at
4 the time you were satisfied that you carried out a careful
5 review of the material that was given to you?
6 A. Yes.
7 Q. Okay, you spent sometime then with Sergeant MacIntyre on
8 the 17th, and your report indicates also, sir, that on the
9 17th you:

10 visited the scene of the crime
11 with Sergeant of Detectives John
MacINTYRE, ...

12 Do you remember doing that?
13 A. I remember visiting the scene of the crime. If you were
14 to ask me whose car, what time of the day it was, I can't
15 recall.
16 Q. Do you remember whether it was the day or the night?
17 A. I can't -- I think it was daytime.
18 Q. Okay.
19 A. I'm almost certain it was daytime.
20 Q. Do you remember how long you spent in the Park?
21 A. No, you know, at that time having been -- been stationed in
22 Sydney just a few years previous, I was familiar with the
23 focus of the place and I just think I went there to see
24 whether or not -- to see how the lighting situation was,
25 where the light standards were. But again, it's -- that's

1 hazy in my memory.

2 Q. Do you have any idea how much time you spent in the Park?

3 A. No, I'm sorry I don't.

4 Q. No, do you have any recollection of what you were shown or

5 what you did when you were there?

6 A. No, no.

7 Q. You indicate also in your report, sir, in paragraph 5, I take

8 it this is still related to November 17th, at the beginning:

9 > Sgt. McKINLEY received MacNEIL's
10 > written permission that he would
> undergo the polygraph test. We
11 > interviewed MacNeil and it was
> obvious by his demeanour and
12 > speech that he has sub-normal
> intelligence and is slightly
13 > mental.

14 Did you interview Jimmy MacNeil on the 17th?

15 A. On the 17th? My report says I did. I have no reason to

16 believe otherwise. But I can't recall the circumstances

17 of speaking to him then.

18 Q. Did you discuss Jimmy MacNeil with Sergeant MacIntyre on

19 the 17th?

20 A. Oh, I'm sure we did. I'm sure we did.

21 Q. Okay.

22 A. We, you know, we talked about it.

23 Q. Can you give us any indication today how you reached the

24 conclusion that he was:

25 > has sub-normal intelligence and
> is slightly mental?

1 A. Well, you know, I couldn't seem to get a consistent story
2 out of him. He'd skip around. How do you -- how do you
3 know that anybody is -- is without giving them an I.Q.
4 test, what their intelligence level is, you know.
5 Q. So your recollection of how you reached that conclusion is
6 just from interviewing him?
7 A. Yes.
8 Q. Your report then says:

> He was, nonetheless,(presuming that's Mr. MacNeil)
> 9 convinced that EBSARY had stuck a knife into
> 10 the deceased and that later they
> went to EBSARY's home where he,
> 11 EBSARY, washed off the knife.

12 You then say:

> 13 Because we were certain that
> McNEIL's account of the
> 14 altercation insofar as it
> concerned EBSARY allegedly
> 15 stabbing MARSHALL was a figment
> of his imagination, we did not
> 16 immediately question him or take
> any further action with respect
> 17 to MacNEIL at this time.

18 How did you conclude on November the 17th, that MacNeil's
19 account "was a figment of his imagination"?
20 A. Well, that's, you know, that's difficult too but underlying
21 all of this is the fact that Marshall had had a jury trial,
22 that the thing had been to Preliminary Hearing, that
23 competent counsel had been engaged on both sides of the
24 cases, and that MacNeil was not credible -- credible to the
25 extent that it took him sometime to come forward. You know,

1 these are the things that I seem to recall going through
2 my head at the time.
3 Q. And this is six days before you gave Mr. MaNeil a polygraph?
4 A. Yes.
5 Q. And you concluded on the 17th already without the benefit
6 of the polygraph, in fact, the very question you say you've
7 been brought down to Sydney to answer, had already been
8 answered. That is that you were certain that his account
9 of the altercation insofar as it concerned Ebsary, "was
10 a figment of his imagination"?
11 A. Well, I thought it was, but -- but I wasn't certain to the
12 extent that I would not ask the polygraph operator to come
13 down.
14 Q. Did you have any discussions with Sergeant MacIntyre on the
15 17th concerning his impression of Jimmy MacNeil?
16 A. I'm sure we did.
17 Q. And are you able to tell us today what -- what your impression
18 was of what Sergeant MacIntyre thought of him?
19 A. Well, I think -- I think he thought the same as what I did or
20 I thought the same as what he did. I don't know whether I got the
21 cart before the horse or the horse before the cart.
22 Q. What was it that he thought?
23 A. About it being a cock-and-bull story about MacNeil --
24 MacNeil's statement that -- that Marshall didn't do it, that --
25 that Ebsary did.

1 Q. And were you then -- were you the 17th accepting Sergeant
2 MacIntyre's impression of Jimmy MacNeil as something that
3 you would take into account in coming to your conclusion --
4 A. Yes.
5 Q. -- that it "was a figment of his imagination"?
6 A. Sure. Part of it.
7 Q. Well, on the 17th, sir, what else did you take into account
8 in coming to that conclusion?
9 A. I can't say. I can't remember.
10 Q. Did Sergeant MacIntyre give you the statements that were taken
11 by him of Jimmy MacNeil and Roy Ebsary?
12 A. Well, I'm pretty certain he did.
13 Q. And those two statements are contained in volumes -- in
14 volume 16 at 176 and 186. Mr. Ebsary's is at page 186 and
15 Mr. MacNeil's is at 176. On the 17th, sir, you've now --
16 you've been to the Park with Sergeant MacIntyre. You spent
17 sometime reviewing the material. If I understand you
18 correctly, you've spoken with Jimmy MacNeil. Was there anything
19 else that you did with respect to this investigation on
20 November the 17th?
21 A. I called Sergeant Burgess in Halifax on the telephone to
22 -- to line up the polygraph operator for me.
23 Q. And in volume 16 at 195 --
24 A. And I think I asked him to look -- to check with N. C. I. S.
25 for criminal records.

1 Q. Okay, we'll get to that in a sec.

2 A. Yes, yeh.

3 Q. You're familiar with that document, sir?

4 A. Yes, sir.

5 Q. And is that a direction from your boss, Wardrop, requesting

6 polygraph?

7 A. Yes, sir.

8 Q. And can you indicate to us in the last three lines of that

9 transmission, it says:

10 IF EXAMINATION OF MACNEIL REVEALS
HE IS TELLING TRUTH POSSIBLY 3
11 FURTHER EXAMINATIONS WILL BE
REQUIRED. ADVISE IF EXAMINER AVAILABLE
12 & ETA SYDNEY.

