

1 11:56 a.m.

2 MR. SPICER

3 The next witness is Mr. Smith, My Lord. Mr. Smith
4 also has counsel with him, Mr. Gordon Petrie. I
5 understand Mr. Petrie would like to be able to ask
6 questions of his client at some point, and also if he feels
7 it appropriate to object to other people's questions.

8 MR. CHAIRMAN

9 We have no objection to Mr. Petrie appearing for Mr.
10 Smith. He can object if he wishes, but we're not used to
11 objections. We...being so well run, it never...didn't have
12 any valid objections anyway.

13 MR. EUGENE SMITH, duly called and sworn, testified as
14 follows:

15 EXAMINATION BY MR. SPICER

16 Q. Your full name, Mr. Smith.

17 A. My name is Eugene Clarence Smith.

18 Q. And you're a retired member of the RCMP.

19 A. That's correct, sir, I am.

20 Q. Retired in 1979.

21 A. 1979.

22 Q. Right. And you are the RCMP officer who conducted the
23 polygraph examinations on Messrs. Ebsary and MacNeil.

24 A. Yes, I am, sir, right.

25 Q. In what year did you join the RCMP?

- 1 A. I joined the RCMP in 1959.
- 2 Q. As what?
- 3 A. As a Third Class Constable.
- 4 Q. I see. And can you take us through your career with
- 5 the RCMP and the responsibilities that you held along
- 6 the way?
- 7 A. Yes. Following my recruit training in Regina, which
- 8 would have been in 1960, I was transferred to Ottawa
- 9 for a six-month period.
- 10 Q. Are you still Third Class Constable at this point?
- 11 A. After a year, no, yes, I would be until I got there and
- 12 then while I was in Ottawa for six months I'd go to a
- 13 Second Class. That's the way it went in those days.
- 14 Following my six months in Ottawa I was transferred to
- 15 H Division, Nova Scotia.
- 16 Q. Would that be to Halifax?
- 17 A. I spent one year in Halifax Detachment.
- 18 Q. What year would that have been, sir?
- 19 A. That would have been 1960 to '61, and in 1962 I was
- 20 transferred to Bridgetown Detachment. I stayed in
- 21 Bridgetown until 1965. From there I was transferred to
- 22 Stewiacke Detachment.
- 23 Q. As what? What's your rank at this time?
- 24 A. I'm still a constable at this time.
- 25

MR. SMITH, EXAM. BY MR. SPICER1
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Q. Yes.

A. In 1966 I transferred from Stewiacke to Halifax GIS and in 1968 I was promoted to corporal while in Halifax.

Q. During the course of those years would you have been responsible for carrying out investigations yourself?

A. Yes, sir.

Q. Okay. Sorry, 1968 you were on.

A. In 1971 I was identified as a candidate for polygraph training and I went to the National Training Centre of Polygraph Science in New York City.

Q. Is that the Dick Arthur School?

A. That was the National Training Centre of Polygraph Science run by Mr. Richard Arthur, yes.

MR. CHAIRMAN

Where was that?

MR. SPICER

New York

MR. SMITH

New York City.

MR. CHAIRMAN

What was the name of the school?

MR. SMITH

The National Training Centre of Polygraph Science.

MR. CHAIRMAN

MR. SMITH, EXAM. BY MR. SPICER

1 The National Training Centre of Polygraph Science, New
2 York.
3

4 And that was in 1971.

5 MR. SMITH

6 That was in 1971, sir, yes.

7 A. Following that training period I went for a one-month
8 internship with the Michigan State Police.

9 Q. Was that an internship in polygraph testing?

10 A. In polygraph training, yes. And, I was a number of
11 posts throughout the State of Michigan, Lansing and
12 Rockford, Detroit, Jackson.

13 Q. Was that the normal route that one took from that
14 school in New York? They would go off and do a
15 month...

16 A. At that time in the RCMP, yes. That was the normal
17 route. Following my month in Michigan I returned to
18 Halifax for a short period of time and then transferred
19 with my family to Saskatchewan.

20 Q. From this point in time are you solely concerned with
21 polygraph? Is that now your job with the RCMP?

22 A. Yes, absolutely full time. Shortly after my arrival in
23 Saskatchewan I then went for a two-week period with
24 Sergeant W. L. Holmes, who was at that time the force's
25 only other polygraph examiner in Vancouver. And,

1

following that period of in-service training I went
back to Saskatchewan and opened up the S Division
polygraph section out of Regina.

2

3

4

5

Q. What year would that have been?

6

A. That would have been in August of 1971.

7

Q. And did you remain in Regina for the balance of your
career?

8

9

A. No, I stayed in Regina in that position from 1971 to
1977. In 1977 I was transferred to Headquarters Ottawa
and at that point in my career I was promoted to Staff
Sergeant and became the polygraph coordinator for the
entire RCMP polygraph program.

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Q. At that stage of the game were you still administering
polygraphs yourself in 1977?

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A. Not as many as I had been before, but yes, I was doing
a number of tests on...particularly at that time as it
pertained to internal investigations within the force
itself.

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23

Q. Polygraph of other RCMP officers.

24

A. Yes, and cases involving the security service, that
type of work, that branch of the RCMP.

25

Q. That's in 1977.

A. From '77 until I retired in '79.

Q. When we spoke last night you had dug up a couple of

MR. SMITH, EXAM. BY MR. SPICER

1 notes that you had kept over the years, in particular
2 in connection with this incident.

3
4 A. Yes, I did, sir.

5 Q. Perhaps, we'll just introduce those now. Do you have
6 your originals with you?

7 A. Original copies I guess you'd call them, Mr. Spicer.

8 Q. Okay. The four handwritten sheets.

9 A. Yes.

10 Q. Okay. Fine. We've already had these marked, I think,
11 sir.

12 EXHIBIT 92 - FOUR PAGES OF MR. SMITH'S HANDWRITTEN NOTES

13 EXHIBIT 93 - MR. SMITH'S RECORD OF POLYGRAPH EXAMINATIONS

14 Q. Okay. We've had your four sheets marked as Exhibit 92
15 and your other record of the test that you conducted,
16 and I believe it would be Exhibit 93, is that right, or
17 is it 91?

18 CLERK

19 93.

20 MR. SPICER

21 This one is 93, okay.

22 Q. You indicated to us a couple of minutes ago that you
23 were identified as a candidate for the polygraph
24 program in 1971.

25 A. That's correct, sir.

1 Q. How...how was it that you came to be identified as a
2 candidate?

3 A. Number 1, I applied for the position.
4

5 Q. Right.

6 A. There were a number of other applicants across the
7 country, and after some type of an assessment
8 procedure, that was certainly above knowledge, I was
9 identified as the candidate.

10 Q. At the time that you applied for it, Mr. Smith, was
11 Sgt. Holmes already a polygraph person with the RCMP?

12 A. That's correct, sir, he was.

13 Q. And at that time he would have been the only other one.

14 A. Yes, he was.

15 Q. Was polygraph a fairly recent innovation in the RCMP at
16 that time, in '71?

17 A. Les Holmes was trained in 1979 so it had been going for
18 two years.

19 Q. '69.

20 A. Oh, '69, I'm sorry.

21 Q. And would he also have been trained at, I'm going to
22 call it, the Dick Arthur School in New York?

23 A. He took basically the same route that I did.

24 Q. So, he would have gone to New York.

25 A. And Michigan.

1
2 Q. And Michigan, okay. Could you tell us...I want to ask
3 you a few questions about that course in New York.

4 First of all, how long was it?

5 A. It was over a six-week period, Monday to Saturday
6 inclusive. I think if I recall correctly it was
7 somewhere in the area of two hundred and seventy or
8 two hundred and eighty hours or classroom...classroom
9 lectures.

10 Q. That was full-time for that six-week period?

11 A. Yes, it was.

12 Q. Okay. What were the nature of the courses that you
13 took?

14 A. Well, naturally the polygraph instrument itself was
15 gone into in great detail. The psychology of
16 polygraph, the instrumentation of polygraph, question
17 structure.

18 Q. Tell us something about that, question structure?

19 A. Well, the question structure basically dealt with the
20 two, what we refer to in polygraph as the two main
21 types of questions, A...(A) being the crime question
22 and (B) being a control question.

23 Q. Okay. Let's just stop there for a sec. A crime
24 question is a question you ask the subject concerning
25 the actual event that you're investigating, is that

1 right?

2 A. That's correct, sir.

3 Q. Okay. And a control question, and we'll get to this in
4 a little more detail later, is it fair to say that a
5 control question is a question that is asked generally
6 about the same subject matter. In other words if the
7 crime question is about murder you're going to ask
8 him...

9 A. That's correct, sir.

10 Q. Okay. But not related to the specific incident in
11 question.

12 A. Exactly.

13 Q. Okay. Tell us what you were taught about those sorts
14 of questions at the school?

15 A. The control question.

16 Q. Uh-hum.

17 A. Well, there were a number of types of control question,
18 but the most commonly referred to control question is
19 what Dick Arthur referred to as a known lie question.
20 In other words, it's a question that you've introduced
21 into the polygraph procedure at a given junction in the
22 procedure, that hopefully the subject will be lying to.
23 In other words, it will show some type of anxiety to,
24 hence the name "known lie question."
25

1
2 Q. Okay. We'll get...as I said a minute ago, I'll get
3 into some more detail about that later. But for the
4 moment can you give us an example of what a control
5 question might be say in a murder case? If you're
6 doing a polygraph on somebody who you suspect is...

7 A. Well, in a murder case it would have to be something, if
8 you were asking a subject did he...did he stab Joe
9 Smuck, you would have to have your control question in
10 relation to that crime question, of similar content.
11 In other words, something similar to hurting someone,
12 killing someone, wishing someone might die, commit a
13 serious crime, something in that area.

14 Q. Now, are you hoping that the person will lie in
15 response to that question, the control question?

16 A. You're more than hoping. You're...if you do your
17 procedure properly and it's properly introduced during
18 the pre-test interview you've got to be relatively
19 satisfied in your own mind that, yes, (A) he will be
20 lying to it.

21 Q. And if the person lies to that control question then in
22 summary is what you have a situation where he expresses
23 a degree of anxiety through his physiological responses
24 to the control question and another level of anxiety in
25 response to the crime question, you measure...you

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compare.

A. Compare the two, that's correct.

Q. Okay. And is that what you learnt when you were in New York City?

A. That among...amongst other things, yes.

Q. Okay.

A. There are other techniques that are relevant-irrelevant technique which we touched on very briefly, but it's not one that I ever practised or the school practised but...

Q. Right. And that's another method of...

A. You get both.

Q. ...administering polygraph.

A. Totally different altogether.

Q. One that was not in vogue certainly when you were with the RCMP.

A. One that we never used.

Q. Never used, okay. Did you get any instruction in physiology?

A. Yes, there was certainly basic coverage of physiology, the make up of the body, what happens in a situation of stress, what these physiological responses result from, how they're transmitted through the equipment and are naturally drawn out by the various components on your

1 continually flowing chart.

2
3 Q. Okay. What other sort of things did you, were you
4 taught when you were in New York?

5 A. There is a fair amount of time spent in that particular
6 course on pre-employment polygraph testing. Again,
7 that is any area that we in the Mounted Police did not
8 use and...

9 Q. It's an industrial use essentially.

10 A. That's an industrial use, yeah. And, I never used it
11 in the Mounted Police and have not used it since.
12 Naturally with the...with the instrumentation and
13 running of polygraph, depending upon the person's
14 results, there is a fair amount of interrogation that
15 is actually built right into the technique of polygraph
16 itself.

17 Q. And were you given courses then in that as well,
18 instruction?

19 A. It was certainly there, yes. The primary object of the
20 course wasn't to instruct interrogation. That wasn't
21 what it was geared for. But there is a certain amount
22 of subtle interrogation during the setting up of a
23 polygraph examination.

24 Q. And to some extent it's the case, isn't it, that
25 polygraph is used as a confession-inducing device, or

1 | it has been used for that purpose?

2 |
3 | A. Well, of course, that's not your primary objective when
4 | you start a polygraph test really. If the subject is
5 | truthful, there's no interrogation, there's no
6 | interviewing basically following the test. If the
7 | subject is deceptive naturally you do it into a subtle
8 | interrogation afterwards because you're there for that
9 | purpose to determine the truth.

10 | Q. And if you happen...

11 | A. And as an investigative aid you'd be very amiss if you
12 | didn't.

13 | Q. Right. And if you happen to get a confession so much
14 | the better.

15 | A. Well, that's correct, certainly.

16 | Q. Okay. You indicated to us that after you had spent
17 | your six week in New York you went off to Michigan. At
18 | what point in time do you actually get...do you get a
19 | diploma or certificate, something from the school?

20 | A. You...at the National Training Centre at that
21 | particular time, in 1971, there was an internship
22 | before certification, in other words before the diploma
23 | was granted, and it basically was that you had to
24 | complete fifty polygraph cases. Each one of those
25 | cases had to be packaged up, shipped off to New York

1 where they were reviewed by the National Training
2 Centre of Polygraph Science and then eventually
3 returned to you. Of course, they were critiqued,
4 criticized, marked up, down, whatever.

5 Q. Right.

6 A. And, following that juncture if they were satisfied
7 that you were, (A) following the procedures that were
8 taught at the training centre, you would receive your
9 certification.

10 Q. And if they weren't satisfied presumably you wouldn't.

11 A. Yes.

12 Q. Okay. And in this particular case, jumping ahead a
13 little bit, you were still in the interning period at
14 the time that you administered the polygraph to Ebsary
15 and MacNeil, is that true?

16 A. In...when these tests were administered.

17 Q. Yes.

18 A. That's correct, sir.

19 Q. Okay. So that these tests, in particular, on MacNeil
20 and Ebsary would have been tests that would have had to
21 have been sent back to New York to the Arthur school.

22 A. Absolutely, yes.

23 Q. And, I take it that you were successful and did get you
24 certificate at some point.
25

1 A. Yes, I did.

2 Q. Do you remember when that occurred?

3 A. It would have been sometime in the early part of 1972
4 or late '71, somewhere in that area, December,
5 January, December '71 or January '72.

6 Q. But sometime fairly shortly after you had administered
7 fifty tests, is that the...

8 A. Correct.

9 Q. Okay. And if...Exhibit 93 is an indication of your
10 examinations.

11 A. Pardon me, Mr. Spicer, but which one is 93 now?

12 Q. Sorry, 93 is this one here.

13 A. Okay, great.

14 Q. I believe you had indicated...Exhibit 93 is your record
15 of the polygraph examination, is that correct?

16 A. That's correct, sir, yes.

17 Q. Okay. And the figure on the left-hand side of the
18 page, examination number, would that be your actual
19 examination. That's in other words, MacNeil would be
20 51 and Ebsary would have been 52.

21 A. 51 and 52 respectively of the polygraph examinations
22 that I had administered, personally myself.

23 Q. Okay. And are you still saying that those two in
24 particular, 51 and 52, would have been sent back to New
25

1 York?

2 A. Yes.

3 Q. So, it would have been...it's about fifty that got sent
4 back then, is that right?

5 A. No, you're misunderstanding, I think. The cases, not
6 tests.

7 Q. Oh, it's cases, okay.

8 A. If you go to the second file you'll see polygraph file
9 number, that particular one was 71 and poly 25.

10 Q. Right.

11 A. I was still in internship with them until I got to 71
12 poly 50.

13 Q. I see.

14 A. And the reason your numbers are different because you
15 run many tests sometimes on an individual
16 investigation.

17 Q. Okay. So, it's not fifty polygraph examinations, it's
18 fifty different cases regardless of how many polygraph
19 tests there has been.

