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**ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION**

Volume XXXVII

- Held: January 11, 1988, in the Imperial Room, Lord Nelson Hotel,
Halifax, Nova Scotia
- Before: Chief Justice T.A. Hickman, Chairman
Assoc. Chief Justice L.A. Poitras and
Hon. G. T. Evans, Commissioners
- Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David
Osborn: Commission counsel
- Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:
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- Mr. Michael G. Whalley, Q.C.: Counsel for City of Sydney
- Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre
- Mr. Donald C. Murray: Counsel for Mr. William Urquhart
- Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for
Donald MacNeil estate
- Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the
Attorney General of Nova Scotia
- Mr. James D. Bissell: Counsel for the R.C.M.P.
- Mr. Al Pringle: Counsel for the Correctional Services of Canada
- Mr. William L. Ryan: Counsel for Officers Evers, Green and
MacAlpine
- Mr. Charles Broderick: Counsel for Staff Sgt. J. Carroll
- Messrs. S. Bruce Outhouse, Q.C. and Thomas M. MacDonald: Counsel
for Sgt. Wheaton and Insp. Scott
- Mr. Guy LaFosse: Counsel for Sgt. H. Davies
- Messrs. Bruce W. Wildsmith and Graydon Nicholas: Counsel for
the Union of Nova Scotia Indians
- Mr. E. Anthony Ross: Counsel for Oscar N. Seale
- Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black
United Front
- Court Reporting: Margaret E. Graham, OCR, RPR

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MR. MacDONALD - OPENING COMMENTS

1 JANUARY 11, 1988 - 9:35 a.m.

2 MR. CHAIRMAN

3 Well, here we are back again after a very quiet
4 festive season, I'm sure, and I can tell by the look of
5 anticipation on the faces of counsel that they're ready,
6 willing and able to quietly and responsibly move on with
7 this Inquiry.

8 Unfortunately Mr. Justice Evans will not be sitting
9 with us this week. Yesterday, his brother, a retired
10 Provincial Court Judge in Timmins, Ontario, died suddenly,
11 and he will, for that reason, be unable to come to Halifax
12 this week. But under the rules of the Commission two
13 constitute a quorum, so Associate Chief Justice Poitras and
14 I will do our best to carry on. We have extended to our
15 colleague the sympathy of the Commission.

16 Mr. MacDonald.

17 MR. MacDONALD

18 I should warn all counsel, My Lord, I'm told that this
19 mike will be on all the time, so be judicious with your
20 remarks.

21 MR. CHAIRMAN

22 Including this one here?

23 MR. MacDONALD

24 I don't know about that one, but this one that's on my
25 tie at the moment, My Lord. When we commenced hearings in

MR. MacDONALD - OPENING COMMENTS

1 Sydney some time ago I indicated that when we came to
2 Halifax I would make a statement, I believe I used the word
3 "comprehensive". It won't be that. But I think it would
4 be useful if I did give you some indication of what will be
5 taking place during the Halifax phase of these hearings.

6 As you know, during the Sydney phase evidence was
7 presented concerning the factual circumstances leading to
8 the conviction of Donald Marshall, Jr., for the murder of
9 Sandy Seale and the subsequent reinvestigation carried out
10 by Inspector Marshall in November, '71, and that's
11 the...chronologically how far we went, with very few
12 exceptions.

13 All witnesses who had relevant information to present
14 to the Commission gave evidence in Sydney, with the
15 exception of Mr. William Urquhart. As you know, he was
16 scheduled to give evidence and was unable to due to health
17 reasons. We had hoped, in fact, that he would be giving
18 evidence this week. We had scheduled him to give evidence
19 on January the 13th, and that was the case as late as last
20 week, but we now are advised that for medical reasons he
21 will be not able to testify this week, but will be
22 available, hopefully, in early February.