13 Can you tell us whether or you -- did you speak with -- with

14 Wardrop on that day?

15 A. No, I spoke with -- with Sergeant Burgess.

16 Q. He would have been the reader?

17 A. If you'll look at the top of the telex it says "Drafter's

18 name - DLB"?

19 Q. Right.

20 A. He put the thing together on information that I got -- I gave

21 him.

22 Q. Right.

23 A. And he would have the superintendent sign it because it

24 required the authority of -- of a C. I. B. officer before we

25 could use the polygraph.

1 Q. Would it have been your suggestion then that:

2 IF EXAMINATION OF MACNEIL
3 REVEALS HE IS TELLING TRUTH
POSSIBLY 3 FURTHER EXAMINATIONS
WILL BE REQUIRED.

4 A. Yes, sir.

5 Q. Are you able to tell us today who those "3 FURTHER EXAMINATIONS"
6 would have been?

7 A. I think that, you know, to the best of my recollection, it
8 would have been Chant, Pratico and Donald Marshall, Junior.

9 Q. At the time, if I'm reading your request correctly, Wardrop
10 was passing on a request only for an examination for MacNeil?
11 Had you made any decision at that point in time concerning
12 Roy Ebsary?

13 A. Yeh, when it -- when it came to -- to the use of the polygraph
14 I had determined that the first two that should be done, at
15 least, before we went any further with the review, would be
16 Ebsary and MacNeil. I don't know whether you have it or not
17 but you'll note a telex going back from -- from Smith in
18 Regina to Halifax saying "who's the investigator and where
19 can I get a hold of him"?

20 Q. Page 197, would that be the telex you're referring to?

21 A. Yes. And then, of course, the subsequent one that came to
22 -- that came to me at Sydney as a -- an info is the one at
23 196.

24 Q. 196? That's indicating to you that the polygraph examiner
25

had been contacted?

A. Yes, and I'm sure that -- that Smith phoned me and the discussion took place over the phone, as to who I wanted examined at that time.

Q. And the people that you wanted examined at that time were who?

A. Ebsary and MacNeil.

Q. If you could just now look, since you have the volume in front of you, 199 -- 199 and 200. You indicated a couple of minutes that you also made a request in connection with criminal records?

A. Yes, sir.

Q. And are you able to tell us from those three transmissions from 198 to 200, whether or not on November the 17th you would have known that Roy Ebsary had had a conviction --

A. Yes.

Q. -- for possession of a concealed weapon?

A. Yeh.

Q. And that's information that would have come to you on the 17th of November?

A. Yes, sir.

Q. Do you remember doing --

A. And I -- excuse me.

Q. Sorry.

A. I think also that Detective MacIntyre had already told me that -- about Ebsary's conviction. I think.

1 Q. When do you recollect that he told you that?
2 A. When do I recollect it? Well, you know --
3 Q. Well, during the day -- did he tell you during the day of
4 November 17th?
5 A. I think so. He said, "Oh, yes, you might as well know that
6 Ebsary has got a conviction for a concealed weapon".
7 Q. Do you remember anything else about that conversation?
8 A. No, I don't. Other -- other than the fact that -- no, I
9 don't. I don't recall. For some reason or other the previous
10 conviction didn't register too deeply with me. I don't know
11 whether it was a trivial-- a relatively trivial offense. Like
12 there's no M. O. on it, eh, it just says "concealed weapon".
13 Q. Did you understand it at any time to have been a knife?
14 A. Well, again, to the best of my recollection, I believe Detective
15 MacIntyre told me it was a knife involved in that -- in that --
16 BY MR. RUBY:
17 Q. Could you repeat your last phrase, sir?
18 A. Beg your pardon.
19 BY MR. SPICER:
20 Q. Just repeat the last part of your answer?
21 A. I believe it -- that it was Detective MacIntyre who told me
22 that a knife was involved. That's an answer to that
23 question.
24 Q. Certainly. Did you follow that up at all with Sergeant
25 MacIntyre?

1 A. Well, no I didn't. At that time -- at any time I don't
2 think because, again, whether he said that it was a trivial
3 offense or he knew about it or whatever, it got pushed to
4 the background of my mind.
5 Q. And you didn't do anything further about it?
6 A. No.
7 Q. Did you do anything --
8 A. Take cognizance of it but put it in the back of my mind and --
9 Q. But it was information that you had at that time, November
10 17th?
11 A. Say again?
12 Q. It was information that you had that there was a conviction?
13 A. Yes, oh, yes, quite clearly.
14 Q. What else did you do on November 17th in connection with the
15 investigation?
16 A. I recall MacIntyre showing me the jacket and looking at it
17 closely. The one that MacNeil -- that Marshall was wearing.
18 Q. Do you remember any discussion concerning that jacket?
19 A. Well, it seemed to me that when we looked at the jacket
20 we examined the possibility that it was self -- self -- a
21 self-inflicted wound had caused or Marshall had inflicted
22 the tear in the jacket himself. You know, it seems to me
23 we had conversation along that line.
24 Q. Are you able to tell us whether or not that was something
25 that you thought of or something that was suggested to you

1 by Sergeant MacIntyre?
2 A. I really can't say how it came up.
3 Q. Do you know how it was that Sergeant --
4 A. When --
5 Q. Sorry.
6 A. When you look at the jacket, as I recall, it's -- it was
7 cut in half -- half sort of half cut and ripped on the left
8 inner portion. And it looked like it was the type of --
9 the position of the cut was such that it would have been
10 quite easy to take the knife in your right hand and just
11 run it along -- it looked -- it looked like it would be
12 an easy thing to do really.
13 Q. Was any view expressed to you by Sergeant MacIntyre as to
14 whether or not he thought the wound had been self-inflicted?
15 A. Well, again, I think we talked about it and I believe that
16 he did, but my recollection is that he did, yes.
17 Q. And if he had done so, would that have been something that
18 you would have accepted from Sergeant MacIntyre?
19 A. Well, you know, the man tells me this and I say, yes, that's
20 plausible in my own mind. Yeh, it looks -- looks reasonable
21 to assume that -- that because of the position of the cut on
22 the sleeve, at that time, that that could have been the
23 case.
24 Q. Are you able to tell us whether or not you came away from
25 that conversation thinking that perhaps the wound was