20 A. That's correct, sir.

21 Q. Okay. Now, in 1971 what uses was the polygraph being
22 put to by the RCMP?

23 A. The only use that I know the polygraph has ever been
24 put to by the RCMP is an investigative aid on criminal
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or on internal investigations.

Q. Would it be the sort of thing that you would expect to be the sole investigative tool in any investigation?

A. No, definitely not. The polygraph was then and, as far as I know, is still now considered to be an aid to an investigation and certainly not a substitute for an investigation.

Q. Uh-hum. Have you had occasion over the years, sir, to lecture on polygraph?

A. Yes, I have.

Q. And to what sorts of organizations?

A. Mainly within our own...without our own confinement of the RCMP, although I have...I have lectured on occasion at Dick Arthur's school in New York years later, and I've also lectured at the Canadian Police College Polygraph School in Ottawa.

Q. And is one of the points that you would make during those lectures is that the polygraph is, in fact, merely an aid to investigation and not a substitute?

A. Absolutely.

Q. And in 1971 there would have been, once you got on stream, two people carrying out polygraph testing in the RCMP, yourself and Holmes?

A. In 1971 that is correct.

1 Q. Right. Was the size of that polygraph force added to
2 over the years, get more people?

3 A. Yes, when I...when I retired from the force in 1979,
4 just to give you an example, when I was coordinating a
5 program in Ottawa I had at that time eighteen
6 polygraphers under me, not including myself of course.
7 So how many are in the course today I can't tell you.
8 But in '79 there were eighteen.

9 Q. In '71 there were two. What about 1972?

10 A. Well, if my memory serves me correct, in '72 there was
11 another one added in Vancouver, which made three. '73
12 there was one went to Manitoba, one came to Nova Scotia
13 and then from there on in the thing sort of snowballed
14 and ended with the eighteen. I would say there were
15 eighteen probably as early as '77.

16 Q. Over the years how many polygraph tests do you think
17 you've administered yourself in your career?

18 A. I would say roughly somewhere between eight hundred
19 and a thousand.

20 Q. Did you know Inspector Marshall?

21 A. Yes, sir, I do.

22 Q. Prior to...prior to the...

23 A. Yes, sir.

24 Q. Events in November, '71. And in what context did you
25

1 know him?

2 A. I worked for Inspector Marshall.

3 Q. You worked for him.

4 A. For him. When I was transferred from Stewiacke to
5 Halifax GIS in 1966 Al Marshall was the Staff-Sergeant
6 in charge in that particular unit, and I worked
7 directly under him, I would say probably for about
8 three years, and I feel that it was somewhere in that
9 area that he was commissioned and was taken out of that
10 particular element of the RCMP.

11 Q. During that period of time did you have any opportunity
12 to work side by side with him in respect, for instance,
13 of questioning witnesses?

14 A. To work side by side I'd have to say no. To work in
15 conjunction with having him as a supervisor or a
16 manager naturally yes, because I answered...I answered
17 to him. But to actually go out and do investigations in
18 the field as I was doing at that time, no, I can't
19 recall of working with him.

20 Q. Did you form any impression during the time that you
21 worked for him of his competence as an investigator?

22 A. Knowing his competence as an administrator and an
23 manager, which I held him in high regard, I would have
24 occasion from time to time to sit down with him to
25

1 discuss various files, and I would have to say yes, I
2 would...I would be impressed with the questions
3 pertaining to a particular file that he might come up
4 with or an avenue of investigation to explore.
5

6 Q. Let me ask you about that for a minute. When you did
7 sit down and have discussions with him concerning files
8 would he be probing what it is that you had done in any
9 particular investigation to make sure you had done your
10 job or...

11 A. He wasn't the type of NCO that was totally on our back
12 with unnecessary questioning, but he certainly wanted
13 to be kept abreast of what was going on in the
14 investigation.

15 Q. And would he...would you get the impression during
16 these discussions that he wanted to satisfy himself
17 that all the avenues were being explored?

18 A. Exactly.

19 Q. Okay. Now, I'll just refer you to Exhibit 92, sir,
20 which is your other four pages of notes. I just want
21 to...

22 A. You grouped them all as one, as 92.

23 Q. They're all one now, yeah.

24 A. Great.

25 Q. And they're... How did you first become involved with

1 this particular investigation?
2

3 A. Well, I have a habit of keeping, I guess I'm a bit of a
4 packrat, keeping notes. I have my notes going back to
5 1966.

6 Q. Oh, yeah, let me just advise counsel of what the order
7 of these pages is. One, two, three, four. So you go
8 across the page and then down and across. Okay.

9 A. Now, the particular notes on this time if you look at
10 the one with the 17th of November, '71.

11 Q. Right, the top left hand...

12 A. About half way down the page. This is the type of
13 notes that I kept when I was on polygraph, not doing
14 the investigations as such at that time, they're
15 naturally not in as much detail as my notes prior to.
16 Basically it was to let me know where I was because I
17 was traveling all over Canada and it let me know where
18 I was at what particular time and what I was doing. On
19 that date, November the 17th it says, "Tested, Hanley
20 Detachment". Hanley Detachment was a small detachment
21 just south of Saskatoon. "7:30 a.m. to 4:30 p.m.
22 Returned to Regina." At the bottom of that page you'll
23 see "Call from Inspector Marshall re polygraph exam H
24 Division."

25 Q. Now, if I could just stop you there. Do you have any

1
2 recollection of the substance of that conversation at
3 this time?

4 A. Yes, I talked to Inspector Marshall on the phone and he
5 basically told me that he had a particular situation
6 that he felt the polygraph could be of assistance to
7 him. He gave me the details briefly and...

8 Q. Can you tell us now what...what it was, what the
9 situation was that he thought required the polygraph
10 and what the details were that he gave you?

11 A. I can't give you the details, no, but what he basically
12 said was he had a situation on a murder investigation
13 done in Sydney where there had been a conviction
14 registered and following the conviction someone else
15 had come forth and said the wrong guy was convicted,
16 somebody else did the crime. And, quite frankly that's
17 what I remember of it. It was an unusual request
18 because it was the policy of the RCMP at that time, the
19 polygraph was not used following the laying of a
20 charge. In other words, it was our view that if a
21 policeman had reasonable and probable grounds to
22 believe an offence had been committed and he laid an
23 information it was then up to the court to decide as to
24 the truth or the innocence, the guilt or the innocence,
25 pardon me.

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Q. Um.

A. So, for that reason that policy was in place, and because of that you will see later on in my notes that I did make a call to Les Holmes in Vancouver before I departed Regina for Nova Scotia.

Q. Where do your notes indicate that?

A. If you go over to the one at the top of the page it says, "20th, 21st of November, '71."

Q. Yes, the bottom left-hand corner of the one.

A. It showed "Weekend off".

Q. Right.

A. Underneath that it has, I have the dates of the May seminar that I was going to attend in New York in '72 and then you'll see about halfway down, "To office during the p.m. of 21st," which would be Sunday, "Called Southey Detachment re polygraph examination and called Sergeant Holmes re Nova Scotia test."

Q. Now, why would you call him?

A. Basically because I felt the nature of the request from H Division was unusual in that it would...if we did get involved with polygraph it would be a...basically contrary to what the present policy way, if you took the policy to the letter of the law. So, I can't tell you what the discussion was Sergeant Holmes. My memory

1 is not that clear.

2
3 Q. Apart from the fact that administering this polygraph
4 you thought perhaps violated the policy, was there
5 anything different about the way that you would have to
6 administer the polygraph test itself because of the
7 fact that you were in a circumstance where there, in
8 fact, had been a conviction?

9 A. I couldn't see any but I...I probably discussed that
10 aspect with Sergeant Holmes, although I can't
11 definitely recall that.

12 Q. Okay. So, you leave for Sydney and Halifax and perhaps
13 you could direct us to that portion of the notes?

14 A. Yes, continuing down that page, "22nd November, a.m.,
15 left Regina, Air Canada flight, 9:00 a.m., for Halifax
16 and Sydney. Arrived Sydney late p.m." Basically with
17 the assistance of those notes it tells me that I flew
18 from Regina to Halifax, I met Inspector Al Marshall at
19 the airport in Halifax. We continued on a later flight
20 to Sydney.

21 Q. Are you able to tell us today whether you discussed
22 this case on the way up from Halifax to Sydney with
23 Inspector Marshall?

24 A. Oh, there's no doubt the case was discussed, we sat on
25 the plane together.

1
2 Q. Did Inspector Marshall offer to you at that time his
3 views concerning whether or not that Jimmy MacNeil was
4 telling the truth?

5 A. I guess to the best of my recall I would have to say he
6 was sceptical.

7 Q. And in what way did he express that scepticism, or do
8 you remember?

9 A. Simply that he had...he had reviewed the investigation
10 and saw no conflicts in statements or evidence that was
11 there, reviewed the proceedings at the trial and
12 mentioned to me that it was Judge Louis Dubinsky that
13 heard the case.

14 Q. What was the significance of that to him or do you
15 know?

16 A. Only in that I feel that Inspector Marshall, the same
17 as myself, held Mr. Dubinsky in high regard as a Judge,
18 and of course he knew that I had a number of cases
19 before Mr. Dubinsky, that we had been involved in in
20 Halifax GIS and I think that's basically why he
21 mentioned it. And, that he saw nothing in the...in his
22 review to indicate that the decision of the court was
23 in error.

24 Q. Would you have had the impression then by the time you
25 got to Sydney that it was his view that it was unlikely

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that MacNeil was telling the truth?

A. I would have to say that, yes, but bear in mind that's not unusual.

Q. Um.

A. That happens in many, many cases in investigations and you end up turning investigations around.

Q. And is it not unusual for you, as the polygraph person, to be aware of the fact that the investigator really doesn't believe the person he's about...

A. Certainly I'll listen to him, I'm a good listener. I'll listen to that type of thing. Whether it has a bearing on what the end result is going to be I'd have to say, no, it doesn't. But I'll certainly listen to what they're saying and their reasons for saying what they're saying.

Q. And is it also the case then that it wouldn't be unusual in your experience for the original investigating officer to indicate to you that he really didn't believe the guy anyway?

A. I...I missed you there, I'm sorry.

Q. Well, you indicated to me that Inspector Marshall would have indicated to you that perhaps he thought it was unlikely that MacNeil was telling the truth and I'm just trying to get a sense from you as to whether or

1 not that's the sort of information that wouldn't be
2 unusual for you to get from other investigators in
3 other cases.

4 A. That's right. It's not, you know, I don't put it in
5 the category of need to know, but it's nice to know.

6 Q. Why is it an advantage to you to know that?

7 A. I don't say that's an advantage.

8 Q. Uh-hum.

9 A. It's just...

10 Q. I'll use your word then, why is it nice to know?

11 A. Well, you take two pieces of information, you have
12 information that you have to know and then you have the
13 frivolous stuff that I call it's nice to know.

14 Q. Right.

15 MR. PUGSLEY

16 What was the phrase?

17 MR. SPICER

18 Nice.

19 MR. PUGSLEY

20 What's called nice?

21 MR. SMITH

22 Well, frivolous, opinions and views.

23 Q. Frivolous is nice.

24 A. That you don't need to know.
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MR. SMITH, EXAM. BY MR. SPICER

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Q. That you don't, but it's nice to know.

A. Yeah.

MR. CHAIRMAN

On that note we will adjourn.

INQUIRY ADJOURNED TO 2:00 p.m.

1
2 2:07 p.m.

3 Q. Before we broke at lunch time you were indicating to us
4 that Inspector Marshall had given you some indication
5 of his views concerning MacNeil, the likelihood that
6 MacNeil was telling the truth. Were you satisfied by
7 the time you got to Sydney that you were aware of what
8 investigation Inspector Marshall had done to that point
9 in time.

10 A. No, not by the time we got to Sydney because we didn't
11 discuss the case in any great deal going down on the
12 plane. But the following morning, you see, I had a
13 problem with my baggage that night, it didn't arrive,
14 part of my equipment was not available first thing in
15 the morning, so we were rather late in getting started
16 as far as the actual polygraph test goes. And over
17 breakfast and back in the motel room, prior to the
18 testing, we had further discussions on the particular
19 matter.

20 Q. Can you tell us today what it was that Inspector
21 Marshall told you?

22 A. No, I honestly couldn't give you any definite words of
23 what Inspector Marshall told me. I guess he basically
24 answered anything that I had put to him as far as the
25 review that he was undertaking and I might add, that

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was my impression of what he was doing, was a review of this new evidence following the trial.

Q. What sorts of questions would you put to him, would you have put to him concerning that...

A. Basically, I was interested in what, the two people in question were MacNeil and Ebsary. What their version of the, what I refer to as the case facts, or the investigative facts. I don't recall reading either one of their statements. I certainly read no statements and saw no part of the Sydney City Police file. And if my memory is correct anything that Al Marshall gave me was verbally, such as what was MacNeil saying, what took place, was Ebsary denying it, how was he denying it and whether or not he had reviewed the Sydney City Police file to be satisfied in his own mind that there were no great discrepancies in what was there. And that was basically it.

Q. Did you have the impression at that time, that is prior to the administration of the polygraph test, that Marshall had interviewed Ebsary?

A. I don't know whether he did or did not.

Q. Did you have the impression that he'd interviewed MacNeil?

A. I felt that he'd interviewed MacNeil.

1 Q. Did you discuss the case with anybody other than Al
2 Marshall prior to the administration of the polygraph
3 test?

4 A. No, I did not. If I might back up there, Inspector
5 Gardiner of the OC of Sydney Division, at one stage of
6 the game prior to the test starting, was in the motel
7 room. But I don't recall getting into any discussions
8 about the case with him. If you look in one of the
9 exhibits you will notice that on the morning of the
10 24th I have "Sydney area - Talked to members of Sydney
11 Subdivision on polygraph."

12 Q. This is Exhibit 92, your own notes you're looking at.

13 A. Yes.

14 Q. That's the day after, isn't it.

15 A. That is the day after but that particular morning, the
16 morning of the 23rd, he brought that subject up because
17 that certainly wasn't in my itinerary to do. And he
18 said if you have time while you're in Sydney could you
19 do that because the members in Sydney were rather
20 foreign to polygraph and basically that was the
21 discussions I had with Inspector Gardiner.

22 Q. And your note on the 23rd says, "9 a.m. to 9 p.m... (is
23 that it?) ran two subjects on murder investigation."

24 A. That's correct.
25

1 Q. And that would this Ebsary and MacNeil.

2 A. Yeah.

3 Q. Is it important for you as the person administering the
4 polygraph to get accurate information regarding all the
5 available facts and the circumstances before you
6 administer the test?

7 A. It's important to get as much as you can, yes, from the
8 investigating officer and group that together with what
9 you glean from the subject doing a pre-test interview
10 to make sure you're getting the proper question
11 structure.

12 Q. Perhaps prior, before we get into discussion of the two
13 specific polygraph tests, I'd like to ask you a few
14 general questions about how the polygraph itself works.

15 A. Yes, sir.

16 Q. What is it that the polygraph machine measures?

17 A. The polygraph instrument measures physiological
18 responses of the subject that emanate from his body in
19 a situation where questions are being put to him on, in
20 a structured test.

21 Q. And, specifically, what physiological responses are
22 measured by the polygraph machine?

23 A. The three basic units on that piece of equipment that I
24 was using at that time were the pneumograph. A
25

1 pneumograph is dividing into two, a upper and lower
2 pneumograph tube, which record the subject's
3 respiratory rate. The cardio cuff which goes on the
4 arm records the person's cardiovascular system...