23 We propose to continue with the chronological
24 treatment of the events surrounding Donald Marshall,
25 Jr. including his time in prison; various attempts to secure

MR. MacDONALD - OPENING COMMENTS

1 his release; the investigation carried out in 1982 by the
2 RCMP; the reference proceedings in the Nova Scotia Court of
3 Appeal which led to the acquittal of Mr. Marshall; the
4 subsequent dealings between him and the various levels of
5 government leading to payment of compensation; and the
6 further review by the RCMP and the Department of Attorney
7 General of the 198...of the '71 investigation and related
8 matters.

9 We anticipate the requirement to call evidence from
10 approximately fifty witnesses in order to cover all of
11 these areas.

12 We will also be calling evidence of an expert nature,
13 relating to the practises followed in Nova Scotia with
14 respect to post-mortem examinations, and the procedures
15 followed in other jurisdictions.

16 It is possible, in addition, that we will introduce
17 expert evidence with respect to the reference proceedings
18 in the Appeal Division, and such evidence would be similar
19 to that evidence that was given by Professor Archibald in
20 Sydney with respect to the trial proceedings.

21 Now, when all the evidence relating to...directly to
22 Mr. Marshall has been presented, it is our intention at
23 that time to introduce other evidence dealing with the
24 administration of justice in Nova Scotia.

25 Mr. Chairman, in your opening remarks, I believe, at

MR. MacDONALD - OPENING COMMENTS

1 the application for funding you said the following, and I
2 quote:

3 Bringing out the facts will give the
4 Commission a understanding of what
5 happened, but that is only a beginning. It
6 is not enough to examine minutely one
7 incident and from that to expect to suggest
8 changes within a complex system of
9 administration of justice. In order to
10 develop meaningful recommendations--the
11 most important part of our mandate--all
12 contributing or potentially contributing
13 factors must be carefully reviewed within
14 the context of the current state of the
15 administration of justice in Nova Scotia.

16 Thus the analysis of the Marshall case alone would not
17 enable the Commission to draw a conclusion or make
18 meaningful recommendations on the system as a whole.

19 Proceeding in this fashion will necessitate certain
20 witnesses taking the stand on two occasions. You will
21 recall we followed that procedure in Sydney when dealing
22 with the Sydney Police Department officials.

23 In the first segment of the Halifax headings,
24 therefore, members of the Attorney General's Department
25 will be called to discuss their involvement and
26 participation in the various phases of the Donald Marshall,
27 Jr., matter. At that time their evidence will be
28 restricted to their role in the Marshall matter. Some of
29 these officials will be recalled at a later stage to
30 discuss the changes, if any, which have been made in the
31 operation of the Department and their involvement in other

MR. MacDONALD - OPENING COMMENTS

1 cases being considered by the Commission as relevant to a
2 complete examination of the system of the administration of
3 justice.

4 It is during this second phase of the hearings, as
5 well, that evidence will be called from representatives of
6 the Sydney Police Department to discuss changes, if any,
7 which have taken place in the administration and
8 functioning of that Department.

9 It is important to remember that many of the parties
10 granting standing before this Commission are interested
11 only in the Donald Marshall, Jr., case. We expect,
12 therefore, that when we have concluded calling the evidence
13 directly relating to Mr. Marshall some counsel who had been
14 participating on a regular basis before the Commission will
15 no longer consider it necessary to attend to represent the
16 interest of their particular client.

17 Once all the evidence has been called it is proposed
18 to have oral argument addressed to the Commission by any
19 interested party. You have indicated before, Mr. Chairman,
20 that arguments in this matter are to be heard in Sydney and
21 that the date for final arguments will be fixed at the
22 appropriate time.

23 That's a brief outline, My Lord, of how we attend to
24 proceed. Mr. Spicer will be calling the first witness.

25

MR. WARDROP - EXAM. BY MR. SPICER

1 MR. SPICER

2 The first witness is Mr. Wardrop.

3 MR. DONALD JAMES WARDROP, duly called and sworn,
4 testified as follows:

5 EXAMINATION BY MR. SPICER

6 Q. Mr. Wardrop, what's your full name, please?

7 A. Donald James Wardrop. Could I make a few brief
8 comments
9 before we start.

10 MR. SPICER

11 Go ahead.

12 MR. WARDROP

13 Very short. I've heard a lot of comment on this
14 Inquiry about, "I don't recall," and I want to say that was
15 sixteen years ago, with age there's going to be a lot of
16 "don't recalls" in this Inquiry. I...and for the news
17 media, in particular, I say that I will try my best to keep
18 it to a minimum.