1 self-inflicted?
2 A. I think I did.
3 Q. Do you know how it was that Sergeant MacIntyre happened to have
4 the jacket? Did he indicate to you where he got it from?
5 A. No.
6 Q. That jacket had been introduced as -- at the trial as an
7 exhibit?
8 A. I see.
9 Q. Do you have any idea how it would have got into the possession
10 of Sergeant MacIntyre?
11 A. I've had exhibits in court, in Magistrate's Court, items that
12 have been entered as exhibits given to me by a Magistrate
13 and the Magistrate had said, "Corporal, Sergeant, whatever,
14 because of the nature of this exhibit, I want you to keep
15 it in your -- in your possession, in your locked exhibit
16 locker". That's -- that's happened to me in Nova Scotia.
17 Q. And your locked exhibit locker, would that have been in the
18 court house?
19 A. No, with the Detachment.
20 Q. With the Detachment?
21 A. Yeh.
22 Q. Would that normally be drugs?
23 A. Drugs and money. Yeh, right on, not jackets, no.
24 Q. Did you leave Sydney on the 17th and come back to Halifax?
25 A. I don't recall, sir. I don't recall what day I came back.

1 Q. Your report doesn't indicate anything for any dates between
2 the 17th and the 23rd?
3 A. Yeh.
4 Q. Are you able to tell us whether you spent that time in Sydney
5 or whether you spent that time in Halifax?
6 A. I believe I spent most of that time in Halifax. I don't
7 think -- once -- once I got word that Smith was practically
8 on his way to all intense in purposes, that it wouldn't be
9 a long delay, I'm certain that I would have got in the car
10 and come back to Halifax and tried to re-digest everything
11 and wait for his arrival.
12 Q. Would you have taken the material that you'd been given by
13 Sergeant MacIntyre with you when you went back to Halifax?
14 A. Yes.
15 Q. Had you formed any tentative conclusions when you left Sydney
16 and went back to Halifax?
17 A. I became -- I was starting to get more incredulous as --
18 that -- put it the other way around. I started to believe
19 that Marshall was, indeed, the person who committed the
20 crime.
21 Q. And why at that -- why would you have started to come to
22 that conclusion?
23 A. Well, I think, you know, on the long drive back when I think
24 back of going over the thing, what sticks in my mind is the
25 fact that the case had gone through Preliminary Hearing. The

1 case had gone to trial in the Supreme Court. And I was
2 starting to say to my self, I don't believe this happened
3 this way. That is the way MacNeil said it happened. And
4 I guess that's from spending a long time doing police work
5 and seeing more people, who I considered guilty, get off
6 then the other way around, seeing an innocent person being
7 convicted before a judge and jury, you know, my experience
8 was the other way around.
9 Q. That by the time you went back to Halifax on the 17th,
10 other than interview Jimmy MacNeil, you hadn't spoken to
11 Roy Ebsary at that point, had you?
12 A. No, no.
13 Q. You hadn't spoken to Chant?
14 A. No.
15 Q. Pratico?
16 A. No.
17 Q. Gushue?
18 A. No.
19 Q. You had spoken to John MacIntyre?
20 A. Yes.
21 BY MR. CHAIRMAN:
22 Q. Do I understand that you had seen the statements that had
23 been given by Jimmy MacNeil and Roy Ebsary to the Sydney
24 Police?
25 A. To the best of my recollection, My Lord, yes.

1 MR. CHAIRMAN:
2 Okay.
3 BY MR. SPICER:
4 Q. You've spoken to Jimmy MacNeil, you've looked at those two
5 statements of Ebsary and MacNeil, you're driving back to
6 Halifax and you're tentatively reaching the conclusion that
7 what Jimmy MacNeil's saying, can't be true?
8 A. Yep. As near as I can recollect.
9 Q. That's without having done any -- any interviews at all?
10 A. That's right.
11 Q. Was it you just couldn't believe that a mistake had been
12 made?
13 A. Well, I was -- I was doubtful that--not that a mistake couldn't
14 be made but that this thing could go all through the court
15 system. Knowing -- knowing that -- knowing the lawyers that
16 I--as well as I knew them and Mr. Dubinsky -- Mr. Justice
17 Dubinsky, I thought -- I thought and incidently I was glad to
18 see, without being trite about these things, the Supreme
19 Court of Canada two weeks ago saying, in the polygraph
20 case that -- that truthfulness of witnesses to be determined
21 when they're on the stand or words to that effect.
22 Q. Is it fair to say as when you're heading back to Halifax on
23 the 17th, you didn't want to believe that a mistake could
24 have been made?
25 A. Well, you're stretching that I think. You know, I really

1 think that's putting it a little too -- the wrong light on
2 it.
3 Q. You certainly hoped one hadn't been made?
4 A. Oh, absolutely. I'd hoped that it hadn't.
5 Q. Between the time you went back to Halifax and then came back
6 to Sydney with Corporal Smith, are you able to give us some
7 indication of how much time you would have spent reviewing
8 the material that you had?
9 A. No. I took it back for the purpose of having another -- of
10 rehashing it again in the quietness of my own office and I
11 don't know how busy I was at the time. Whether I had other
12 -- obviously I had other things to do. I wouldn't have
13 spent the whole of the time looking at those statements --
14 Q. Are you able --
15 A. -- or the material that I had. But how much -- how much, I --
16 you know, I think really I was at that stage prepared to say
17 okay, let's wait till the next shoe drops, that is when --
18 when the polygraphist arrives.
19 Q. If you're prepared to "wait till the next shoe" dropped, would
20 it be your recollection that you probably didn't do too much
21 you were just waiting for Smith to arrive?
22 A. Yeh.
23 Q. Do you know whether or not you discussed the material that
24 you picked up in Sydney with anybody else in the R. C. M. P.
25 in Halifax during that period of time?

A. Well, you know, I could have -- I could have, in fact, I feel -- I feel that I must have said to Wardrop, "This is what's happened so far".