5 Q. The blood pressure?

6 A. Pardon me? Yeah, the actual blood pressure, the actual
7 heart beat, tracing of the heart pattern. The galvanic
8 skin response is measured through two metal plates that
9 are attached to the forefinger and the ring finger of
10 the left hand and they're recorded on a separate pin on
11 the polygraph.

12 Q. What is it that that latter one is actually recording?

13 A. It's recording sweat.

14 Q. Sweat?

15 A. The amount of sweat that emanates from one's pores in a
16 situation of stress.

17 Q. And quite apart from the question of the structured
18 questions that are asked, is it fair to say that the
19 idea is that the measurement of these physiological
20 changes produces an improvement in the ability to
21 differentiate between deception and truthfulness?

22 A. That's correct.

23 Q. You have a machine, you've got somebody hooked up to it
24 and he's having these physiological responses, how do
25

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you then gauge whether or not his responses are true or deceptive?

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A. To the crime questions. We had mentioned control questions before lunch. The first in the structured sequence of questions are control questions and crime questions. The general rule of thumb is that if a person is truthful to the crime questions you will have a greater physiological response recorded on the chart at the point of the control questions.

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Q. Why is that?

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A. Why is that? It's basically where the individual's psychological set is. In other words, it's the question that represents the greatest danger to his well-being.

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Q. And as you told us before lunch, the control question is the one that, in order to, for this system to work, he's got to lie to, is that correct?

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A. Ideally, yes, he should be lying to that control question. And if it's properly structured in the pre-test interview, now bear in mind, you just don't bring him in a room and set him down and start throwing a bunch of questions at him. It's a structured program. And if those control questions are properly introduced, if you're doing your job properly and reviewing the

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1 control questions with him and convince him that those
2 control questions are every bit as important as the
3 crime questions, in other words, it's crucial that he
4 tell, it's important that he tell the truth to every
5 question on that particular examination.
6

7 Q. And this is what you're telling him during the pre-
8 test?

9 A. Pre-test interview, that's correct, at one juncture of
10 the interview. Then you should come away, at that
11 particular time, leaving him with some doubt in his
12 mind about whether he's being truthful or not being
13 truthful to those control questions. And the rule of
14 thumb is that if you, in this particular case, if
15 you're doing a murder, we'll say, and you've asked him
16 did he stab Joe Schmuck or whatever, if you also have
17 directly beyond that question, or in front of it,
18 depending upon your test structure, a control question
19 relating to that same issue, in other words, "In your
20 entire life did you ever wish anyone you know would
21 die?", depending upon what his response to that was
22 when you programmed the question, and if he said,
23 "Well, yes, I had a school teacher one time... well,
24 okay, other than that's there's no one else...", in
25 other words, you shut him off from basically bleeding

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himself dry of emotions of that particular question.

Q. In other words, if I could make sure I'm understanding what you're saying. You want to leave the subject in a situation where he's still got something to lie about.

A. Something to be concerned about with that question.

Q. With respect to that control question.

A. That's correct.

Q. So you then structure it, do you have a series of control questions or would there be just one in the course of a test?

A. No, in that particular test that I was running, and I can speak with some certainty on it because I was still under my internship and certification program from N.T.C. so everything had to be basically structured the same, there would have been four control questions and four crime questions. Two of the control questions are what Arthur refers to as "known lie" questions. One is a question that he uses in his systems called a "known truth" question and the other is a questions that he refers to as a "AGC" or a guilt complex question.

Q. What does that mean, those two categories?

A. A known truth question, again, is a question that you know the subject is telling the truth to. And you introduce it in the pre-test interview in such a way

1 that you know in your own mind that the subject will be
2 telling the truth to that question. That question is
3 structure, although he does not necessarily know that
4 you know that. And that question is structured and
5 placed in the procedure as the first time in the series
6 of questions that you are going to mention anything to
7 do with the crime, knowing that you know the subject is
8 telling the truth to that. That bleeds off, possibly,
9 some responses that would come from the person that may
10 be a bit nervous, a bit uptight. You maybe haven't
11 relaxed to the point that you should have.

12 Q. Would you expect a subject to demonstrate some anxiety,
13 notwithstanding the fact that they're telling the truth
14 in responding to the known truth question?

15 A. Run that by me again, sir, please?

16 Q. Well, what's the point of a known truth question in
17 terms of...

18 A. It's basically a question for him to respond to. It's
19 put in there basically for the truthful person. It's
20 the first time the crime or the subject's name that's
21 involved in the crime may be mentioned. And it's
22 basically a control question to bleed off that
23 physiological response that may be there because it's,
24 "Oop, there's that name", the first time it's mentioned
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and it's placed at the very start of the test.

Q. Because he's anxious anyway.

A. That could well be.

Q. All right. So there's that, then there's the general control question and then you mentioned another category to me...

A. There's that, there's the two known, what I refer to as known lie questions...

Q. Right.

A. Guarantees. And then there is an AGC, what Arthur refers to in his technique as an AGC, or a guilt complex question.

Q. What's that all about?

A. That's another question which is introduced to him in the pre-test interview. Basically, again, it's a question that, in all probability, he'll know the truth to and you'll know that it's a question that the subject is telling the truth to and it's programmed down toward the end of the chart as opposed toward the front in a series of questions. It's just another area where the truthful person can seize upon to react as opposed to the crime question.

Q. Would it be a question related to the crime itself?

A. No, but it would be a similar in content. Similar type

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question in content.

Q. And what is it that one would expect, let's take the truthful person to start with. What is the relationship that you would expect to see between in response to the control question and a response to the crime question?

A. Ideally, if the person is truthful to the issue that's being tested, he's being examined on, he should have responses on these control questions. And when I say control questions I mean the known truth, the AGC and the known lie question. His responses to those control questions should be greater than his responses to the crime questions.

Q. And when you're saying his responses should be greater, you mean the degree of physiological change demonstrated on the machine would be greater in the case of the control question...

A. At the point of those questions.

Q. Okay.

A. Following the asking of the question.

Q. And the person who's not telling the truth?

A. Conversely is true. If the person is not telling the truth he should skip over the control questions and his responses will be at the crime questions.

1 Q. So would the person who's being deceptive, the
2 response, according to the theory, should be greater to
3 the crime question than to the control question because
4 that's what he's really worried about, isn't he?

5 A. That's correct. That represents the greatest amount of
6 danger to his well-being.

7 Q. Is it fair to say, then, that in order for this to
8 work, the control questions have to be pretty good.

9 A. Extremely important. If you don't have proper control
10 questions, you're probably in difficulty and that's why
11 you may end up with indefinite opinions.

12 Q. And if you don't have decent control questions then you
13 don't, then you can't measure the difference properly
14 between the control question and the crime question.

15 A. It certainly wouldn't be as reliable, no.

16 Q. How do you come up with the control questions?

17 A. As I said this morning, the control question has to be
18 a question that's similar in content, it's got to be
19 answered with the same answer, either "yes" or "no".
20 In other words, if the subject is answering "yes" to
21 the crime question, the control that's directly behind
22 it or directly in front of it, he should also be
23 answering "yes" to and vice versa. And you come up,
24 you say, how do you come up with it, you basically
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MR. SMITH, EXAM. BY MR. SPICER

1 program the individual during the pre-test interview,
2 we've got the horse ahead of the cart here, a little
3 bit, in that, number one; the first thing you do when
4 you sit down with him is have a permission form signed.
5 Secondly; you go into what I call a "background form",
6 it's referred to as a background form, and that
7 background form can take as long as 20, 25 minutes,
8 maybe even a half an hour to complete.

9 Q. Is that a check list to some extent?

10 A. No, it's a prepared background form where you go into
11 the subject's background, his education, his work
12 habits, his likes, his dislikes, his family. Whether
13 he's married, whether he isn't married. What his
14 habits are. What he does in his spare time. What his
15 hobbies are. Likes, dislikes, this type of thing. And
16 that background form, there's no question about it, has
17 a number of purposes. But it, first of all, it gets
18 you right early in the program to have an opportunity
19 to get to know that individual. It gives him the same
20 opportunity, to get to know me, because he hasn't met
21 me before. And quite often, as I say, it can go a half
22 an hour because you may get into some areas in there
23 where there's some common bonds between you and him.
24 He may be a downhill skier, you may be a downhill skier
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MR. SMITH, EXAM. BY MR. SPICER

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and, of course, you'll relate that and you'll build up confidence in one another, basically.

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Q. What's the purpose of trying to build up his confidence?

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A. Number one, the subject is going to be put at ease that way if he knows who he's dealing with. Ideally, he'll form a favourable opinion of the examiner. If the subject does not like the polygraph examiner, if there's animosity built up you're not into a healthy situation because, again, you're measuring emotion on the polygraph charts itself and how you differentiate between the emotion of anger, animosity, fear, so it's very important.

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Q. How do you differentiate between those?

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A. It's important, pardon me?

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Q. Can you differentiate between those emotions on a machine?

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A. You can if everything is correct. You can't look that chart and say, "Oh, that's anger, that's fear." But if you've done your job properly in programming that pre-test interview, and all things being equal, bearing in mind that each test is only going to take a very short period of time, and say, two, two and a half minutes, in that area, depending on what type of test you're

1 using, because you're spacing your questions 15, 20
2 seconds apart, you may go a little bit one way or the
3 other, but that's generally the 20-second rule, and
4 bearing in mind that his temperament does not change
5 all that much during that short test structure period,
6 there's not a lot of things being said, there's nothing
7 being said that's going to change it other than the
8 questions that are being asked of that particular
9 individual. So if he has at the start of the test
10 something that's bothering him, unless something
11 drastic happens during the course of that chart, he's
12 going to be basically the same individual at the end of
13 the chart. So it should not be a problem. Of course,
14 the background form is important, too, because you go
15 into his medical background to determine whether he's
16 having any type of physical problems. Whether he's on
17 any type of medication. And if he's on medication has
18 he taken it that day, this type of thing. Because
19 that, of course is important. And following that
20 background form you then give the subject an
21 opportunity to tell you his version of why he's there.
22 What's this all about. And, of course, he will then
23 relate, as best he can, his knowledge of the particular
24 issue at hand.
25

MR. SMITH, EXAM. BY MR. SPICER

1 Q. And how does this relate to the development of the
2 control questions in any particular case?
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4 A. Well, I'm just, it really doesn't...

5 Q. Okay.

6 A. Okay. But I'm just leading up to that point because I
7 felt we're going to get here the same way.

8 Q. Yeah, we are.

9 A. Following the, what we refer to as his version of the
10 facts, he then is given a basic run-down on how the
11 polygraph works. What the components are. Where they
12 go. You can, may even place them on his body to get
13 him used to them once, take them off again, as you
14 explain the incident to him. You then get into the
15 area of, as I call, programming the controls. The
16 known truth, the AGC and the known lie. And the known
17 lie question is programmed in a very specific manner in
18 that perhaps back on the background form that he said
19 he was raised by his parents, by his mother and father,
20 you can relate back to that, that he was raised by both
21 parents. You'll always determine which parent he may
22 have gotten along with better, one or the other, and,
23 of course, that's the parent that you will relate to.
24 You explain to him that there's a number of things that
25 are important during the course of the test, but

1 something that's really important is that he tell the
2 truth. And that what is really going to make the
3 polygraph function in a way that it's going to enable
4 to me to formulate an opinion, is that he must be able
5 to know that he's telling the truth without having
6 guilt feelings because guilt feelings can cause a
7 problem, unwarranted guilt feelings. And you explain
8 to him, for that reason, along with some crime
9 questions that are in the test structure, there will be
10 some other questions because you were raised by your
11 parents. "You were taught right from wrong, is that
12 not correct?" Most people will say "yes, their parents
13 taught them right from wrong." "They taught you it was
14 wrong to lie, cheat, steal." Whatever control
15 questions you're going to use, in this case, if it was
16 commit a crime, "You were taught by your parents not to
17 commit a crime." Not too many people say their parents
18 taught them to commit crime. So whatever two known lie
19 questions you're going to use you'll use those two,
20 whether it be lie, cheat, steal, crime, hurt, whatever.
21 Speaking of that, and of course I'm talking about the
22 subject now, not you, speaking of that Joe, of having
23 been taught by your parents it was wrong to lie, cheat,
24 steal, whatever, even to this day if you did go out and
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1 do something that your parents taught you not to, how
2 would you feel about that? Now, not too many will say
3 they feel good. They'll generally end up saying bad,
4 or I have guilt feelings. And, of course, that's when
5 you hone, well that, it's important that we get rid of
6 those guilt feelings. And I have a way of doing that
7 and it's simply structuring this particular question.
8 "In your entire life did you ever wish anyone you knew
9 would die?" If right off the bat he says, "no", that's
10 fine, you go on and leave it. He may come back to it
11 and say, "Well, I thought of somebody." "Okay, fine.
12 Who was that? Now besides that, there's no one else."
13 So these controls are, as I say, are programmed
14 properly. And then when you get to the point where you
15 make up and structure the crime questions, and I have
16 always been in the habit of asking the individual,
17 "What questions do you feel will resolve the issue?"
18 Sort of get him to participate in making up these time
19 questions. That's why it's never possible, as a rule,
20 to give the investigator, and sometimes I'll say, "Well
21 ask him this, ask him that", and, of course, you can't
22 do that because that is something that's going to be
23 built up between you, the examiner, and the subject.
24 Once we arrive at those questions you then explain to
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2 2:30 p.m.

3 him that we're going to ask those questions as well as
4 these first questions that we reviewed. And then you
5 review them with him and have him answer "yes" or "no",
6 truthfully, to each one. Now quite often there you'll
7 get the guy, "Oh, I thought of something else." "Well,
8 okay, what was that, Joe? Fine, now having told me
9 that, there's nothing else." "No". And you sort of
10 attempt, at this stage, if he's telling you too much to
11 shut him off. So that you are leaving something there
12 in that control for him to respond.

13 Q. How do you do know you're leaving something there?

14 A. You're leaving something there, I would say
15 in most cases, unless you bleed him totally dry and
16 have him tell you that he's the biggest criminal in the
17 world. Because you're always leaving that doubt in his
18 mind. If you've got him properly convinced that those
19 questions are equally as important as the crime
20 questions, and in fact they are. If you foul up, you
21 have a problem. These are going to create a problem,
22 yes, because it's important he feels that those
23 questions are every bit as important as the crime
24 questions.

25 Q. Is the ability to be able to transmit that importance

1 to the subject something that you as a person
2 administering polygraphs learn over time? In other
3 words, is it something experience teaches you to get
4 better at that?

5 A. No, I think you're in a basic theory at polygraph
6 school itself because you run an awful lot of tests at
7 polygraph school during that six-week period. And of
8 course, that's something that you learn at that point.
9 You're given examples of control questions, what types
10 of control questions to use in a certain type of case,
11 that type of thing. But I would suggest to...that sure,
12 it's the same as anything else, with more experience,
13 yeah, you'll probably develop a different technique.
14 But the technique in our school is so programmed into
15 you at that point, I think that any individual who has
16 been half of it at all interested in the job he's
17 doing, would have a pretty good idea of how he should
18 go about introducing the control questions.

19 Q. The control questions themselves, are those questions
20 questions, I mean, is there a list of those you pick
21 from that you're given at the school in New York or do
22 you do that yourself?

23 A. Oh, yes, there's literally dozens of them that you can
24 use.
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Q. Do you ever...at that stage of the game in 1971, were you able to tell us whether or not the control questions that you used in these particular cases were ones that you would have brought with you in a sense from the school in New York?