19 MR. SPICER

20 When we do get to that point, Mr. Wardrop, we just
21 want to be sure when you don't recall that it is, in fact,
22 that you don't recall.

23 MR. WARDROP

24 That is exactly what I'm trying to lay down, but there
25 has been many comments spread over the CP Press from here

MR. WARDROP - EXAM. BY MR. SPICER

1 to Winnipeg, where I live, about this business of "I don't
2 recall" and one particular person, one particular
3 individual, the press even counted the times that he didn't
4 recall, which I found astounding.

5 MR. SPICER

6 Q. You're a retired member of the RCMP.

7 A. Yes.

8 Q. Where do you currently reside, sir?

9 A. Winnipeg.

10 Q. When did you first commence your career with the RCMP?

11 A. In 1946. Two years before that I was in the Air Force
12 during World War II and I've completed thirty-five
13 years in the Mounted Police, retiring the 2nd of May,
14 1979.

15 Q. Now, can you briefly take us through your career with
16 the RCMP in terms of positions you held and the
17 locations in which you served?

18 A. Exactly. When I first started to get involved in
19 investigative procedures was in Moncton. In 1958 I was
20 commissioned. In 1963 I went to Regina. In 19...

21 Q. Just let's...just slow down for a second. In 1962 what
22 was your rank?

23 A. I was a Sub Inspector.

24 Q. Okay.

25 A. Went to Regina for two years, then I went to Edmonton

MR. WARDROP - EXAM. BY MR. SPICER

1 as an Inspector for two years. Then I went...to IC in
2 Edmonton. Went to Swift Current as OC at Swift Current
3 subdivision.

4 Q. OC means Officer in Charge.

5 A. Right. Yeah. Came back to Halifax then as OC Halifax
6 subdivision.

7 Q. And what year was that, sir?

8 A. 1970.

9 Q. And for how long were you in Halifax?

10 A. One year in that position, then I moved to CIB Officer,
11 1971 to '74.

12 Q. Would that also have been in Halifax?

13 A. In Halifax.

14 Q. Right.

15 A. Uh-huh. After that I went to Toronto, three years in
16 Toronto. Then on...mostly involved in drugs. Then I
17 went to...from there I went as the CO of Manitoba in
18 1976 to 1979.

19 Q. And it was from that position that you retired in 1979.

20 A. Right.

21 Q. During the years 19...in 1971, in November of 1971,
22 were you at that time then CIB officer in Halifax.

23 A. Yes.

24 Q. Can you give...give us an indication of what your
25 responsibilities would have been in that position?

MR. WARDROP - EXAM. BY MR. SPICER

- 1 A. I was completely involved in the whole CIB function,
2 criminal investigation function for the whole of the
3 Province of Nova Scotia.
- 4 Q. And was it a supervisory function or did you carry out
5 investigations yourself?
- 6 A. No, it was a supervisory function. I had an
7 investigative arm working under me.
- 8 Q. To whom did you report?
- 9 A. Super...Chief Superintendent Jack Mudge.
- 10 Q. And did Al Marshall report to you?
- 11 A. Yes.
- 12 Q. What was his position in 1979?
- 13 A. He was Detective Inspector, Sub Inspector.
- 14 Q. And as such would you have considered him to be a
15 person capable of carrying out an independent
16 investigation?
- 17 A. He had carried out many investigations for me. When I
18 say "many" a few, you know, the number, I suppose,
19 would be irrelevant, but yes, he was a very competent
20 investigator. He had thirteen years service and I
21 never questioned any of his investigations whatever.
- 22 Q. Had you ever done any investigations with him yourself?
- 23 A. No, no. You mean getting into the field and going out,
24 no, no.
- 25 Q. Yes.