1 Q. Other than that?
2 A. Other than that, no.
3 Q. And what was it that you thought had happened so far?
4 A. Well, not so much as what had happened but how we were
5 approaching the review of the case. In other words, okay,
6 we've looked at this, we've looked at that, we'd like to
7 get the polygraph down, so we'll just sit tight until he gets
8 here.
9 Q. Would you -- do you recollect whether or not you would have
10 indicated to Wardrop whether you started to form any conclusions
11 at all in your own mind?
12 A. No, I -- No. No, I can't recall any.
13 Q. Now you were going to tell us whether you met Corporal Smith
14 in Halifax and then came up to Sydney or whether you met him
15 in Sydney?
16 A. I believe we met in Halifax and I can't recall whether we drove
17 to Sydney or flew. I really can't.
18 Q. Whose decision was it as to who was to get the polygraph?
19 A. Mine, sir.
20 Q. Yours. Are you able to tell us whose decision it was as to
21 which order the polygraph tests were to be administered in?
22 A. I would leave that up to the polygrapher.
23 Q. And did you leave that up to Corporal Smith?
24 A. Yes.
25 Q. What information did you give to Corporal Smith to enable him

1 to properly conduct the polygraph?
2 A. I think we had a verbal discussion. I can't recall giving
3 him any of the material that I had. This was a new field
4 for me. He'd been at it for a while and as I recall he would
5 ask, you know, what about this, what about that, or the
6 next thing as opposed to me saying, this is what happened.
7 I think I relied on him to do the asking.
8 Q. Did you -- Do you remember whether or not you discussed with
9 Smith what you knew at that point in time about the incident
10 itself?
11 A. I'm sorry. I don't have any recall of it but I did that.
12 Q. Do you know whether or not you would have told Smith that --
13 about Roy Ebsary's record?
14 A. No, I can't recall that. I can't recall whether I did or I
15 did not.
16 Q. Do you know whether or not you would have indicated to Smith
17 any tentative conclusions that -- that you were starting to
18 reach yourself at that time?
19 A. No, I don't -- I don't think I did to Smith.
20 Q. Would you have said anything to him at all about what you
21 thought about Jimmy MacNeil?
22 A. I can't remember. I really can't.
23 Q. What was your own state of knowledge of the polygraph at that
24 time? What did you know about it?
25 A. Smith, you see, had been working for me before he went to polygraph

1 school. He went down to the States -- to New York first and
2 after a period of time there, I believe his family was still
3 living in the Halifax area, and he came back for a short time
4 and then went to Michigan I believe. Now if that's right,
5 we had some discussion about the polygraph then. In any event,
6 I think he was in Halifax, whether it was between classes or
7 between schools or whatever and he'd been in the office and
8 as I recall he was very enthusiastic about the polygraph
9 program. He was enthusiastic about the school which not only
10 taught the actual mechanics of the polygraph but which taught
11 also interrogation technics. Now while -- when Smith -- This
12 is another context. At that time to my knowledge before --
13 before Smith was taken as a polygraph operator there was only
14 one polygraphist in -- in the country, and then the powers-that-
15 be decided to expand the program and they were looking for
16 candidates who they thought would do a good job of it. He
17 qualified and -- and so Smith's name poped up. And he was
18 eventually selected. And we didn't know, you know -- He
19 was off -- off and running down in the States, but, you know,
20 it seems to me that I had a conversation when he came back.
21 He came down to the office at some time and we were sort of
22 half kidding him about this mickey mouse machine just in jest
23 and boy, he wasn't jesting. He was firmly convinced of how
24 the thing worked, how well it worked and -- and I think we
25 might have asked him, "Well, can you test this type of person

1 or that type of person, or whatever, and, you know, he was
2 very enthusiastic about the polygraph program, having been to
3 school.
4 Q. My question --
5 MR. CHAIRMAN:
6 We'll rise for a few moments to get out of the heat.
7
8 INQUIRY ADJOURNED AT: 3:39 p.m., AND RECONVENED AT: 3:53 p.m.
9
10 BY MR. SPICER:
11 Q. Just before we broke, I asked you what the polygraph was and
12 I believe you answered in terms of Corporal Smith. I'd just
13 like to ask you again at that time in November of 1971, what
14 did you understand the reliability, for instance, of the
15 polygraph to be?
16 A. Can I say also that I believed that during a
17 Canadian Police College class in 1968 that I mentioned that
18 I attended, I believe I attended some polygraph lectures then.
19 Q. And what was your understanding then of the reliability of
20 the polygraph based on what you knew at that time?
21 A. Well, my best recall is that the combination of the polygraphist
22 pre-test interrogation and then the use of the machine that
23 it's reliability was quite high. Please don't ask me to put
24 a number on it, but that is my impression that between those
25 two entities, that is, the pre-test interrogation and the use

1 of the machine itself that it was quite reliable.
2 Q. But not as the sole investigative technique I take it?
3 A. No. No. No.
4 Q. It would be an aid to be used in conjunction with other
5 investigative techniques?
6 A. It's an aid definitely.
7 Q. And would it also be the case, sir, that in order -- to your
8 knowledge, in order to conduct a proper pre-test interview, the
9 person conducting the polygraph test would have to be fully
10 advised of the circumstances of the offense and the personalities
11 involved?
12 A. I don't think he would go ahead -- you know, I don't -- you know,
13 I can't see how he could to start with. I don't see how he --
14 I don't see how he could on the pre-test without having a level
15 of knowledge which satisfies the polygraphist.
16 Q. What does that mean?
17 A. Well, the polygraphist's got to know certain details. I don't
18 know whether he wants to know or should know all the details.
19 Q. Did you have any understanding at the time as to what information
20 you should be trying to give to the polygraph operator in order
21 that he might be able to carry out a proper test?
22 A. Just run -- run that again please.
23 Q. Did you have any idea what information you should convey to
24 Corporal Smith concerning the offense and the personalities
25 involved?

1 A. No, I -- I -- I believe it worked the other way around.
2 I relied on Smith to ask me questions.
3 Q. And you --
4 A. Sufficient -- Sufficient to -- to get him to a level of
5 knowledge or understanding about the case where he could conduct
6 his knowledgeable test on the subject.
7 Q. Do you think he would have asked you or do you have any
8 recollection whether he would have asked you about Jimmy
9 MacNeil; what he was like? You had interviewed him.
10 A. I can't recall him asking specifically that. I'm sure that he
11 must have but when you ask me in that context I, you know --
12 Q. And what about Roy Ebsary?
13 A. The same thing.
14 Q. But you hadn't even interviewed Roy Ebsary at that point, had
15 you?
16 A. No, only his statement from -- that he gave on the night of
17 November the -- whenever it was -- the 15th I think.
18 Q. Had you had discussions with Sergeant MacIntyre concerning
19 Roy Ebsary?
20 A. I think almost definitely.
21 Q. Do you have any recollection of what your impression was of
22 what you were told by Sergeant MacIntyre concerning Roy Ebsary?
23 A. Any recollection of what I was told? No, I'm sorry, I don't.
24 Q. In any event, at this point in time, by the time you came back
25 to Sydney to arrange for the giving of the polygraph test, Roy