A. Oh, absolutely.

Q. They wouldn't be ones that you'd make up yourself?

A. No. I can honestly say I've never made one up. I've always gone back and used questions that were given to us at the school.

Q. And just to come back to one point, you've got to be satisfied yourself as the examiner that the subject is going to lie to one of these control questions, right, in order for the thing to work?

A. Either knowing that he's telling a deliberate lie or at least having some doubt about some little thing that he's done in his past.

Q. Let's assume that you've administered the test to somebody that's truthful.

A. Yes.

Q. So you would have a greater response to the control question than you would to the crime question?

A. Yes.

Q. How do you score that? How do you conclude there's

1 indications of truthfulness here? How would you have
2 done it in '71?

3
4 A. In 1971, there was a chart analysis sheet that was
5 given to us at N.T.C. or National Training Center and
6 this chart analysis sheet is marked off so that each
7 question, which has its own symbol...for example, the
8 first question, of course, is No. 1 and the next one
9 3G. The next one is 3K. The next one is 5 down the
10 line. It's squared off and I haven't got one with me.

11 Q. It's squared off in such a way that you have an area
12 where you mark the response in the three parameters, in
13 the numeral graph, the cardio and the G.S.R. And in
14 the control question, the same as the crime question,
15 you mark what you think is the greatest response. Now
16 if it's a small response, we'll say on the upper
17 numeral, you'll put a small tick. If it's a big
18 response, you'll put a big tick. Now the schools in
19 polygraph today have refined that somewhat and gone to
20 what is referred to as a numerical evaluation.

21 Q. As of a one, two, three, system?

22 A. Exactly, exactly, a plus or a minus, whatever. What
23 that new system is doing basically is forcing the
24 polygraph examiner to pay stricter attention to his
25 charts. In other words, you are looking for that

1
2 numerical evaluation that you're going to equate to
3 that particular reaction.

4 Q. That wasn't the system you were using in '71?

5 A. No, I was using the chart analysis form. And of course
6 I can say that. I will say as I get more experience in
7 the system, I didn't always use it. If they were
8 blatantly truthful charts or blatantly deceptive
9 charts, after I was done my certification, it was just
10 one of the shortcuts that you would probably follow
11 through an odd tape. But during that particular phase,
12 there's no doubt in my mind, I was using the chart
13 analysis because it had to go back with the case to New
14 York.

15 Q. And is there, in this chart analysis system, it sounds
16 like a fairly rough and ready method, big tick, little
17 tick.

18 A. Not really. As I say all numerical evaluation does is
19 put numbers on it as opposed to big ticks, little
20 ticks.

21 Q. Is there a point where, and let's take the truthful
22 subject again. How much greater does the response have
23 to be in terms of these ticks to the control question
24 as opposed to the crime question before you
25 can...before you would be satisfied in saying "I

1 believe that the subject is truthful."
2

3 A. Well, you score them up. O.K.? You score the big
4 ticks versus the little ticks, crime versus the
5 control. And if you do not come out in an area where
6 you think the reactions are much stronger to the
7 control questions, of course, you're not going to call
8 the person truthful. If they're not much stronger to
9 the crime questions, you're not going to call the
10 person deceptive.

11 Q. What are you going to call them?

12 A. If they come out basically the same, you've got an
13 indefinite chart and you have to score it as that.

14 Q. And an indefinite chart means that you can't render
15 anything at all?

16 A. That's correct.

17 Q. So is the ability to reach a conclusion then based on
18 looking for a fair degree of differentiation between
19 the answer to the control question and the answer to the
20 crime question?

21 A. Ideally, yes.

22 Q. Ideally. And is that something again, the ability to
23 be able to read those charts and the ability to be able
24 to say "This person looks truthful" or "this chart
25 looks truthful," is that something that you would get

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better at as you became more experienced?

A. No, again, I feel that when I left N.T.C., I was as good at evaluating charts than probably as I am today. Because that's the whole essence of the polygraph examination, are the charts, and that was an area that Mr. Richard O. Arthur stressed very strongly.

Q. Would you agree that the degree to which the control question can generate sufficient anxiety to be comparable to the crime question depends on a number of factors. I mean, surely it depends on the person being tested to some degree?

A. Well, certainly, the whole test depends on him.

Q. It depends to some extent on the nature of the issue?

A. Exactly. That's why it's important to get the two of them correlated.

Q. And does it not also depend on the skill of the polygrapher to some extent?

A. Oh, the whole system depends certainly.

Q. And those factors are all to one degree or another somewhat subjective, are they not?

A. I guess probably not any more than any type of interview system, psychiatry or what have you.

Q. Sure, and I'm not trying to compare them to anything else.

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A. No, no, and I'm not either, but I would say to a certain extent, sure, but I think basically that can be said about any type of scientific testing procedure.

Q. If I understand your testimony so far, you would conduct a pretest interview which you already described to us. You'd conduct the test itself.

A. Anything before the test starts is referred to in our system as a pretest interview.

Q. And the pretest interview itself is an integral and important part of the whole process?

A. Oh, very much so.

Q. Because it allows you to develop a rapport...

A. The whole structure of everything is there.

Q. Are there then some circumstances where after you've administered the test, you conduct a post test question?

A. Yes, if the subject was deceptive, certainly, you would go into a...after you'd analyzed your charts and you're satisfied from what the charts are telling you that there is deception somewhere in the system, you would go into a subtle interrogation, yes. Interview. That's always a controversial word, but "interview," "interrogation," call it what you want. Yes, definitely.

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2 Q. And that subsequent interview/interrogation is intended
3 to somehow or another get at the truth?

4 A. Exactly.

5 Q. And in some circumstances, it's that aspect of the
6 polygraph that's been referred to as the confession-
7 inducing aspect of the polygraph. You've heard that
8 phrase over the years?

9 A. I've heard that phrase over the years.

10 Q. Did you agree with that?

11 A. Pardon me?

12 Q. Did you agree with it?

13 A. Well, certainly, I would agree with it. Oh, yes,
14 definitely.

15 Q. O.K. let's go to the two specific instances, Jimmy
16 MacNeil. Where did the tests take place?

17 A. We had a suite of rooms at the Wandlyn Motel in Sydney.
18 I say a "suite" in that I had a room...

19 Q. I was going to ask you what a suite of rooms was in
20 that place.

21 A. I thought of how I said it. We had two rooms where I
22 did my examination and one was a bed, naturally where I
23 slept, but off that bedroom was another room that the
24 bed had been taken out of. It was basically an empty
25 room with a desk and a chair. And I'm not sure whether

1 the room was set up that way, but I suspect, if I
2 remember right, I had something to do with getting the
3 room the way I wanted it. I can't swear to it, but I
4 would suggest I probably did. Then Inspector Marshall
5 in some part of the motel had his own room. So there
6 was three rooms. I guess that's where I'm getting the
7 suite from.

8
9 Q. Was Inspector Marshall's room somewhere else? It
10 wasn't right next to yours?

11 A. It wasn't adjoining mine, no.

12 Q. No adjoining doors?

13 A. No.

14 Q. Was it your decision to examine MacNeil first?

15 A. Yes, it was

16 Q. And why would you have made that decision?

17 A. Generally speaking, the rule of thumb is you do the
18 accuser first in any type of situation where you have
19 two people with one person saying "He did such and
20 such." If it's A that's saying that he did such and
21 such, you're going to do B.

22 Q. Why is that?

23 A. To determine if what he's saying is truthful or not
24 truthful.

25 Q. Wouldn't that predispose you to some extent as to what

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the results of the second one would be?

A. Not if you go about your job in a professional manner that you should do it and what you should not, no.

Q. Did you conduct the interview and the tests of Jimmy MacNeil, would you be in plain clothes, in uniform?

A. Oh, no, I wouldn't be in uniform, plain clothes. No polygraph tests that I know of are run with a policeman in uniform.

Q. I'm just going to refer you now to your report which is at page...

MR. MURRAY

Can I just clarify that? He did or did not use a uniform?

MR. SPICER

Never used his uniform.

MR. MURRAY

At any time?

MR. SPICER

Never used his uniform.

Q. It's page 202 of Volume 16. That's the report that you eventually filed.

A. Yes, it is, sir.

Q. And I take it from what you said to us earlier, you never did see any statement from Jimmy MacNeil?

A. I don't recall seeing it, no.

1
2 Q. And to deal with Jimmy MacNeil first, at the bottom of
3 202, you say:

4 Throughout MacNeil's examination,
5 there were irregular and erratic reactions
6 to the test questions.

7 Can you fill us in a little bit more on what was going
8 on to produce irregular and erratic reactions?

9 A. Well, I have a much clearer memory of Mr. MacNeil than
10 I do of Mr. Ebsary. And in Mr. MacNeil's case, in that
11 background there's an area that we get into as far as
12 drinking habits and what have you. The gentleman was
13 in the habit of drinking, as I recall it, quite
14 extensively. In fact, he admitted he had been out the
15 night before. And as I recall Mr. MacNeil it was
16 almost to the point where the man was into the D.T.s I
17 could not get him to sit still.

18 Q. Is it important for a subject to sit still?

19 A. Extremely important because if the subject is moving,
20 every time he moves, he's moving his pneumograph tube,
21 he's moving his cardio cuff. You get pens bouncing all
22 over the place. And of course, you program them to do
23 that. I couldn't do that with MacNeil and of course,
24 that's why I only ran one chart. And I ran that one
25 chart and his responses were exactly as I say. They
were irregular and erratic. They were all over the

1
2 place. And there was no way you could tell whether he
3 was responding to the control questions or the crime
4 questions. Now following that one chart, and in this
5 report, I should mention that I referred to him as
6 being indefinite. Technically, the man's examination
7 should have been called incomplete because no polygraph
8 opinion can be rendered without...in the Arthur
9 technique without three separate charts being run. I
10 was satisfied from running this first one that I was
11 not going to be able to...because of the condition that
12 he was in, I was not going to be able to get a chart
13 that I would be able to properly interpret.

14 Q. And that's why on your note on Exhibit 93, opposite or
15 beside the name of Jimmy MacNeil, you have a tick by
16 "in."

17 A. Which means "indefinite."

18 Q. Indefinite?

19 A. Now I would say shortly after this particular page or
20 two pages, I introduced into that statistical data
21 another abbreviation of "ic" meaning "incomplete." And
22 that was for examinations whereby you did not run the
23 three prescribed charts.

24 Q. Other than the fact that he was fidgety, would
25 MacNeil's apparent fondness for alcohol at the time

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2 have had any effect on your ability to carry out the
3 test? In other words, if you could have sat him down
4 and kept him still. Is the fact that he was in the
5 habit of drinking a lot cause you any difficulty?

6 A. I don't recall. That did, there's no question about
7 it because I'm...as I said, you know, I'm not an expert
8 in alcoholism or anything of that nature, but I am
9 satisfied that the man was in the D.T.s that day. Now
10 separate and apart from that, that's the thing that
11 stands out in my mind. Separate and apart from that, I
12 can't give you anything else that would say "Hey, it
13 can't be done for this reason or that reason or that
14 reason." Heavens knows that was enough. I just made a
15 chart that I could not interpret. Other than the fact
16 that following that chart I did run what we referred to
17 as a double verification test, and a double
18 verification test is a chart that you will usually run
19 on every subject basically to determine whether or not
20 you've done your job in getting the polygraph properly
21 adjusted to his particular sensitivity. Whether or not
22 he is a person who is physically capable of responding.
23 And it's usually in that 2 spot and right direct behind
24 the first set of charts. In this particular case with
25 Epsary, I did run or with, sorry, MacNeil, I did run a

1 double verification.
2

3 Q. And what is that?

4 A. And I'm not even sure that I may be did run two. I
5 could not pick the number that he was deceptive to.

6 Q. Do you want to just back up for a second and explain in
7 a little more detail what the double verification test
8 is and what you do.

9 A. What you do in the double verification test, you have a
10 number of pieces of paper with seven, eight, whatever
11 numbers on it. And you let him pick out one number and
12 of course, you tell him not to tell you the number that
13 he's picking out from that packet. And then you run a
14 program, a polygraph test on those numbers. "Did you
15 pick number so and so?" Of course, he's instructed to
16 say no to each and every one. "Did you pick number so
17 and so? No. Did you pick number so and so? No. Did
18 you pick number so and so? No." Usually it's very
19 easy to determine that particular number. In his case
20 I couldn't and that was another reason why I said, you
21 know, I wasn't going to go any further with the test.
22 And again it was the same thing. His responses were
23 just uninterpretable.

24 Q. And would that be again because of the physical
25 fidgeting and moving around?

1 A. As I recall, yes, that was his big problem.

2 Q. Would how smart he was or his intelligence have any
3 effect on the reliability?

4 A. Yes, I would say it would.

5 Q. And in what respect?

6 A. Usually I have found the smarter the individual, the
7 better polygraph subject he's going to be. If a person
8 is of low intellect, you could have problems.

9 Q. Did you form any opinion as to where MacNeil fit in
10 that scale?

11 A. I don't recall of any opinion. If I had my background
12 form here and my sheets that I fill out during the
13 course of the test, I could certainly answer that, but
14 I can't.

15 Q. And you checked, I gather, to find that material and
16 it's been destroyed, to the best of your knowledge?

17 A. Yes, I checked in 1982.

18 Q. Did you have any discussions with Al Marshall
19 concerning the intelligence of Jimmy MacNeil prior to
20 the test being administered?

21 A. I don't recall any particular thing that was said. I
22 somehow got the impression that Marshall felt that he
23 was not that sharp an intellect. But I don't recall
24 specifically how it came about and what was said.
25

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2 Q. But in any event it was the result, in your mind in any
3 event, of the alcohol that was causing you the problem?

4 A. I think it was, yes.

5 Q. Go back to page 202 again.

6 There were irregular and erratic
7 reactions to the test questions. These
8 variations are the type which prevent an
9 analysis of the charts and I can render no
10 opinion as to whether or not MacNeil was
11 telling the truth when he answered "yes" to
12 the following test questions..."

13 So you weren't prepared to say "yea" or "nay" on this
14 guy?

15 A. Absolutely not.

16 Q. The test questions themselves at the top of 203. Are
17 those test questions that MacNeil made up in
18 consultation with you?

19 A. I can't say I can answer that. I don't recall that part
20 of it. I would say my normal procedure then was
21 certainly to discuss them with him. You certainly
22 would not have a question on the test the subject did
23 not want to answer. That was an out and out no-no.
24 You can't have any surprise questions thrown in there.
25 I certainly would have reviewed with him, but how much
input he had that particular day into the question
structure, I can't tell you. But they came about, the
questions came about as a result of his version of the

1 facts as I call it. I picked the things out that he
2 had discussed and said were in fact true, made the
3 questions up and went from there.
4

5 Q. So would it have been MacNeil then that would have
6 mentioned to you "seeing Roy washing blood off the
7 knife," for instance, Question 4?

8 A. Yes, he did discuss that with me.

9 Q. Do you have any recollection today of what the control
10 questions were that you might have been using with
11 MacNeil?

12 A. I would strongly suspect, in view of the fact that an
13 alleged murder was the issue and again, I'm
14 speculating, sir, that they would be hurt and probably
15 crying. "Did you ever deliberately hurt anyone in your
16 life? Have you ever committed a serious crime?" Or
17 some variation of those.

18 Q. And in MacNeil's case, you ran the test once and then
19 you ran the double verification and then you go on to
20 say on 203 in your remarks:

21 It will be noted I gave an indefinite
22 opinion as to MacNeil's polygraph
23 examination. However, the following should
24 be added. The subject was interviewed
25 after the examination on a number of
occasions and was quite ready to admit that
he was lying and that he was only joking
when he said that Ebsary had stabbed Seale.
He would then revert to his original story.