MR. WARDROP - EXAM. BY MR. SPICER

1 A. I was...my function was...as CIB Officer entailed
2 mostly in the office, you know, in the whole Province.
3 I didn't get out in the field that...like that to go
4 out.

5 Q. Would it have been your job then to assign
6 investigators to the various jobs that needed to be
7 done?

8 A. Exactly, yes.

9 Q. And were you, in fact, the person who assigned Al
10 Marshall to the reinvestigation of the Marshall case?

11 A. Yes, I did.

12 Q. Prior to the November, 1971 reinvestigation done by
13 Mr. Marshall, had you yourself ever been involved in a
14 reinvestigation or an investigation of another police
15 force?

16 A. Yes, I have.

17 Q. Was that a common experience, an uncommon experience?

18 A. It wasn't a common experience. It occurred
19 occasionally.

20 Q. In what sorts of circumstances would it...had it
21 occurred with you previously?

22 A. In Swift Current there was the one specific, there
23 probably would be more, but this is the one that stands
24 out in my mind. There was an investigation there that
25 entailed the Swift Current City Police and...

MR. WARDROP - EXAM. BY MR. SPICER

- 1 Q. Was it going back and looking...
- 2 A. The matter came to our attention and we cleared it with
3 the Attorney General that it wasn't done according
4 to...there was something awry and they asked us to come
5 in and look at it and we did.
- 6 Q. And were you involved in that yourself?
- 7 A. I was the OC. I detailed a person to go and
8 investigate it.
- 9 Q. When you say you "detailed somebody to go and
10 investigate it" do you, when you do that, do you tell
11 somebody "And, I want you to go and interview this
12 person or that person," or do you just tell them that
13 there's an investigation that needs to be done and rely
14 on their competence to go and do it?
- 15 A. Let me say this about that. I was doing the same job as
16 Marshall was doing here in Moncton for four years. I
17 had several...I would say six murder investigations,
18 and when I was tasked to do a job nobody said, "You go
19 out and talk to so and so," or, "You go and talk to so
20 and so," and this. They never ever after I finished my
21 investigation said, "What did you do? What did you do?
22 What didn't you do?" They relied on my initiative and
23 my capability. This is what I relied on here, okay.
24 I'll lay that down to you right now.
- 25 Q. All right. When you say "in this case", you're saying

MR. WARDROP - EXAM. BY MR. SPICER

- 1 you relied on that when Al Marshall went off to Sydney?
- 2 A. Exactly.
- 3 Q. Okay. What is your...what was your first knowledge of
4 the situation in Sydney? How did it come to your
5 attention?
- 6 A. I knew that there was a murder in Sydney. I knew that
7 a certain person by the name of Marshall was convicted.
8 I didn't follow the thing in the newspaper because I
9 had my own function to perform here. I got word from
10 the Attorney General's Department that there was a
11 person by the name of MacNeil that was putting...that
12 was maybe a slang expression "putting the finger" on
13 Ebsary, and that he was saying Marshall hadn't
14 committed the murder. I...
- 15 Q. Sorry. MacNeil was saying that Marshall committed it.
- 16 A. No, no. That Ebsary had committed the murder, not
17 Marshall. Okay. And this came over to me from the
18 Attorney General's Department. Now...
- 19 Q. Do you remember who in the Attorney General's
20 Department?
- 21 A. This is exactly what I'm going to try to tell you. I'm
22 not sure if Bob Anderson or Gordon Gale called me
23 direct or if I might have been out of the office at the
24 time and Burgess might have taken the call. If I was
25 out of the office they had free...we had a very

MR. WARDROP - EXAM. BY MR. SPICER

1 informal relationship with the Attorney General's
2 Department. Like if I was out and they wanted to talk
3 to anyone else they would talk to one of my readers,
4 and Burgess would be the one that would talk to them.
5 So, I don't know. It was one of the two. But anyway,
6 I was told that the Attorney General had received this
7 information, they wanted an investigation.