1 Ebsary had not been seen by yourself?
2 A. Correct.
3 Q. Can you tell us where the polygraph test was administered?
4 A. In the Wandlyn Motel in Sydney.
5 Q. Who was present at the testing?
6 A. We had rented a suite of rooms so that there was an adjoining
7 room to the bedroom. I was there, but not in the room with
8 the polygraphist and the subject to be examined. I was in
9 the adjacent room.
10 Q. Did you have an opportunity to speak to either Mr. MacNeil or
11 Mr. Ebsary prior to them going in for the polygraph?
12 A. No, as I recall, the policy was -- at the time is that once
13 the polygraphist had agreed to do an examination that the
14 subjects to be examined were not to be questioned by
15 investigators.
16 Q. Other than the person doing the polygraph test?
17 A. Yes, sir.
18 Q. Do you remember whether or not you went and picked up either
19 Mr. MacNeil or Mr. Ebsary?
20 A. I don't believe I did. I think one of the fellows from G.I.S.
21 picked them up, Sydney G.I.S.
22 Q. Do you remember what Mr. Ebsary was wearing?
23 A. No.
24 Q. With respect to Mr. MacNeil, do you have any idea how long
25 the test took, how long he was in there for?

1 A. The pre-test and test, I would say better than an hour and
2 a half.
3 Q. And what about Mr. Ebsary?
4 A. Probably the same time.
5 Q. Did you have occasion to speak --
6 A. Excuse me, if I might just clarify.
7 Q. Sure.
8 A. I think the rule of thumb for the polygraphist back then was
9 that he wouldn't do any more than two examinations a day.
10 Q. Two examinations of two different people?
11 A. Right.
12 Q. Did you speak to Mr. MacNeil subsequent to the polygraph?
13 A. Yes, I did. Yes, I did, sir.
14 Q. Was there anybody else present during that interview?
15 A. Well, I don't know where Smith was at the time and whether
16 he was there or out getting a coffee or -- but other than --
17 the only other person that could have been there was Smith
18 and I don't know whether he was -- as I say, whether he was
19 there or out getting a coffee.
20 Q. And Corporal Smith had concluded with respect to MacNeil, that
21 he couldn't give an opinion, he gave an indefinite opinion?
22 A. That's right.
23 Q. You say in your report, sir, in paragraph eight --
24 A. Inconclusive I think is what the -- He couldn't say yes or no.
25 Q. Right:

1 And with respect to MacNeil's
test please note Corporal
2 Smith cannot give an opinion
as to whether or not he's
3 telling the truth. Post-
examination questioning leaves
4 no doubt in my mind MacNeil
is not telling the truth when
5 he said Ebsary stabbed Seale.

6 A. Yeh, that's -- that's

7 Q. Well --

8 A. My -- My impression from talking to him, that he was confused,
9 that -- that he wasn't giving -- telling us -- telling me the
10 events as they actually occurred.

11 Q. What made you think that?

12 A. Well, you know, there it is in the statement. I've talked to
13 him after the polygraph and not for a very long period of time.
14 I came to that conclusion and I'm sorry, I -- you know, other
15 than that fact that he seemed to be wandering and whatnot in
16 his speech --

17 Q. Had you not already concluded on November the 17th that
18 MacNeil's account of the altercation --

19 A. Yeh.

20 Q. --insofar as it concerned Ebsary allegedly stabbing Marshall
21 was a figment of his imagination?

22 A. Yes, and if you ask me what -- what was the more important of
23 the two interviews I would have said the first one.

24 Q. What was the point of the polygraph if you had already made
25 up your mind that it was a figment of his imagination?

1 A. Because he was -- he was coming anyway to do Ebsary.
2 Q. Well, I thought your evidence, sir, was that he was coming
3 to do MacNeil and Ebsary?
4 A. Yes. Yes, so he's there and let's do him.
5 Q. And my question though is, if you'd already concluded that this
6 whole thing was a figment of his imagination why would the --
7 what's the importance of the post-examination questioning.
8 You already decided that it was a figment of his imagination
9 six days before?
10 A. Yeh, I wanted to be sure and that's why I had him take the
11 polygraph test, and because the polygraph test was inconclusive
12 I wanted to talk to him again and so I did and for a very
13 short time after the polygraph test.
14 Q. So the polygraph test is inconclusive and all the post-
15 examination questioning does is confirm what you'd already
16 decided six days before. Is that fair to say?
17 A. It confirmed the conclusion that I had come to beforehand.
18 Q. Yes. What about Mr. Ebsary, did you speak to him subsequent
19 to the polygraph, the administration of the polygraph?
20 A. I don't believe I did other than to pass the time of day with
21 him.
22 Q. And why was that?
23 A. Because after Ebsary was finished and I talked to Corporal
24 Smith there was no-- there was no doubt in Smith's mind but
25 what Ebsary was telling the truth so why, you know, go back

1 and talk to him again.
2 Q. Because you've already told us a couple of minutes ago, sir,
3 that the polygraph was only an aid to investigations --
4 A. Yes.
5 Q. -- and it was not the sole thing that you would use.
6 A. Yeh, I know. That's what I said --
7 Q. So why didn't you talk to him?
8 A. -- and that's what I mean but --
9 Q. But that's not what you did and I want to know why you didn't
10 do it?
11 A. Well, you know, I -- the only thing I can say is that because
12 Smith was so positive or the results of Ebsary's test, I should
13 say, as interpreted by Smith were so positive I figured
14 it was game over.
15 Q. Notwithstanding the fact that you knew that a polygraph was
16 only an aid, you were prepared to ignore that and accept the
17 polygraph result --
18 A. Yes.
19 Q. -- as the sole determining factor --
20 A. Yes.
21 Q. -- in decided whether or not he was telling the truth?
22 A. Yep. He was -- that test was so positive that I accepted it.
23 Q. Do you consider that's a good investigative technique, sir?
24 A. In 1987, no sir.
25 Q. Well, you told me a minute ago though, sir, that you knew