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Can you tell us any more about that?

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A. Following my determination that I wasn't going to be able to make a determination, I guess is the best way of putting it, I had a brief conversation with Mr. MacNeil advising him that I was not going to be able to render an opinion.

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Q. Did you ever indicate to him that he failed the polygraph?

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A. Oh, no, definitely not.

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Q. He gave testimony that he thought he failed the test and as a consequence of that failure that dire consequences might occur to him and that was the reason why he started into saying it was all a joke and he made it up.

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A. I can't comment on what he gave in his evidence, but I definitely didn't tell him that he didn't pass his polygraph test.

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Q. That's not a word that you would use?

A. Pardon me?

Q. You wouldn't use that word?

A. No.

Q. Would it be your practice to advise people immediately at the conclusion of the test as to whether or not they were telling the truth or not?

1 A. 100% of the time.

2 Q. So in this case you would have just told Mr. MacNeil
3 that you couldn't form any conclusion, that's all?

4 A. That's correct.

5 Q. You're saying in your note here in your remarks that he
6 then reverts to his original story. You believe his
7 mind was open to anything that might be suggested to
8 him. And then you say I do not feel he's mentally
9 capable of responding to a polygraph examination. For
10 that reason no other tests were administered. What do
11 you mean when you say you don't feel he's "mentally
12 capable of responding"?

13 A. Because of the discussion we had following the test.
14 You know, I basically told the chap that I would not be
15 able to determine because he was having problems. There
16 was problems there was making him a person that
17 couldn't be examined. And if he had any explanation
18 for these problems and that's when we entered
19 discussion. I don't recall sitting here today what
20 that discussion was. But going from what I said there
21 which was shortly after the examination, I would
22 conclude from that that he did in fact on occasion
23 during that brief interview tell me that he was making
24 the story up and then reverted back. And when you have
25

1 someone flipflopping like that, it's...you know, you're
2 into a very dangerous situation.

3
4 Q. Are you able to tell us...what would you have advised
5 Inspector Marshall as to your conclusion concerning
6 Jimmy MacNeil?

7 A. Exactly as I said in the report, that I was not able to
8 form an opinion.

9 Q. Would you have any idea, from your own experience with
10 MacNeil and with Marshall on that occasion how
11 Inspector Marshall could have concluded subsequent to
12 the interview that there was no doubt in his mind that
13 MacNeil wasn't telling the truth?

14 A. Pardon me?

15 Q. Al Marshall concluded...he did some post interview
16 questioning as well.

17 A. Yes, they left my room, the polygraph room, they did go
18 out into the bedroom area and I think he and Marshall
19 did have a conversation.

20 Q. And and MacNeil?

21 A. He and MacNeil, yes.

22 Q. He then indicates in his report as a result of that
23 that there was no doubt in his mind that MacNeil was
24 not telling the truth.

25 A. That's his opinion, not mine.

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Q. Did you discuss that with him at all?

2

A. With who?

3

Q. With Al Marshall what his conclusion was.

4

A. I've never...until last night saw a copy of Al Marshall's report. I've never discussed this file with Al Marshall since. No, I never did.

7

Q. And in November of 1971, did you have any discussion with Al Marshall about his conclusion that MacNeil was not telling the truth?

8

9

10

A. He never told me that.

11

Q. He never told you that?

12

A. No.

13

Q. And the information that you relayed to Marshall was simply that you couldn't form any opinion at all?

14

15

A. That's right. As I said at the outset this morning, I knew that he was sceptical but he never, ever told me that he felt that MacNeil was lying.

16

17

18

Q. During the administration of the polygraph test, would it just have been the two of you in the room?

19

20

A. Mr. MacNeil and myself, yes.

21

Q. And would the door have been closed into the adjoining room?

22

23

A. The door would be closed.

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Q. How long do you think it would have taken with Mr.

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MacNeil?

A. I would think that under the circumstances, I was probably in there close to two hours.

Q. Two hours?

A. Yeah, because it seems to me we were all after the lunch period when we broke and I know we didn't start before 11:00 because my bag was astray and it was midmorning before we even got that to get set up. I would say somewhere in the area of two hours.

Q. Would you have advised Inspector Marshall as to your view of MacNeil's truth or the lack of opinion, I guess, prior to starting on Ebsary?

A. Oh, yes.

Q. How much time elapsed between your administration of the test of MacNeil and the administration of the test to Ebsary?

A. Well, as I recall we went and had lunch and the only reason I recall that is I bumped into a chap that was in the restaurant at the Wandlyn that I hadn't seen for some time, a member of the force, so we definitely had lunch in between and I would say there would be an hour or more in between examinations.

Q. So you would have done Mr. Ebsary in the afternoon?

A. In the late afternoon, yes, mid to late afternoon.

1
2 Q. Prior to you seeing Roy Ebsary, did you know anything
3 about him? Had you been told anything by Inspector
4 Marshall?

5 A. Very little, as I recall, because I don't recall that
6 he...whether he said he had interviewed him or not. I
7 think basically his interviewing dealt with MacNeil,
8 although I think he said he had reviewed a statement
9 that Ebsary had given to somebody, whether it had been
10 the Sydney City Police or whatever. But about him as
11 an individual, not a heck of a lot, as I recall.

12 Q. Were you advised, for instance, by Inspector Marshall
13 that Roy Ebsary had a criminal record for possession of
14 a concealed weapon?

15 A. If Marshall knew that, I'd be surprised if he didn't
16 tell me.

17 Q. But you don't know one way or the other?

18 A. I don't recall it.

19 Q. Would that be important to you to know that as a
20 background fact?

21 A. I would have certainly covered it in the background
22 form that i completed on Mr. Ebsary.

23 Q. Do you remember conducting the pretest interview with
24 Mr. Ebsary?

25 A. No, my problem with Mr. Ebsary is something that

1 I...the outstanding one of the two that stands out in
2 my mind was Mr. MacNeil and of course I think that's
3 basically because of the indefinite opinion or
4 incomplete tests that I arrived at. No polygraphist
5 likes that. I do recall running the examination, no
6 question about it. From looking at the report, I know
7 the questions I asked. I can speculate as to the
8 controls, but I don't recall a heck of a lot that was
9 outstanding about Mr. Ebsary at that time.

10 Q. Do you want to go back for a second? Would you expect
11 in your normal practice to be advised of criminal
12 records of subjects?

13 A. Oh, yes, definitely, yeah.

14 Q. Ebsary himself described the pretest interview, if I
15 understood his testimony correctly at Page 66 as being
16 somewhat brief and he doesn't remember being asked
17 about anything other than his health before you got
18 into the test. Can you comment on that?

19 A. He's wrong.

20 Q. He's wrong on that?

21 A. Absolutely.

22 Q. What information would you have tried to elicit from
23 Roy Ebsary during the pretest interview?

24 A. As I say, this whole Arthur technique is basically a
25

1 structured program. You go step, one step, two steps,
2 three, and you follow it, a print out on a sheet as you
3 go down, permission form, background, your version of
4 the facts, polygraph instrumentation and controls and
5 so on. And I have no reason to believe that I would
6 have taken any different approach in Mr. Ebsary's case.

7
8 Q. And at the present time you don't have any recollection
9 of what you actually did?

10 A. I don't even recall...I know he denied the stabbing by
11 the word I worded the questions, but I don't recall
12 whether...I know that MacNeil said that they were in
13 the park. I don't even recall if Ebsary said that he
14 was even in the park. I do know that he was pooh-
15 poohing what MacNeil said, but how strongly he was
16 pooh-poohing it, I don't recall.

17 Q. The questions that you asked Roy Ebsary on Page 202,
18 the crime questions, you indicated a minute ago, you
19 could probably speculate as to what the control
20 questions might have been. Can you give us some
21 indication of what you think those questions would have
22 been?

23 A. I would think the controls, the two known lie questions
24 particularly would have been either "Did you ever
25 deliberately hurt anyone? Have you ever committed a

1
2 crime?" or a variation of that or "Did you ever wish
3 anyone you know would die?" Those are generally, in
4 the polygraph field, reserved for murder cases.

5 They're strong controls.

6 Q. And you'd be expecting no answers to those?

7 A. After they were properly introduced and programmed,
8 yes.

9 Q. And when you indicate in your report, in Item A:

10 There were indications of truthfulness in
11 Ebsary's polygraph recordings when he
12 answered "no" to the following test
13 questions.

14 How did you assess that Roy Ebsary was telling the
15 truth when he answered "no"?

16 A. Not having all the charts to go by, I can only
17 conclude, generally speaking, his physiological
18 responses were stronger to the control questions than
19 to the crime questions.

20 Q. And when you say his physiological responses, would
21 that be...indicates that he would be expressing through
22 his body greater anxiety in respect of the control
23 questions than in respect of the crime questions?

24 A. Exactly.

25 Q. If Roy Ebsary thought he was defending himself, for
instance, would that have some effect on the way in

1 which he might respond to the crime questions?
2

3 A. If anybody felt that what they did was not wrong, I
4 don't think they'd respond to a polygraph question, a
5 crime question.

6 Q. So is it a necessary element then of a successful
7 polygraph test that the person, the subject have some
8 guilty feeling about what's occurred?

9 A. Yes, in other words know right from wrong.

10 Q. Know right from wrong and...yeah. What other
11 circumstances would prevent you from being able to get
12 a proper reading? In other words, you say that
13 somebody has to know right from wrong. Are there other
14 circumstances that would prevent...

15 A. Now are you talking about Ebsary in particular?

16 Q. No, generally.

17 A. If a person had a disease of the mind that they did not
18 know right from wrong, of course, and that's basically
19 the same thing. If you were giving a polygraph
20 examination to a subject and you thought he was Adolph
21 Hitler and you told him or you asked him "Are you
22 Adolph Hitler?" and he said "yes." He's going to come
23 out truthful, if he really believes that. So the
24 polygraph doesn't necessarily record what is true, but
25 what that person believes to be true, in my experience.

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Q. Now how do you deal with that in the pretest interview?
How do you assess whether or not you've got somebody
who's able to or doesn't know right from wrong or
thinks he is Adolph Hitler? Maybe Adolph Hitler would
be fairly obvious, but...

A. I haven't done him but, no, I guess really the whole
pretest interview, you've got to assess the individual,
particularly in that background from. And if you see
anything in that background form that you think may
cause problems... I would love to be able to sit here
and have perfect recall of what happened on that
particular date in, I'd love it probably better than
anybody else in the room, but I can't. So I've got to
speak in generalities.

Q. Sure.

A. But if he was in that particular situation, and bearing
in mind in Ebsary's case, the obvious answer is the man
was truthful. And I have no reason to believe
otherwise, quite frankly. Failing that, it would have
to be that. a, he didn't know that he did it, he had a
problem with memory, a lapse of memory, had a blackout,
didn't know that he had done it, or he did not remember
knowing that he had done it. Or he is rationalizing
and justifying his actions. You know, what one's,

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would make the results of the polygraph wrong if, in fact, they are wrong, I couldn't speculate on that.

Q. You can't speculate as to which of those things that you've just mentioned.

A. No.

Q. And the last one that you mentioned is really a person with no guilt, essentially.

A. Yeah. There's very few of them, I think, hopefully.

Q. Do you have any recollections at all, any impressions of Roy Ebsary in that interview?

A. Other than the fact that he was an older gentleman and that he pooh-poohed what his partner was saying, MacNeil, they were apparently friends, drinking buddies, no, I don't recall. I don't recall medical problems that caused me concern. I don't recall any family problems. I don't recall any particular thing that day. I do know that I ran the prescribed number of charts and was satisfied he was telling the truth.

Q. Would you have done this "double test" that you were talking about on MacNeil, would you have done it on Ebsary as well, double verification test?

A. Yes, and again, I can't tell you what the results were but I would assume that I was probably able to pick the number.

1 Q. Would it be the case that as a result of your
2 conclusion that Roy Ebsary was telling the truth, you
3 wouldn't have conducted any post test interview of him.
4

5 A. No.

6 Q. Do you remember saying to him at the end of the test,
7 "Well, I think you're telling the truth."

8 A. Absolutely.

9 Q. Do you remember what his reaction was?

10 A. No.

11 Q. Can you tell us what view you would have expressed to
12 Al Marshall concerning Roy Ebsary's truthfulness?

13 A. Again, basically as I expressed in my report, that as a
14 result of the polygraph examination, it was my opinion
15 that the subject was truthful for when he answered the
16 questions.

17 Q. "Indications of truthfulness" is the phrase that you
18 use in your report. Is that the way that you would
19 normally express it?

20 A. That's a preprinted form report, okay?

21 Q. Those aren't your words?

22 A. No, and you fill in the person's name and the bottom of
23 the report, "Conclusions and Remarks", would be mine.
24 The question wording would be mine but the rest of
25 it...

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Q. Sorry?

A. The question wording would be mine and a combination of mine and the subject's but the other areas that are marked off and the authorization of the....that was all, we would just fill in the blanks.

Q. All right, so then the words that you used...

A. "Indication of truthfulness" is just a way of saying I feel the subject passed the polygraph.

Q. And you say at the end of your report in the "Remarks" section, "I do feel, however, that Ebsary was truthful with reference to his polygraph examination."

A. Yeah.

Q. That's the view that you would have expressed to Al Marshall.

A. Absolutely.

Q. Al Marshall indicated during his testimony when asked about the view that you had expressed to him that you, he got the impression that there was no doubt in your mind, he indicated that on page 5668 of the transcript and on page 5647, he said, in fact he said it three times, that your attitude was you were so positive that Ebsary was telling the truth that he then used that polygraph test result as the sole determining factor in deciding whether or not Ebsary was telling the truth.

1 Would you have any way of indicating to us now whether
2 you would have expressed yourself in such a way that
3 Inspector Marshall could have thought that you were so
4 positive and that there was no doubt in your mind?

5 A. First of all, I can say with a fair amount of
6 confidence that I did not say that there was no doubt.
7 I have never taken a position in the field of polygraph
8 that it's 100%. That goes, not only with investigators
9 that I deal with, but it goes with anybody I've
10 lectured to on polygraph. It goes with any discussions
11 I get into in seminars. You can always get into a
12 situation where there is arguments about for
13 admissibility or against admissibility of polygraph in
14 court. I personally feel the Phillion decision of the
15 Supreme Court of Canada is a correct decision because I
16 feel the polygraph is an investigative aid rather than
17 the entire investigation itself and that's basically
18 where it should stay. So I can definitely say I did
19 not say that. And b, what would make me say it even
20 more is that later that night in the motel room, late
21 afternoon, in discussions when the crown prosecutor
22 from Cape Breton County came in...

23 Q. That's Donnie MacNeil?

24 A. To get the results, that's correct, I expressed the
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desire to him that in view of the fact that I was in Sydney, that they should make an approach to Marshall's defence counsel and ask if he would submit to a polygraph. And I distinctly remember saying it for the purpose, particularly in view of the results of MacNeil's, to take away, delete the possibility of doubt. Donnie MacNeil thought it was an excellent idea and Al Marshall was right there.

Q. Who...Not right in the room?

A. Yes, Al Marshall was there.

Q. Al Marshall was there?

A. Yes.

Q. Al Marshall was there.

A. That's right. So I don't know why he would, you know, would draw that conclusion.

Q. Was Al Marshall in earshot of that discussion that you had with Donnie MacNeil?

A. Oh, absolutely, in fact, it was a three-way conversation and it was agreed. You see, I had programmed myself for this lecture at Sydney Subdivision the next morning and it was agreed that Mr. MacNeil would check into that and that we would check back with him the following day, which we did do.