8 Q. And Burgess is...

9 A. Is my...one of the chief readers there.

10 Q. What's the function of reader?

11 A. Well, they handle criminal files and they research them
12 and they delve into them, and you know, they go into
13 them pretty carefully.

14 Q. Are they commissioned?

15 A. No, no.

16 Q. No.

17 A. They're NCO's. Uh-hum.

18 Q. And in Halifax you had Mr. Burgess and others or.

19 A. Well, he was the one that I can recall handling that
20 particular file. Every one had different particular
21 duties. Some would handle Federal statutes and some
22 would handle, you know, the Provincial Statutes,
23 etcetera, etcetera.

24 Q. As a result of the request that you received from the
25 Attorney General's office what did you do?

1 A. I got ahold of Marshall and asked him to go and look
2 into it.

3 Q. Would there have been anybody else other than Al
4 Marshall that you would have considered to do this?

5 A. No, no. He was my main investigator. He was the only
6 investigator that I had. He was my investigator.

7 Q. Do you have any recollection...

8 A. And when I told him...pardon me. When I told him or
9 asked him to go, I said, "Take all your time and go
10 into, dig in there." I didn't say...I can't express the
11 words that I said, but I said, "Look into it, take all
12 the time you need."

13 Q. And what was it that you told him to look into?

14 A. To the fact that this person MacNeil had said this and
15 there seemed to be something, you know, something wrong
16 with the whole thing.

17 Q. Are you able to tell us today when you said that to
18 Marshall what...what in your mind you would have
19 expected him to do?

20 A. I would have expected him to do as I had done when I
21 was an investigator for many years in Moncton, to
22 ...to...a basic routine thing to go into the whole
23 thing and talked to everyone that was involved.

24 Q. Would you expect him to be acting independently of the
25 Sydney Police Department?

1 A. Yes, of course.

2 Q. Um. Look at volume 16.

3 Q. I would just ask you to turn to page 195 of that
4 volume. Can you tell us what that is?

5 A. Yeah, that is a result of talking to Marshall in Sydney
6 and clearing with me that it would be okay to have the
7 polygraph operator come down. I immediately gave
8 Burgess the nudge and said, you know, send the message
9 off and, of course, I suppose that to do that, he
10 wouldn't have enough detail to do it on his own. He
11 would have got in touch with Marshall and sent it off
12 to Regina. "F" Division is Regina, Saskatchewan and it
13 was the request for Smith to come down and...

14 Q. And the drafter's name, "D.L.B." at the top of that,
15 would that be Burgess?

16 A. Burgess, yeah.

17 Q. And it goes out under your signature.

18 A. Exactly, yes.

19 Q. Towards the end of that message you say:

20 If examination of MacNeil reveals he is
21 telling truth, possibly three further
examinations would be required.

22 Are you able to tell us today what you were thinking at
23 that time as to who those three people would have been?

24 A. I never discussed that with Marshall. He said he
25 needed the polygraph operator and consequential from

1 that, I suppose when he was talking to Burgess, he said
2 "three further examinations", but if you're asking me
3 who he would be thinking about, I would say Marshall,
4 Ebsary, and I don't know who else but, you know, I
5 don't know.

6 Q. You weren't thinking of anybody yourself.

7 A. No.

8 Q. At the time.

9 A. No, no, no.

10 Q. With respect to the polygraph, was the polygraph at
11 that time in 1971 in the RCMP being used extensively?

12 A. I can't recall but it seems to me that it wouldn't have
13 been. It wouldn't have been invoked too much at that
14 time. I can't recall exactly the time but I know that
15 Smith was considered a very efficient and capable
16 operator and for what reason, I don't know. Whether,
17 that he was the first or whether or what but it was
18 coming into vogue, shall we say.