1 that the polygraph was only an aid to investigations?
2 A. Yes. Yes, I realise that but you know --
3 Q. How could you --
4 A. -- I made a judgement in 1971 after the test was made that
5 because it was so positive that I would accept that.
6 Q. Had you not already partially made up your mind that the
7 whole story was as you said to us earlier, a cock and bull
8 story and all you needed was--
9 A. I had - I --
10 Q. -- a polygraph to conclude it for you?
11 A. Yeh.
12 Q. Answer, yes?
13 A. Yes, sir.
14 Q. Did Corporal Smith suggest to you that Junior Marshall might
15 benefit from a polygraph test?
16 A. With respect to Marshall being -- the polygraph with Marshall
17 I should leap ahead to events subsequent to the polygraph
18 test. After the test of Ebsary I called Donnie MacNeil
19 and he came to the motel.
20 Q. That's on the same day?
21 A. Yes, sir.
22 Q. Why did you do that? Why did you call Donnie MacNeil?
23 A. Well, --
24 Q. You weren't reporting to him?
25 A. No, I wasn't reporting to him but, you know, he's heavily

1 involved with the case. I came to the conclusion that
2 now was the time to sit and talk with him again -- or
3 talk with him about the case in light of what had happened
4 at the polygraph test so I asked him to come down and he
5 came.
6 Q. Did you call any of your own superiors before you did that?
7 A. No. My own superiors. I think that in the evening before
8 MacNeil arrived Inspector Gardiner, who was the O.C.
9 Halifax subdivision, stopped in at the motel on his way
10 home. He is theoretically, well, he was senior to me
11 in rank even though he was an Inspector. I was sub-inspector
12 you see, and sub-under. And he was interested in the test.
13 Not that he was involved with the investigation or the
14 interrogation or anything else but being an old policeman
15 he -- and not having done many polygraphs, he was interested.
16 He stopped by the motel on the way home and we told him.
17 Then I --
18 Q. That was just happenstance wasn't it?
19 A. Yes, I --
20 Q. Yeh. You didn't report the results --
21 A. No.
22 Q. -- of your test to Wardrop, for instance, before you talked
23 to Donnie MacNeil?
24 A. No, I didn't. No.
25 Q. And when did you call Donnie MacNeil? Pretty shortly after you

1 got the results from Smith?
2 A. Yes, as I recall it's in the vicinity of five-thirty or
3 quarter to six.
4 Q. What did you tell him?
5 A. I asked him -- I told him that the polygraph tests had
6 been completed and asked him if he'd like to come down
7 and discuss them.
8 Q. And did he come down?
9 A. Yes, sir.
10 Q. And was there anybody else there?
11 A. Smith, I and MacNeil -- Donnie MacNeil.
12 Q. Donnie MacNeil?
13 A. Yeh.
14 Q. Tell me what happened at that meeting? What did you tell
15 him?
16 A. Well, Smith did most of the talking with respect to the
17 polygraph results. As I recall Mr. MacNeil wanted to have
18 some more information about how the polygraph worked and
19 I think Smith explained to him the operation of the polygraph
20 and because I wasn't aware of the policy I said to
21 Smith; "Do a quick check on Donnie MacNeil just to show him
22 that the thing works"; which he didn't do of course because
23 that was contrary to policy or whatever. They don't give
24 demonstrations with polygraph and under -- so he didn't do it.
25 Q. Why did you even suggest that to him at this stage of the game?

1 Surely you're -- are you not in a situation where you're
2 reporting to -- you're telling Donnie MacNeil --
3 A. Yeh.
4 Q. -- the results of a very serious matter?
5 A. Yeh.
6 Q. That is that you've concluded that somebody is telling
7 the truth and that somebody has been, in fact, rightfully
8 convicted for a murder offense?
9 A. Yeh.
10 Q. Why would you even get into the --
11 A. He got into it.
12 Q. He got into it?
13 A. He got into it. He wanted to know more about the
14 instrument and how it worked.
15 Q. What did you tell Donnie MacNeil about what you had
16 now concluded?
17 A. Well, I think I said to him, that's, you know, that appears
18 to be it. Ebsary's telling the truth. MacNeil was only
19 50/50 one way or the other and because of the results of
20 Ebsarys tests are so positive that taking into consideration
21 the other matters of the thing having gone through preliminary
22 hearing and court and whatnot and now we're at the stage that
23 Ebsary when he says in his polygraph examination that -- that
24 he's being truthful at the polygraph examination. I said that,
25 you know, that must -- it convinces me that the right man has

1 been convicted.
2 Q. Did you tell Donnie MacNeil at that meeting that other
3 than administer those polygraph tests and review the material
4 that had been given to you and discuss the matter with
5 Sergeant MacIntyre;that you'd done no other investigation at all?
6 A. Yes, I did. Yeh.
7 Q. You told him that?
8 A. Sure.
9 Q. What did he say?
10 A. Well, I think he was impressed with the polygraph results too.
11 Q. Did you indicate to him at that meeting that it is your
12 understanding as a member of the R.C.M.P. that the polygraph
13 was only an aid to investigation?
14 A. I don't think we got into that.
15 Q. You wouldn't have told him that?
16 A. I don't think we got into that.
17 Q. You'd already made up you mind at that point?
18 A. And then -- Do you want me to continue?
19 Q. Yes. Yeh, please.
20 A. And after we talked about this, discussed the case and the
21 polygraph for some time, to the best of my recollection Donnie
22 MacNeil called the Attorney General, Mr. Pace.
23 Q. Do you know for certain whether or not he spoke to Mr. Pace?
24 A. I am not one hundred percent certain. Of this I am certain,
25 he made a long distance telephone call from my room to a person

in the Attorney Generals Department and to the best of my recollection it was Mr. Pace.

Q. And that's based on something Donnie MacNeil told you, is that --

A. Yes.

Q. Okay.

A. The polygraph -- He wanted to report the polygraph results to Mr. Pace.

Q. Tell us what you heard --

A. If that's who it was. Now, I'm about 99 percent certain and don't ask me why but that sticks in my mind. I can remember him making the telephone call. You know, he --

Q. Did you make the call for him?

A. No.

Q. No?

A. He used -- we had sort of a friendly rivalry. He was -- you know, Donnie was sort of a -- he had a sense of humour all of his own in certain circumstances and he would rib me about being from Upper Canada. He was a fiercely proud Cape Bretoner himself and he would rib me about being from -- being one of those guys from Upper Canada and as a matter of fact he was the first one to tell me of Premier Angus L. MacDonald's famous statement about the Mounted Police. I think when the Mounted Police first came to Nova Scotia the great Mr. MacDonald referred to us as those fellows from the