Q. Okay, let's just back up for a second and we'll come

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back to that. From what you're saying, I gather then that there was a meeting in the motel, or at the Wandlyn subsequent to the administration of these tests.

A. It was a, yeah, I guess you would call it a meeting. I think, what had happened, after I was done with Ebsary, Al Marshall somehow got ahold of Donnie MacNeil, either through telephone or got somebody to go get him or whatever, Mr. MacNeil appeared at the motel. He was interested in polygraph. I discussed polygraph with him to some extent. I discussed the results of these two cases.

Q. Were there just the three of you that were present at the meeting?

A. Three of us, the three of us.

Q. Was there any alcohol consumed at that meeting?

A. You know, that was, if there was, I don't recall, okay? I've been in motel rooms following polygraph tests where, prior to dinner, yes, there had been a drink, perhaps. But that particular day, I don't recall. And if I could recall, I would tell you but I just don't recall it. It certainly wasn't bought by me, if it was, because I didn't have it.

Q. Was there a call made to the A.G.'s office, to your

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knowledge, the Attorney General's office, or the department?

A. Following my discussion with Mr. MacNeil, Donnie MacNeil, I had to, I was sort of flitting back and forth from the polygraph room to the room where they were, because that particular instrument, if you didn't get the ink out of the system, it dried very rapidly. And if you've ever had a problem with getting ink out of a polygraph, you know why I was anxious to get it out. I was dismantling my equipment. But I do recall MacNeil being on the phone. Who he talked to or what he talked about, I just, I don't know who he was talking to.

Q. Was John MacIntyre present at the meeting?

A. No.

Q. So it was just the three of you.

A. I never met John MacIntyre until 198...Oh, I guess it would probably be 1981, late '80 or '81 on something totally far removed from this. I happened to be in Sydney on another matter at the police station and I was introduced to the chief of police. No, there was only the three of us there.

Q. How was it, again, that the question of Junior Marshall being given a polygraph came up?

1
2 A. You know, it got to the point in the discussion with
3 Mr. MacNeil whereby he didn't know all that much about
4 polygraph and I could certainly appreciate that and I
5 was explaining it to him and I certainly explained it
6 to him because of the results of MacNeil's test being
7 indefinite that there certainly was some doubt there.
8 And to attempt to delete that doubt, the smart thing to
9 do would be to get the defence counsel of Mr. Marshall
10 to let him consent to take a polygraph. And like I
11 say, MacNeil agreed to that very readily and said he
12 would look into it in the morning.

13 Q. Did Inspector Marshall express any views as to whether
14 or not that was necessary or sensible?

15 A. Oh, he certainly agreed with it.

16 Q. Did he?

17 A. Oh, yes, absolutely. We drove, we made a particular
18 trip to MacNeil's office the next day to get the
19 answer.

20 Q. All right, let's just talk about that for a minute.
21 The next morning, was it yourself and Al Marshall then
22 that went to MacNeil's office?

23 A. It wasn't in the morning because I was pretty well the
24 entire morning at Sydney Subdivision with my lecture on
25 polygraph. So I would say it was late morning or early

1
2 afternoon when Al Marshall picked me up at subdivision
3 and I had, as far as I recall, already had passage
4 booked back because I had reasons to be back in Regina,
5 but I said, you know, basically, if we can arrange this
6 other test, we'll certainly do it. He picked me up, we
7 drove to an office building in Sydney. I've got to
8 confess, I was stationed in Nova Scotia for 12 years
9 and never been to Sydney prior to this. So I had to go
10 to Regina to get there. It was my first trip to
11 Sydney. I didn't know where we were in the city but we
12 did go to what I was told by Al Marshall was Donnie
13 MacNeil's office. I stayed in the car. He was only in
14 there a matter of minutes, come back out and said,
15 words to the effect that Donnie MacNeil said that
16 Marshall, Junior Marshall would not be taking a
17 polygraph test.

18 Q. Did he indicate, did Al Marshall indicate to you
19 whether Donnie MacNeil had spoken to the defence
20 counsel or how he concluded that Junior wouldn't be
21 taking...

22 A. I obviously concluded that but I can't say that. But I
23 certainly concluded that he had.

24 Q. And you don't have any recollection now as to how you
25 reached that conclusion.

1 3:15 p.m.

2 A. No.

3 Q. Did he indicate, did Al Marshall indicate to you
4 whether Donnie MacNeil had spoken to the defence
5 counsel, or how, and how he concluded that Junior would
6 not take...

7 A. I obviously concluded that but I can't say that. But I
8 certainly concluded that he had.

9 Q. And you can't, you don't have any recollection now as
10 to what...

11 A. No.

12 Q. Your report, itself, is dated, I think, November 30th,
13 page 202, and on 201 there's a transmission slip, would
14 that be the transmission slip, the page before there,
15 transmission slip that would have accompanied your
16 report from "F" Division to "H" Division?

17 A. That's correct? Now, that report going to, that
18 accompanied that transmittal slip, would have been a
19 carbon copy. The original report would have gone to Al
20 Marshall himself and a carbon copy of it would have
21 gone to C.I.B. office of "H" Division because it was my
22 policy to send the original of all reports to the
23 investigator...

24 Q. And would that have been ...
25

- 1 A. With a copy to the C.I.B. officer.
- 2 Q. Would that have been in just the normal mail?
- 3 A. Yes, normal mail.
- 4 Q. Your report is directed to the officer in charge,
- 5 C.I.B., Halifax.
- 6 A. That's what I say. This is, obviously, the copy of the
- 7 one to the officer in charge of C.I.B.
- 8 Q. Oh, I see. So that, would the one that went to
- 9 Marshall, then, have something different on the top
- 10 other than ...
- 11 A. No, no, it would be the same thing since it was outside
- 12 another Division. It was basic protocol to go from
- 13 C.I.B. officer to C.I.B. officer, but the original I
- 14 would have put in a separate envelope and addressed it
- 15 to Al Marshall.
- 16 Q. And on page 202 you have a file number, this is 71-Poly
- 17 25. 202, sir.
- 18 A. Yeah, 71-Poly 25, exactly.
- 19 Q. Am I correct that that indicates your 25th case, as
- 20 opposed to your 25th polygraph test?
- 21 A. 25th case, yes.
- 22 Q. And that's confirmed by Exhibit 93.
- 23 A. My personal ledger, yes.
- 24 Q. Which would indicate that file number for both MacNeil
- 25

1 and Ebsary.

2 A. Correct.

3 Q. And there may, and in fact, this exhibit shows it as
4 well, there are situations, take 71-Poly 22, in which
5 there are a whole series of tests administered.

6 A. In Fredericton, New Brunswick. Sackville, Borden and
7 Summerside, PEI. All in the same file.

8 Q. Subsequent to your completion of the report, and your
9 putting it in the mail system to Inspector Marshall in
10 "H" Division, did you have any further involvement with
11 this particular case until 1982?

12 A. The only involvement is that I had gone to a number of
13 polygraph seminars. One in '72 and, as a matter of
14 fact, I think I mentioned the dates. I can tell you
15 exactly in one of these notebooks. In May of '72, May
16 15 to 19th, I was at a seminar in New York City, where
17 I took the charts in question, I took the charts in
18 question to a seminar at Delta College in Michigan and
19 this is a, this, I guess, is a habit that polygraphists
20 get into, is charts that, from cases that are unusual,
21 or that you had unusual responses in, or the
22 circumstances were unusual. And I guess because of the
23 fact that this was a case where the Court had rendered
24 a decision and I then got involved with polygraph, I
25

1 took those particular charts to those seminars and had
2 other polygraphists go over them. Other than that I
3 had no contact with Al Marshall. I had no contact with
4 anybody in "H" Division. And the first, or the next
5 thing I recall on the Marshall case as such was a
6 telephone call that I received from John MacIntyre in
7 1982.

8 Q. Would your report, your polygraph report, would that
9 have been reviewed by any of your own superiors?

10 A. The report?

11 Q. Yeah, the conclusions that you reached in your report.

12 A. You mean my superiors in Regina?

13 Q. Yes.

14 A. I answered directly to the C.I.B. officer, I believe,
15 at that time in Regina. He would certainly get a copy.
16 But whether he, himself, would get it, or it would go
17 into the reading pool and it would be filed away in a
18 Division file, I couldn't honestly say that
19 Superintendent (Lyzik?) ever saw that report.

20 BREAK

21 3:41 p.m.

22 Q. When we broke I think you'd indicated to us that
23 subsequent to completion of the report you didn't have
24 any further involvement with this matter until sometime
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in 1982.

A. I believe it was in February of '82.

Q. If I could just direct your attention to page 217 of Volume 16...

A. Yes, I have it, sir.

Q. Now that's your letter in response to a telephone conversation with Chief MacIntyre.

A. That's correct, sir, yes.

Q. Do you remember the substance of the telephone conversation with Chief MacIntyre?

A. Only that he called me at the office, either on February the 2nd or a day or two before. And the sum and substance of the conversation was basically that there had been a re-investigation started, or one was about to start in relation to the Marshall murder conviction and that he asked that I send him anything I could recall of my trip to Sydney in 1971.

Q. Did he express to you any attitude concerning the re-investigation?

A. None that I recall, sir, no.

Q. And is what you've just told me then the substance of the conversation to the extent that you remember it?

A. It was not a very long conversation, bearing in mind I did not know John MacIntyre so there certainly wasn't

1 any small talk leading up to or after, it was simply,
2 "Here's what I'm calling for, would you do that?" and I
3 did.

4 Q. And then if you could have a look at Volume 18. This
5 one, page 27.

6 A. Yes.

7 Q. That would seem to be a typed version of your statement
8 which, I think the handwritten version then, is over on
9 page 28, 29...

10 A. I prefer the typed.

11 Q. You were contacted by Corporal Carroll, then, in
12 February of, no, it's not February, December of 1983.

13 A. I had been contacted sometime prior to that, as I
14 recall the facts, by Harry Wheaton from Sydney GIS and
15 he said that either he or Corporal Carroll would like
16 to sit down with me. Then later on Corporal Carroll
17 did call me and made an appointment and we had a
18 meeting on that particular date in Saint John, New
19 Brunswick.

20 Q. And did Corporal Carroll express any views to you as to
21 what was going on with respect to the re-investigation
22 at that time because that would have been ...

23 A. Not a heck of a lot other than it was being re-
24 investigated. I don't recall anything too pertinent
25

MR. SMITH, EXAM. BY MR. RUBY

1 other than they were investigating it and I think
2 following his interview with me he was proceeding
3 across on the ferry with an attempt to see Al Marshall,
4 as I recall.

5 Q. And was that date the date that you remember? Would
6 that be the 19th of December 1983?

7 A. Yes, I think that would be it.

8 Q. And other than those two documents, or the February 2
9 letter to Chief MacIntyre, and the statement that I've
10 just referred you to, did you have any other
11 involvement with this matter subsequent to the
12 completion of your report in 1971?

13 A. No, I would say my next involvement was when I was
14 contacted with the Mounted Police and asked to meet
15 with Inspector Murphy and another member. Basically
16 advising the commission was being set up and ...

17 Q. In connection with the commission.

18 A. Yeah.

19 MR. SPICER

20 Thank you.

21 EXAMINATION BY MR. RUBY

22 Q. The first thing that concerns me, sir, is that I'm not
23 clear on what kind of questions you'd be putting.
24 You've given us some examples of the known lie
25

1 questions. What would be an example for Ebsary, let us
2 say, of the known truth question. What kind of known
3 truth question would you have put in 1974?

4 A. I can't give you exact wording for it, sir, because I
5 don't have it here. But it would have been a question
6 that was introduced in the pre-test interview the same
7 as the other control questions. As I say, it's a
8 question that is referred to by Arthur as a known
9 truth, because it's introduced in such a way to
10 convince the subject that something happened that you
11 know didn't happen.

12 Q. Give me an example. I don't understand what you're
13 saying.

14 A. Okay, let's take this particular case. It may have,
15 and bear in mind I'm saying "may", it may have been
16 something along this line that there was a chap in town
17 by the name of Joe Schmuck, and that's just a, picked
18 out of the air, who had, and you may, you describe this
19 fellow to him. He may be 6'4" with a wooden leg, a
20 character that he's going to remember had he known him,
21 and that there may have been an anonymous telephone
22 call to the police department that said that he told
23 Joe Schmuck that he had, in fact, stabbed Sandy Seale.
24 In other words, I know in my mind that it didn't
25

1 happen...

2 Q. You invented vividly...

3 A. He knows in his mind it didn't happen, that's why it's
4 referred to as a known truth...

5 Q. Good. And the guilt question, the AGC question, give
6 me an example of what that...

7 A. AGC would, again, be a question that, in all
8 probability never happened, hopefully it never
9 happened, and that you know that he would know that he
10 did not. That would be another crime, perhaps similar
11 in content, similar in nature, but again it would be a
12 crime that as far as you were you concerned didn't
13 happen. "Were you the man who stabbed the little girl
14 over by the church last Christmas Eve?" something of
15 that nature.

16 Q. All right, so you can be fairly satisfied that those
17 two are going to be questions he can answer "no" to
18 truthfully.

19 A. Yeah.

20 Q. The other two, let's take for example, "Have you ever
21 committed a crime?"

22 A. Yes.

23 Q. And suppose the fellow said, "Yes, I've broken into
24 Smith's house and I've broken in Jones' house, and
25

1 those are the only two crimes I've ever committed..."

2 A. Okay.

3 Q. You get that in the pre-test interview.

4 A. Yes.

5 Q. And then you come to the test and that's one of the
6 questions, "Have you ever committed a crime other than
7 the Jones and Smith crimes" and he says, "No." He's
8 telling the truth then. Right?

9 A. I don't know whether he's telling the truth.

10 Q. But you've got to know because that's one of the known
11 lie questions, that it's a known lie, correct?

12 A. I'd rather he not be telling the truth.

13 Q. Right.

14 A. Yeah.

15 Q. So if the answer, originally, let's take a different
16 example, "Have you ever committed a crime?" "No." And
17 that was the truth, that would not be a valid known lie
18 question.

19 A. It would be a valid known lie question because if he
20 said no and you worded that question in such a way, "In
21 your entire life did you ever commit a crime?" that
22 control question, that wording of a control question
23 should provoke enough thought in that individual's
24 mind, you know, "Did I ever take an apple? Did I ever
25

1 take a pencil?" which is a crime. And I express it,
2 various things in the world as a crime. But if he goes
3 on to tell me, "No", that's fine. "If you can't
4 remember that's good." In other words, you shut him
5 off from that. So you've still got that thought
6 process in the individual's mind.

7 Q. And suppose he answers that question "yes" in a control
8 question?

9 A. Okay. He won't answer it "yes" because I won't let him
10 answer it "yes". If he says "Yes", he has, I'll say,
11 "Okay, fine. Now I don't want to know all the details
12 but Joe, what was that crime? No details, now when,
13 what was it?"

14 Q. Right.

15 A. "Well I stole an apple." Now, okay, fine. That, you
16 didn't do anything else. And, again, you'll attempt to
17 shut him off so that you bleed him dry from that
18 particular area.

19 Q. But you can't tell whether you have, to use your
20 language, "bleed him dry". Whether at the point when
21 you ask that question...

22 A. If you cut him off quick enough you will still leave
23 that thought process there in my view.

24 Q. That's an assumption, isn't it.
25

- 1 A. If you've done the introduction properly there still
2 should be enough emotion in that question.
- 3 Q. I guess my point is this, when it comes to the four
4 questions which are the crime questions that you're
5 really interested in the answers to, you've got the aid
6 of the whole polygraph process to help you in deciding
7 whether he's telling the truth, correct?
- 8 A. Yes.
- 9 Q. But when it comes to the test questions, the control
10 questions...
- 11 A. Now, just a minute now, not the test questions, the...
- 12 Q. The control questions.
- 13 A. The cont-, the known lie questions.
- 14 Q. The known lie questions.
- 15 A. Okay, yeah.
- 16 Q. You don't have the aid of anything to tell you whether
17 he's telling the truth except your own assumptions.
- 18 A. Well, your own ability to assess what the man is
19 telling you, how he's saying it. If he's hedging,
20 "Well maybe I did, maybe I didn't." Fine, that's the
21 way you leave it. Because that thought process is
22 still going to be evoked into his mind.
- 23 Q. But you've told us that the test doesn't work unless
24 the control questions are really what you think they
25

- 1 are, correct?
- 2 A. That's correct.
- 3 Q. So ultimately, the validity of this test depends on
- 4 your ability to assess the man without the aid of any
- 5 scientific or quasi-scientific machinery at all.
- 6 A. No, I disagree with you.
- 7 Q. Because if you're wrong on whether or not he's lying on
- 8 a known lie question, when you assess him just man-to-
- 9 man, if you're wrong on that, the test can be invalid,
- 10 correct?
- 11 A. Any test can be invalid.
- 12 Q. But if that is the case, if you're wrong in your
- 13 ordinary human assessment of whether he's lying on a
- 14 known lie question, the test will be invalid, correct?
- 15 A. If the control is not properly structured to do what
- 16 the control question is supposed to do, certainly.
- 17 Q. Yes, you agree with me.
- 18 A. You would have a problem with your polygraph chart.
- 19 Q. And all you're depending on is your own human
- 20 assessment, the same way I do and Their Lordships do,
- 21 on whether the man is telling the truth at that point.
- 22 A. On the known lie question?
- 23 Q. Yeah.
- 24 A. I would say you're partially correct.
- 25

- 1 Q. Can you tell me any way in which I'm not correct. What
2 else do you rely on besides that?
- 3 A. Well, you're relying on the thought process of that man
4 saying, "Well, am I or am I not telling the truth."
- 5 Q. (You don't know whether he's telling the truth or he's
6 not telling the truth?) ...
- 7 A. ...well if that's the word you want to use, yes, that's
8 fine.
- 9 Q. It's an assumption on your part.
- 10 A. It's not an assumption.
- 11 Q. You think it's scientific.
- 12 A. If it's properly structured it's not an assumption.
- 13 Q. I suggest to you that at the end of a day it's no more
14 scientific than examining the entrails of a chicken...
- 15 A. That's your opinion, sir.
- 16 Q. It depends upon the question, it depends on your
17 assumptions of what's going on in another man's mind...
- 18 A. No, it isn't.
- 19 Q. Not so.
- 20 A. Not so.
- 21 Q. Your beliefs about what's going on in a man's mind.
22 How would you phrase it? What's the accurate way of
23 phrasing it? Your beliefs about what's going on in his
24 mind.
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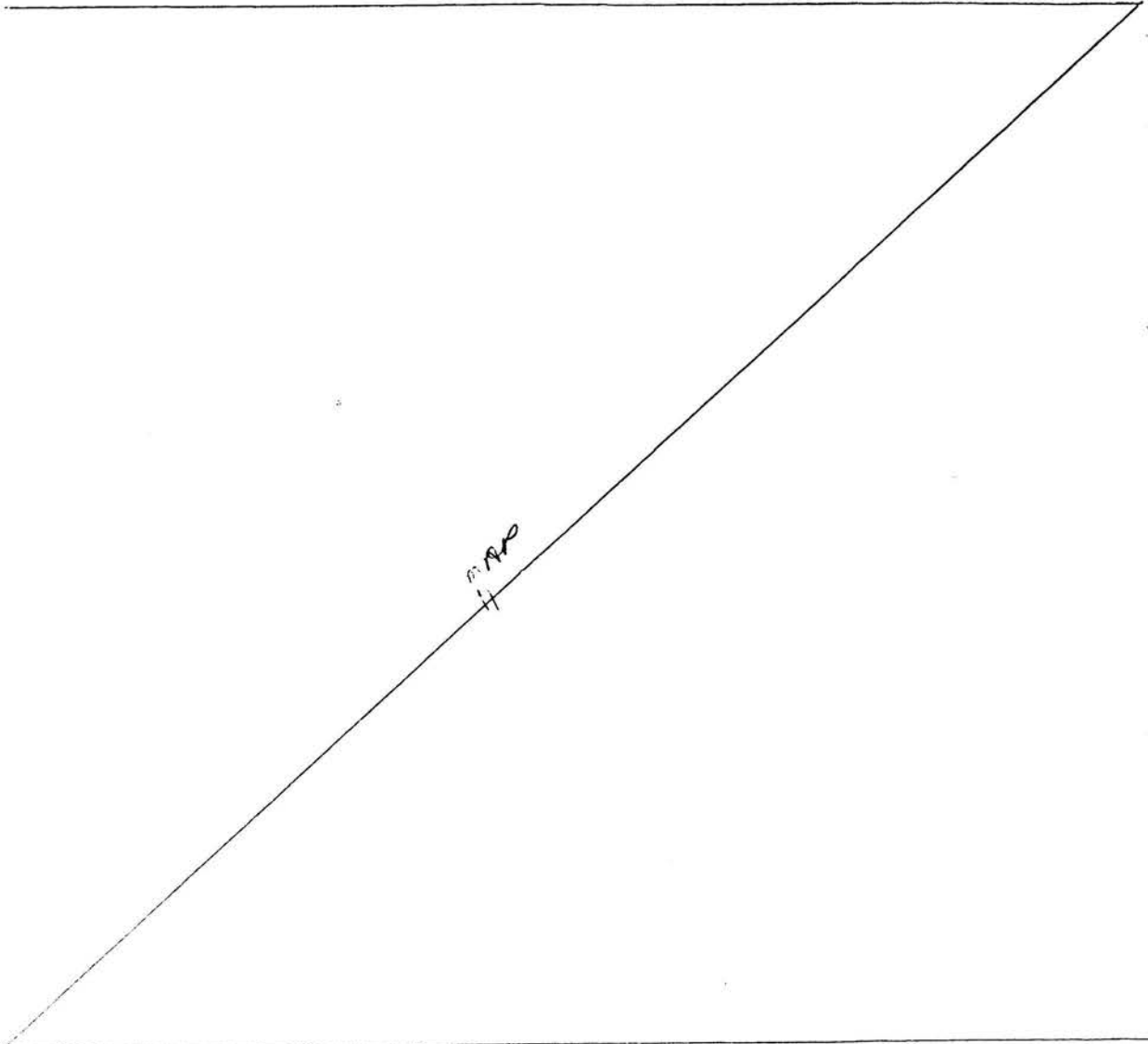
- 1 A. What's your question?
- 2 Q. The validity of the test depends upon the control
- 3 question validity.
- 4 A. The validity of the test depends upon the whole
- 5 procedure...
- 6 Q. Yes. And inter alia, among other things, the validity
- 7 of the control question.
- 8 A. Yes.
- 9 Q. And on the control question whether he's really telling
- 10 a lie to a known lie question, depends upon nothing
- 11 more than your assessment of him, man-to-man, correct?
- 12 A. If you can shut him off properly at the correct
- 13 procedure once he gives you something, "Well I may have
- 14 done this", well, okay fine. "You're not the biggest
- 15 criminal in the world. You're not the biggest thief in
- 16 the world. You haven't done anything else, have you?"
- 17 So you implant that thought in his mind that he hasn't
- 18 done anything else. Whether he has or whether he
- 19 hasn't.
- 20 Q. You think you can implant thoughts in people's minds
- 21 like that.
- 22 A. I'm saying you're programming the control question in
- 23 his mind, yes.
- 24 Q. Inspector Marshall remembered you as being very
- 25

1 enthusiastic about the polygraph program you'd been on
2 and very impressed with how well it worked. Do you
3 still feel that way?

4 A. Does Inspector Marshall still feel I'm enthusiastic? I
5 don't know.

6 Q. Do you still feel as enthusiastic as you did then?
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Mr. Ruby

1 3:56 p.m.

2 A. I'm still a firm believer that the polygraph is a
3 tremendous investigative aid, yes. Now if that's what
4 he means by enthusiastic, I guess I would say, yes.

5 Q. Okay. One of the things you told us about Mr. Ebsary
6 was that he could have been rationalizing in answering
7 the questions and that would produce a false assertion
8 of innocence, is that correct?

9 A. No, I think that was to a hypothetical question, was it
10 not? Any polygraph subject, I don't think it was
11 particularly pertaining to Mr. Ebsary, was it?

12 Q. Fine. But in any event, rationalization is the one of
13 the ways of producing a false assertion of innocence,
14 correct?

15 A. It would be difficult but it's possible, yes. If the
16 person rationalized that they were Adolph Hitler and
17 really believed it, but, of course, you're looking at
18 someone then who's got a disease of the mind, haven't
19 you.

20 Q. So when you say "rationalize" you mean somebody who
21 actually is mentally ill to that extreme extent.

22 A. I think you'd have to look at rationalization in that
23 term, yes.

24 Q. You're familiar with Reid and Inbau on Truth and
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Deception?

A. Yes.

Q. It's a leading text in the field, you agree?

A. It's, yeah, I would say it is. It's right up there.

Q. At page 179 of the 1966 edition, third edition I think it is...

A. What year was that, sir?

Q. 1966. That's the edition you would have been using in 1971, I take it.

A. It's not the issue I have now, I have a later one, but, yeah, I'm familiar with that one.

Q. Okay. He says,

Prior to the advent of the control questioning technique, there was some basis for the view that a person might be able to so rationalize his past criminal behaviour, particularly over a period of years, that there be no deception responses when he said no to the relevant questions on a polygraph test. (And then he goes on to conclude), We know of no instance of any of these... (and he's mentioned a number of others), where the present control questioning technique has been used and we believe that if no such rationalization or self-deceit might produce an indefinite result but an erroneous one.

Do you agree with that?

A. I would have to look at that passage in more detail, sir, before I comment on it. Where are we?

- 1 Q. Starting, I read that passage there and that passage
2 there.
- 3 A. Now what was your question?
- 4 Q. Do you agree with that? It is not possible.
- 5 A. I can't agree or disagree because, you know, they're
6 saying that we know or no instance. I don't know that
7 they're right when they say they know of no instance of
8 this happening. It's very difficult for me to answer
9 that question.
- 10 Q. They're saying that prior to the use of controls that
11 questioning technique which you used...
- 12 A. Prior to the use of control is relevant or irrelevant,
13 basically.
- 14 Q. Say it again, I'm sorry.
- 15 A. It was a relevant/irrelevant technique before the
16 invent of the controls.
- 17 Q. And if I understand that book correctly, what it's
18 saying is prior to the control questioning technique,
19 it might have been possible for somebody to rationalize
20 now it's not possible and we know of no instance, do
21 you agree with that?
- 22 A. I don't know of any instance, no, but I don't know that
23 they don't know of any instance. See, how would you
24 know, how would you ever confirm that particular
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statement?

Q. Isn't that the problem with the polygraph? I mean you can make assertions about it but, ultimately no one can ever know if it's telling you the truth. Whether it's a deceptive technique.

A. Sir, I have never, at any time, ever suggested polygraph was 100 percent.

Q. You really can't tell, though, can you.

A. Well I think if you run in the area of 1000 or 2000 tests and a certain percentage are truthful and a certain percentage of them are deceptive and you don't know, or at least nothing has come back to indicate that an opinion was wrong, you've got to put some validity into statistics like that.

Q. Let me use your own language. I mean you asked, I think rhetorically I'm sure ...

A. Pardon me?

Q. You asked me rhetorically, "How would you ever know?" and I'm suggesting to you...

A. No, no, I'm asking you how would you ever know about this particular statement.

Q. Yes. How would you ever know whether someone was rationalizing their way to a false positive, a false exculpatory statement. You'd never know, correct?

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There's no way to know.

A. No, you would know if there was other evidence, again, where you could prove the person did that. You'd certainly know that way.

Q. You'd know in some cases but not all, correct?

A. Yes, I would accept that statement.

Q. But in the answer that you make claims with the polygraph but you can't prove, isn't that true?

A. I'm not making any claims with the polygraph, you're reading some things that you're claiming Reid and Inbau are saying. I'm not making any claims, sir.

Q. When you talked to Mr. Ebsary, did it not occur to you that he was emotionally unstable?

A. I have no recollection of Mr. Ebsary being emotionally unstable, no.

Q. If he's been emotionally unstable would that trouble you?

A. Oh, certainly.

Q. What would you have done?

A. Well, I hope I would have recognized it, number one.

Q. Right.

A. And if the person was emotionally unstable I certainly would find him unfit for examination, I wouldn't test him.

- 1 Q. And let me see if I can refresh your memory at all.
2 When you asked him his history did he tell you that
3 he'd been in the Navy and that he'd been personally
4 involved in the sinking of the Bismarck.
5 A. The sinking of ...
6 Q. The Bismarck, it's a ship. We've heard a lot about it,
7 but you may not know about it.
8 A. No, I'm sorry I don't. And I don't recall it. If he
9 did, I don't recall.
10 Q. I take it if he'd said to you, "I was personally
11 involved in the sinking of the Bismarck, that wouldn't
12 have mattered to you one way or the other in any event.
13 You wouldn't have drawn any conclusion from that, you
14 wouldn't have.
15 A. I would have had some concerns if he claimed to have
16 sunk the Bismarck.
17 Q. Been personally involved in the sinking of the
18 Bismarck.
19 A. Pardon me?
20 Q. You would have had some concerns.
21 A. Yes, unless he had something to substantiate that.
22 Q. With regard to MacNeil, did it not occur to you that
23 you might want to come back in a week or two when the
24 DT's had passed and see if you could get him at a point
25

- 1 when he was testable?
- 2 A. It's certainly occurred to me since but I don't know
- 3 whether we discussed it at that time or not. Following
- 4 MacNeil and Ebsary my suggestion then was Junior
- 5 Marshall and when that went down the tube, for whatever
- 6 reason, basically we continued with my reservations
- 7 back to Regina. Now bearing in mind I had discussions
- 8 with Al Marshall and I made frequent trips to the
- 9 Maritimes and I said if he ever needed me further on
- 10 that particular file, certainly to get ahold of me.
- 11 That's something that certainly could have been
- 12 considered. Why it wasn't I can't tell you.
- 13 Q. I take it with hindsight you would have preferred to...
- 14 A. Hindsight's always 20/20, sir.
- 15 Q. I see, you would have preferred to test him again and
- 16 when he was hopefully not suffering that condition.
- 17 A. Yes.
- 18 Q. Did it occur to you to test some of the witnesses who
- 19 testified at the trial? I don't know if you knew their
- 20 names - Pratico, Chant ...
- 21 A. I can't even tell you the names of the other witnesses.
- 22 Bear in mind, sir, you got to recall that what my
- 23 impression of Al Marshall's mandate was was this new
- 24 evidence that came about following the conviction, the
- 25

1 review of the what MacNeil was alleging. I didn't go
2 back into the investigation beyond that stage.

3 Q. Would you turn to Volume 18, page 25, it's a document
4 you've seen before. It's the 1982 statement from
5 Corporal Carroll...