1 west with the strange sounding names. Anyway we had
2 a little bit of a friendly rivalry or camaraderie or whatever
3 and I recall -- the reason I recall him calling long distance
4 is I -- you know, I said to him, don't stick that on my
5 bill and that's why, you know, that sticks in my mind.
6 Q. What do you remember of the call, what you heard of it?
7 A. Well, I don't think I was paying too much attention to the
8 call. You know, it's his call and he's in the corner and
9 he talks to the A.G. or, as I say I'm almost dead certain
10 it was the Attorney General, and hung up and I really didn't
11 want to eavesdrop on -- not eavesdrop but I didn't want to
12 listen particularly into what he said to the --
13 Q. Did you hear anything that you remember?
14 A. I can't recall.
15 Q. Do you remember what he said when he hung up?
16 A. After he hung up?
17 Q. Yes.
18 A. Drive me home, I think. By this time it's getting quite
19 late in the evening and --
20 Q. What time would it have been by then, sir?
21 A. Well, you know, it's in the fall of the year. It was certainly
22 dark. Of course it's dark now at five o'clock or six o'clock.
23 I think it was getting on beyond the normal supper hour --
24 dinner hour, pardon me, because to the best of my recollection
25 and I should have checked this out but I didn't, I think he

1 used to live in a big white house. I'm not exactly sure
2 but it -- a big white house partly on the hill. I think
3 I drove him home. I think Smith and I had supper -- dinner
4 at the -- dinner or supper at the -- at a restaurant on
5 Townsend Street and I think we went right back to home and
6 went to bed -- right back to the motel and went to bed.
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1 Q. Did Donny MacNeil say anything to you after he got off the
2 phone about whether or not anything else had to be done or
3 what --
4 A. No. No.
5 Q. What did he say to you?
6 A. Well, I -- You know, I can't recall what he said. He said,
7 "I told them," and I can recall him being immensely relieved
8 that Ebsary was telling the truth, you know, according to the
9 machine. And then I said -- I think he said, "No, let's go
10 home; it's getting later."
11 Q. Did anybody have a drink at that meeting at all?
12 A. Well, I seem to recall that I did, but Smith doesn't; so it
13 must be my mind that's playing tricks on me.
14 Q. No, not necessarily. That's your recollection that you --
15 A. Yeh. If we had a drink -- Put it this way, I never -- It was
16 not my practice to take liquor to -- on an investigation or
17 to have it there. It was, however, not routinely
18 a fact that I would have a drink before my dinner, you know,
19 like people anywhere. I don't recall ordering any room
20 service, and if we had a drink, I would think that it would
21 be limited to one or two at the outside and that MacNeil
22 must've brought the bottle with him.
23 Q. Is that your recollection?
24 A. Yes, sir.
25 Q. After you dropped Mr. MacNeil off, you went back to the hotel?

1 A. No, I think we went to the restaurant.
2 Q. Went to the restaurant and had dinner?
3 A. Yes, sir.
4 Q. What about Junior Marshall's polygraph? I asked you that a
5 few minutes ago --
6 A. Yeh.
7 Q. -- and I don't think you've answered that.
8 A. Okay. My memory is vague on this. It seems that we -- to the
9 best of my recollection, that we considered doing Marshall some-
10 where along in the bet -- somewhere in the time frame of Smith
11 arriving with his equipment and departing -- somewhere along
12 somebody had suggested -- whether it was me, whether is was
13 Smith, whether it was Mr. MacNeil -- that we do Marshall on
14 the polygraph. I'm vague. I don't really recall this myself.
15 What I do recall is that again somewhere in the piece, Marshall's
16 lawyer had refused us permission to conduct --
17 Q. Do you have any recollection who told you that?
18 A. No, I don't. I'm sorry, and, you know, you asked me this
19 question some time ago and I've done everything except,
20 take hypnosis. I, you know, certainly thought about it
21 first thing in the morning and last thing before I went to bed
22 to rack my brain because this sort of is a very decisive piece
23 of information if this in fact is what happened that Rosenblum
24 was contacted and refused permission. I realize the import
25 of that type of evidence. It changes things.

1 Q. But you can't remember?
2 A. But I can't remember. I --
3 Q. Did you then go back to Halifax the next day -- 24th?
4 A. I can't recall, sir, whether I went back then or the following
5 day or -- I can't recall.
6 Q. Other than writing up your report, which is dated December 21,
7 did you do any further work on the case?
8 A. No.
9 Q. Why is there a lapse of time from the time you left Sydney to
10 December 21, the time when the report was written up?
11 A. Why was there a lapse of time? Well, three weeks is a normal
12 time frame -- Three, three and a half weeks is a
13 normal time frame for submitting reports to the best of my
14 recollection. Now, I think the urgency, if there was any, of
15 writing the report went out of the picture when -- because my
16 boss, Wardrop, knew about what happened. When I got back, I
17 told him the results of the polygraph; so he was -- I don't
18 know if satisfied is the right word or not, but he was aware,
19 and Donny MacNeil certainly was aware and again, I think the
20 Attorney General was aware; so there was no great urgency and
21 whether I was busy on other duties, whether it took sometimes
22 three weeks to prepare, you know, I'm not prepared to say now
23 what it was that -- other than the fact that it was fairly
24 normal in those circumstances to submit a report, you know,
25 about twenty-one days later.

1 Q. The report itself is --
2 A. Because, you know -- Let's remember, too, that I didn't get
3 any direction from either my superior or as far as I know,
4 the Attorney General's Department to, say, submit a report, eh.
5 "What's going on. Submit the report," you know, like you
6 might expect, you know. If there was a lapse in reporting
7 the thing, you know, it's reasonable to assume that if it was
8 a very important matter, that somebody up there would start
9 asking questions. "Where's the report?" you know or "Get in
10 gear, and get this thing done," and --
11 Q. That didn't happen?
12 A. That didn't happen.
13 Q. Did you discuss the contents of your report with anybody in
14 the R.C.M.P. prior to preparation of it other than to tell
15 Wardrop?
16 A. Wardrop. Other than to tell Wardrop, no.
17 Q. Okay. And what was it that you told him?
18 A. Well, basicallly that we had -- the results of the polygraph
19 examination and then, you know, I can't recall exactly how
20 much I went through with him, but the main thing was the poly-
21 graph examination.
22 Q. At the time that you prepared your report, would you still
23 have had possession of the materials that you'd been given
24 by Sergeant MacIntyre?
25 A. No, I recall driving back -- Before I left Sydney, I drove

1 back to -- I drove around the the police station and gave him
2 those materials back.
3 Q. So at the time you prepared your report, you didn't have that
4 material with you?
5 A. I don't know whether I had extracted notes off it or -- But it
6 seems to me that I had given the material back before I left
7 Sydney. Now, I could be mistaken.
8 Q. What's your recollection?
9 A. That's my recollection.
10 Q. You gave it back; so that when you came to prepare this
11 report, which is really quite detailed, on the 21st of
12 December, you were doing that from memory?
13 A. No. No, I said I might've -- I probably made notes off it -- off
14 the material.
15 Q. Okay. So you might've had some notes from the material that
16 you'd been given earlier.
17 A. Yes.
18 Q. I see.
19 A. I think almost assuredly because I couldn't remember all that.
20 Q. What did you do with the report, sir, when you completed it?
21 A. I had the steno -- My secretary typed it. I put a transmittal
22 slip on it and sent it to the C.I.B. office.
23 Q. Would that be your normal practice?
24 A. Yes, sir.
25 Q. Did you hear anything further about your report at that time?