6 A. Volume 18, page, what is it, sir?

7 Q. Page 25. There's just one small section I have with
8 regard to it. Are you at page 25 in Volume 18?

9 A. Yes, this is a report by...

10 Q. Corporal Carroll.

11 A. Corporal (McElmon?)...

12 Q. 1982.

13 A. Or Corporal Carroll, sorry, yeah.

14 Q. It's an interview with you. If you look at line 5, or
15 line 4, I guess.

16 He was permitted to review his polygraph
17 report of 1971 and other correspondence
18 pertaining to his involvement since he
did not have personal notes.

19 Now we've seen the polygraph report. What would the
20 other correspondence be, do you recall?

21 A. No, I don't. I do recall him having a copy of my
22 report there but I don't know what he's getting at
23 there.

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MR. SMITH, EXAM. BY MR. PUGSLEY

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MR. RUBY

You've been very patient with me, sir, thank you.

MR. SMITH

You're welcome, sir.

4:05 p.m.

EXAMINATION BY MR. PUGSLEY

Q. Mr. Smith, I'm acting for John MacIntyre.

A. Yes, sir.

Q. How old are you?

A. I'm 48, sir.

Q. And what is your general education?

A. I graduated from Grade 12, Saint John High School,
1958.

Q. Then joined the force?

A. Then joined the Mounted Police the following year.

Q. Did you have anything to do with polygraphs before you
went to New York in 1971?

A. I had seen one. That was basically it.

Q. All right. And when was it that you went to New York?

A. I went to New York in April of 1971.

Q. And remained there for a period of six weeks.

A. Yes.

Q. And you were asked by my friend, Mr. Spicer, how many
polygraph examinations you have carried out in your

1 career and you indicated between 800 and 1000.

2 A. Yes.

3 Q. But you also said, and you were also asked as to
4 whether or not you felt that as time went on your
5 skills improved and you indicated and that perhaps they
6 did not. Perhaps you were as good a polygraph operator
7 when you got out of the New York school as you were at
8 the end of seven or eight years of...

9 A. I stand to be corrected but I don't think I said that.
10 I said that in relation to chart interpretation that I
11 felt I was as competent in interpreting charts...

12 Q. Yes.

13 A. And I didn't say that as it pertains to the entire
14 procedure.

15 Q. I apologize.

16 A. At least I didn't intend that.

17 Q. Did you feel that you were more skilled as an
18 interrogator after experience in the real world?

19 A. I don't think I was any more skilled as an interrogator
20 following polygraph training, no. No, I feel I had a
21 fair amount of experience at that. Mind you, you learn
22 every day.

23 Q. Of course. You carried out some tests during that six-
24 week trial period in New York, did you? Some
25

- 1 polygraph tests.
- 2 A. Yeah, they were trumped up tests. Make-believe tests.
- 3 You tested your fellow classmates, this type of thing.
- 4 Q. They weren't in the real world.
- 5 A. Not in the real world.
- 6 Q. They were pretend tests. Pretend tests.
- 7 A. Oh, yes. Absolutely.
- 8 Q. So that you did not perform your first test until,
- 9 well, did you perform any in Michigan?
- 10 A. No.
- 11 Q. So it was not until you returned to Canada and that
- 12 would be in August 1971, when you performed your first
- 13 test?
- 14 A. August of '71.
- 15 Q. And you performed, so this was your twenty-fifth test
- 16 you indeed performed...
- 17 A. No.
- 18 Q. I'm sorry, your twenty-fifth case.
- 19 A. Twenty-fifth case, fifty-first, fifty-second test.
- 20 Q. Right. Did you play any part in the number of people
- 21 who were going to be put through the test in Sydney in
- 22 November 1971?
- 23 A. The only part that I tried to play in there was that I
- 24 suggested that we do Donald Marshall.
- 25

- 1 Q. Yes.
- 2 A. I was involved with the two and then suggested that
- 3 there...
- 4 Q. And you suggested that you do Donald Marshall because
- 5 why?
- 6 A. Mainly because of the indefinite or incomplete test of
- 7 MacNeil.
- 8 Q. That concerned you.
- 9 A. Certainly.
- 10 Q. You would have preferred to have had a complete test
- 11 from MacNeil.
- 12 A. Exactly.
- 13 Q. And there was, of course, one way to remedy that
- 14 problem as my friend, Mr. Ruby, suggested, namely for
- 15 you to do Mr. MacNeil on another day.
- 16 A. That's correct.
- 17 Q. On the day following the day he was done, you could
- 18 have done that.
- 19 A. No, I wouldn't like to do it that soon, no.
- 20 Q. I see.
- 21 A. No, it would have had to have been on another trip.
- 22 Q. Why was that?
- 23 A. Well because you try to get some space in between.
- 24 Q. I see. But was the problem with MacNeil the fact that,
- 25

1 in your opinion, he had the DT's when you carried out
2 the test on November the 23rd, or 24th?

3 A. That was the big thing I recall, sir, yes.

4 Q. That was the big thing.

5 A. Yeah.

6 Q. And by "DT's" you mean he had a hangover.

7 A. He was into the shakes. I mean he was in advanced
8 stages of DT's, as far as I was concerned.

9 Q. And that affected his ability to...

10 A. Sit still and be a good subject.

11 Q. Yes. Did you even wonder whether it was worthwhile to
12 carry out any test at all?

13 A. Pardon me?

14 Q. Did you even wonder whether it was worthwhile to carry
15 out any test at all on MacNeil?

16 A. Well as the morning went on he got progressively worse.

17 Q. In what sense?

18 A. As far as his shakes and DT's were concerned. He
19 seemed to be going into it.

20 Q. Can you describe what you mean? Was he physically
21 shaking?

22 A. Well just basically unable to sit still. Very uneasy.
23 Appeared agitated. Hands actually shaking.

24 Q. And was this apparent when he first was interviewed by
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you in the morning?

A. Not as much as the interview progressed, no.

Q. He became more nervous as the interview progressed?

A. No, I don't think that's the right word. The DT's became more apparent, as I recall.

Q. Did you ask him if he had been drinking?

A. It was certainly discussed with him, yes.

Q. And what did he respond?

A. Oh, he was quite willing and ready to admit that he did have a problem with alcohol.

Q. Yes. So whether or not he was telling the truth when he said that he saw Ebsary stab Seale, you were not able to make a determination.

A. I was not able to make a determination.

Q. Did you tell that to Inspector Marshall?

A. Yes.

Q. What did you say to him?

A. I told him I was not able to determine whether or not the man was truthful.

Q. That was a very important part of the equation. You were only doing two tests and one man, because he'd been drinking the night or the day or the morning before, you're not able to tell whether he was telling the truth, so you could only test one-half of the

1 equation, namely Ebsary. Is that right?

2 A. Oh those two, yeah, I would say that's correct. I was
3 only able to test one.

4 Q. That's right. And that was the reason why you
5 suggested that Donald Marshall be tested.

6 A. Yes.

7 Q. Did you suggest that anyone else be tested?

8 A. No.

9 Q. Did you discuss with Al Marshall that there were two
10 eye witnesses to this murder who gave evidence?

11 A. I knew nothing, sir, of anything prior to MacNeil
12 surfacing. I knew nothing of the previous file.

13 Q. And that was not discussed with you by Marshall.

14 A. No.

15 Q. You indicated that your first fifty cases had to be
16 sent back to New York ...

17 A. The first which did you say, now?

18 Q. Fifty cases.

19 A. Fifty, yes.

20 Q. Fifty cases.

21 A. Fifty.

22 Q. Had to be sent back to New York for purposes of
23 checking there by the school that you went to.

24 A. Evaluation of my progress, yes.

25

- 1 Q. What do you send to them? What do they check?
- 2 A. Everything.
- 3 Q. Everything.
- 4 A. You send your procedure sheet, you send your polygraph
- 5 charts, you send your background form, you sent even
- 6 the scratch paper that you may have made notes on
- 7 during the course of the interview. Everything had to
- 8 go back.
- 9 Q. And they review that and, presumably, come to the
- 10 conclusion as to whether or not you are capable or not.
- 11 A. That amongst other things, yes,
- 12 Q. And if you're not capable you don't pass.
- 13 A. I would assume that would be the case.
- 14 Q. And that decision is only made after your first fifty
- 15 cases have been reviewed by New York.
- 16 A. That's correct, yes.
- 17 Q. When Inspector Marshall asked you to come to Sydney to
- 18 test two people in connection with a murder, did you
- 19 say to him, "Look it, Al, I haven't passed yet."
- 20 A. No.
- 21 Q. Never told him what stage you were in.
- 22 A. No.
- 23 Q. I haven't got, I haven't reviewed Inspector Marshall's
- 24 evidence today or yesterday, but my recollection is
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4:16 p.m.

that he thought you were a pretty experienced fellow. Indeed, Mr. Wardrop this morning gave that impression, as I recall it, that you had a good deal of experience. That was, in this field, but this was not so. You had not had a great deal of experience. You were still a candidate.

A. That is your opinion, sir. I don't agree with it.

Q. I see. But you were still...

A. I felt fully qualified to do what I did or I would not have done it.

Q. But you were still in the process of passing...

A. I was still in the process of being certified by the National Training Center. You're correct on that point.

Q. And you did not receive your certification until February of 1972?

A. I can't tell you exactly. I feel it was in late '71 or early '72, December, January, in that area somewhere.

Q. Exhibit 93, which has been introduced shows the examinations you conducted from October 26, 1971 until November 23, 1971 and one of them apparently refers to the sudden death of a man by the name of John Felsing, I take it in Fredericton, New Brunswick, is that so?

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A. Yes, that's right.

Q. And there are nine or ten tests that you performed in that case?

A. It's your number, just a moment, sir.

Q. Certainly.

A. Ten, you're correct, yes.

Q. Who made the decision that you were going to examine ten subjects in the Felsing death?

A. I would assume the C.I.B. officer of J Division, which means New Brunswick.

Q. Did you have any part to play in the number of people who were going to be examined by polygraph in that case?

A. That was a particularly unusual case, the details of which are very vivid in my mind. It was an older case. It happened back in the sixties and it was a situation whereby the investigation had turned up nothing but a bunch of suspects, possibilities. So they used the polygraph in that case to eliminate these possibilities, to double check.

Q. Are you saying that each one of the persons you examined in the Felsing case were suspects?

A. Or they would not have been tested, yes.

Q. I see, so you had ten possible suspects in that case?

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A. Yes, there were many. I honestly believe that there was more because I think I did more later on or maybe even before.

Q. But you did not play any part in the number of people who were going to be examined?

A. I don't understand your question there, sir?

Q. Did you play part in the number of people or...

A. Well, I played a part because I ran them on the polygraph.

Q. But in the selection of the people themselves and in the number of people who were examined by polygraph, did you play any part apart from carrying out the test?

A. No, I would examine the people the investigators felt should be tested if I felt they were competent and capable of being tested. I'm not saying that there wasn't some that they thought should be done that we didn't do. I just don't know that.

Q. Were there any that you recommended be done that were not on the list presented to you by the investigating constables?

A. No, not that I know of.

Q. The columns that are to the right of the name that have the ticks in them, what do they mean? "T" what does that mean?

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A. "T" means for "truthful." "D" means "deceptive." "In"

3

means "indefinite." "V.T" means "verified truthful."

4

"V.D." means "verified deceptive." And "V.E." means

5

verified error."

6

Q. I see.

7

A. Going from left to right.

8

Q. So the ticks we have for our case are truthful for Roy

9

Ebsary and indefinite for Jimmy MacNeil?

10

A. Exactly, yes.

11

Q. You indicated that the room in which this test was

12

carried out with MacNeil and Ebsary was in the Wandlyn

13

Hotel, a regular bedroom with the bed removed.

14

A. There was no bed in it, so I am assuming that it was a

15

bedroom with the bed removed. Now I've...

16

Q. How big is the polygraph machine which you used?

17

A. How big?

18

Q. How big is it? What does it look like?

19

A. Oh, I suppose twice as high as a briefcase in length

20

and half as long again or half as wide again and

21

probably eight, ten inches thick, depending upon what

22

particular type of instrument you're looking at.

23

Q. Well, the one you were using in this case.

24

A. I am describing to you my Storting that I was using at

25

that particular time.

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Q. You would put this on the table, would you? There was a table in the room?

3

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A. Yes, correct.

5

Q. Put it on the table and there are a number of leads?

6

A. A number of...

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Q. A number of leads, are there, that go from the machine to the person who's being tested?

8

9

A. Number of leads?

10

Q. Leads, wires.

11

A. Oh, oh, the instruments.

12

Q. The attachments.

13

A. Yeah, the attachments, pardon me, sorry. Yes, that's correct.

14

15

Q. And these attachments are attached where?

16

A. The two pneumographs go around the chest, one upper, one lower. The cardio cuff goes on the right arm.

17

18

Q. On the chest, does he take off his shirt or what...

19

A. No.

20

Q. You open the shirt, do you?

21

A. No.

22

Q. Attach it to the shirt itself?

23

A. Right over top of the shirt. Are we o.k. there?

24

Q. Yes, got that.

25

A. And then the cardio cuff goes on the right arm.

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Q. You roll up the sleeve, do you?

3

A. Yes. It can be done with the sleeve down. Sometimes you would and sometimes you wouldn't depending on the pattern that you were getting. And the G.S.R. is attached to the two fingers of the left hand.

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Q. And how close is the subject to the machine?

8

A. Oh, it would be setting directly in front of him.

9

Q. And where do you sit?

10

A. Most of the time you would probably be standing when you're running the test, over the top of the polygraph.

11

12

Q. But the first part of the introduction with the subject is taken up with the pretest interview?

13

14

A. Correct.

15

Q. And during which time the machine is just there. None of the leads are attached?

16

17

A. Correct.

18

Q. Did MacNeil express any apprehension about the machine, about the results of it or why he was there?

19

20

A. None that I recall, sir, no.

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Q. And you say that you are provided with a series of control questions from the place where you attended this course in New York and those are the control questions that you used?

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A. There are literally dozens of control questions that

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can be used. You pick the one that you feel best suits the situation.

Q. And you had these lists of dozens of questions with you that morning, did you?

A. I would have had some, some of the more pertinent ones I would have probably had, yes.

Q. And these would be on a piece of paper in front of you and then you make a selection that morning as to which ones you're going to ask Jimmy MacNeil?

A. I wouldn't say they'd be on a piece of paper laying out in front of me, but they'd be somewhere in my paraphernalia.

Q. What are you doing at the present time, sir?

A. I'm presently employed in private industry.

Q. And what do you do there?

A. I'm in private industry. I wouldn't care to go any further than that.

Q. You're in private industry in the Province of New Brunswick, are you?

A. That's correct.

Q. In some kind of security business or...

A. I'm not in the security business as such.

Q. Something to do with investigations, that kind of thing, is it?

MR. SMITH, EXAM. BY MR. PUGSLEY

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A. Yes, correct.

Q. And you've been doing that for what period of time?

A. Six years.

MR. PUGSLEY

My Lord, it would be helpful if I could have the break tonight to review my notes. I could complete my cross-examination of this witness very quickly in the morning if I could have a break now.

MR. CHAIRMAN

I have no objection. I think it was indicated to me that this witness has to get back to work tomorrow morning.

MR. PETRIE

That's my understanding. I think, My Lord, if it assists the commission, we are prepared to stay over if necessary.

MR. CHAIRMAN

O.K. we'll adjourn until 9:30 a.m.

ADJOURNED TO JANUARY 12, 1988, 9:30 A.M.

REPORTER'S CERTIFICATE

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I, Margaret E. Graham Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



Margaret E. Graham

DATED THIS 11 day of January , 1988 , at Dartmouth,
Nova Scotia