1 A. I heard lots about it since, but I didn't at that time.
2 Q. Well, we'll get to that, but at that --
3 A. Yes.
4 Q. -- time, what would the transmittal slip have said on it?
5 A. Well, it's just a -- Cripes, haven't we got one here? 315011,
6 it's a little form that says from, to, file caption --
7 Q. Perhaps, is that -- If you look on page 201 of that Volume,
8 would that be the sort of thing?
9 A. 201.
10 Q. That's a correspondence. I don't know if that's what you're
11 talking about.
12 A. Yeh.
13 Q. It would be that form of document?
14 A. Either that or a very -- Either that or one about half the
15 size that conveys the same information essentially. We have
16 two different forms.
17 Q. And that particular one is dated the 30th of November and
18 probably the transmittal slip that accompanied Corporal Smith's
19 polygraph test results, which are on the following pages.
20 A. Yeh.
21 Q. Okay.
22 A. From, to --
23 Q. But that would've been the extent of what you would've done,
24 sir? You would've completed the transmittal slip and sent it
25 off to C.I.B.?

1 A. Yeh.
2 Q. And to which person would that've been?
3 A. The officer in charge of C.I.B.
4 Q. And that would've been him?
5 A. Superintendent Wardrop.
6 Q. At the time.
7 A. But the -- Let me say, too, that -- you know, just to clarify.
8 That stuff goes into his mailbox, and he has a chief clerk
9 that sorts it out and all this, that, and the next thing, you
10 know. Whatever that paper trail is, I never got too involved
11 in it ever. I hated paperwork and so exactly how they run the
12 C.I.B. office, I can't swear to.
13 Q. Did Inspector Wardrop ever come back to you and query you about
14 anything in your report?
15 A. No, sir.
16 Q. Did you receive any confirmation that Inspector Wardrop even
17 had the report?
18 A. No.
19 Q. To your knowledge, was the report ever forwarded to the Attorney
20 General's Office?
21 A. I have no direct knowledge of that.
22 Q. Were you ever told it had been?
23 A. Sorry, sir?
24 Q. Were you ever told that it had been by -- forwarded to the
25 A.G.'s Office by anybody?

1 A. No.
2 Q. No? You had no knowledge of it at all?
3 A. No.
4 Q. So it goes --
5 A. And I'll tell you why I assumed that it had, if that's your
6 next question?
7 Q. No, I -- No. It goes out of your office with a transmittal
8 slip, and that's the last you see of it?
9 A. Yes, sir.
10 Q. And you never asked any questions about it?
11 A. No, sir.
12 Q. Can you give us any idea of how much time, not including your
13 travel time or the time you spent sitting around while MacNeil
14 and Ebsary were taking the polygraph -- how much time you,
15 sir, spent personally on this investigation?
16 A. The total time I spent excluding travelling time.
17 Q. Not counting your travels but the actual time --
18 A. Yeh.
19 Q. -- you spent working, going through material.
20 A. Yeh.
21 Q. Andexcluding the time you -- unless you were working when you
22 running the polygraph.
23 A. I would say three and a half or four days.
24 Q. Full working days?
25 A. Yes. Possibly longer. Possibly a little longer.

1 Q. In the years since 1971, have you ever received any direct critism
2 for this report from within the R.C.M.P.?
3 A. No, sir.
4 Q. All right. I'm going to move on to another area and then I'll --
5 whether you want to -- It's going to be some time before I
6 would finish.
7 MR. CHAIRMAN:
8 All right. There's not much point in your moving into another area.
9 There's just one thing I wanted to clear up from this witness at
10 this point.
11 BY MR. CHAIRMAN:
12 Q. Did I understand you to say that you had concluded, based on
13 the polygraph test, that Jimmy MacNeil was not telling the
14 truth, and Roy Ebsary was?
15 A. Yes, sir.
16 Q. Was that the conclusion of Smith?
17 A. I'd have a tough time answering that one, My Lord.
18 Q. Why I ask you that is because --
19 A. Yeh.
20 Q. -- in his report, he says that as a result of his analysis,
21 that he can render no opinion as to whether or not MacNeil
22 is telling the truth.
23 A. Yes.
24 Q. Did you interpret that as meaning that MacNeil was not telling
25 the truth?

1 A. I interpreted it as being a fifty-fifty possibility that he
2 was telling the truth or lying.
3 Q. So the --
4 A. In other words, My Lord, there is a fifty-fifty chance that
5 he was telling the truth, and there's a fifty-fifty chance
6 that he was lying. Does that make sense?
7 Q. It's not for me to respond to that. So that your conclusion
8 was based upon your two interviews, a report that Ebsary was
9 telling the truth, and that there's a fifty-fifty chance that
10 MacNeil was not telling the truth?
11 A. Yes, sir.
12 Q. And that concluded the investigation?
13 A. Yes, sir.
14 MR. CHAIRMAN:
15 Rise until nine-thirty tomorrow.
16
17 INQUIRY ADJOURNED AT 4:29 o'clock in the afternoon on the 18th
day of September, A.D., 1987.
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AA-4 COURT REPORTER'S CERTIFICATE

I, Judith M. Robson, an Official Court Reporter, do certify that the transcript of evidence hereto annexed is a true and accurate transcript of the Royal Commission on the Donald Marshall, Jr., Prosecution as held on the 18th day of November, A.D., 1987, at Sydney, in the County of Cape Breton, Province of Nova Scotia, taken by way of recording and reduced to typewritten copy.

Judith M. Robson
Official Court Reporter
Registered Professional Reporter

Sydney Discovery Services
November 18, 1987