19 Q. At that time in 1971, was it considered to be an aid to
20 investigation; in other words, one of the things that
21 you would do?

22 A. Yes, yeah, it would be an aid, yes.

23 Q. Would there be a circumstance where that would be all
24 you would do, just do a polygraph?

25 A. No, no, no. No, no, no, I never ever thought of that

1 like that.

2 Q. So you would have expected Marshall to talk to people
3 as well as...

4 A. Of course, yes.

5 Q. What was your knowledge of the polygraph in November of
6 1971? Did you know how it worked? Did you know what
7 it was...

8 A. Not really, no. I never got into it. It was one of
9 these advances, technical advances that everybody
10 seemed to advocate from our headquarters and, you know,
11 I accepted it as that.

12 Q. Being advocated as an aid to investigation.

13 A. Yeah.

14 Q. I'll just take you through the documents here, sir, 196
15 of the same volume. Again, that seems to be a message
16 drafted by Mr. Burgess and going out under your
17 signature on the 17th of November.

18 A. Yes.

19 Q. Is that just indicating to whoever is coming from "F"
20 Division...

21 A. To let him know who is the main investigator of the
22 thing, who he should contact.

23 Q. And to get in touch with Al Marshall at that phone
24 number in Sydney.

25 A. Uh-huh.

1 Q. Will you turn to page 200? A couple of notes seemed to
2 be generated by the crime index in Halifax indicating
3 where Ebsary's criminal record. Are you able to tell
4 us about whether or not you would have had that
5 information?

6 A. I never read that, no. I never read those reports. I
7 haven't seen them, no. You see, the thing is that, I
8 might tell you, things are transmitted between
9 detachments and even different police departments and
10 our MCIS, which is Modus Criminal Index Section, I
11 wouldn't see because that was just a routine thing and
12 they transmitted back and forth like, I mean.

13 Q. Notwithstanding that you may not have seen the message,
14 did you know in November of '71 from any source that
15 Roy Ebsary had a criminal record for possession of a
16 concealed weapon?

17 A. No.

18 Q. Did not?

19 A. No.

20 Q. If Al Marshall had known that, would you expect him to
21 tell you at some point?

22 A. I don't think that had much bearing on the thing at
23 that particular time. No, I wouldn't have, I suppose
24 it would have been good information for me to know but,
25 you know, to go down and look at him and say, "You

1 didn't tell me," I don't think I could have said that,
2 no.

3 Q. Is it the sort of information, though, that you would
4 have expected to see in Marshall's report?

5 A. You know, I don't think that that would have really
6 very much bearing on this particular situation. No, I
7 don't, I didn't, I wouldn't think that I would be
8 astounded if it wasn't in the report, no. It wasn't,
9 it didn't seem to be all that serious, like, you know,
10 like that he should have highlighted it or something
11 like that.

12 Q. In any event, you didn't know about it.

13 A. No.

14 Q. Al Marshall goes up to Sydney on the 16th or 17th and
15 then comes back to Halifax and is in Halifax for a few
16 days and goes back up to Sydney with Mr. Smith.

17 A. You see...

18 Q. My question is did you during the period of time that
19 Al Marshall was back in Halifax before he went up to
20 Sydney, did you have any discussions with him
21 concerning this case?

22 A. You see, I have searched my mind over and over again
23 about that. I don't even recall him coming back. I
24 don't, if he came back, I don't recall seeing him. As
25 far as I'm concerned, when he left to go to Sydney, he

1 was there for two weeks. Now if he came back...I want
2 to say one thing clearly, that he was pretty well on
3 his own. He had a loose rein maybe, maybe too loose.
4 Not necessarily too loose but he was one, the only one
5 investigator I had and I didn't ride herd on him and
6 say where are you from day to day and such and such
7 like this. As far as I'm concerned, he would have been
8 there for two weeks. I can't recall him coming back
9 and I can't recall having any conversation with him if
10 he was back.

11 Q. His indication in his testimony at page 5636 of the
12 transcript was that he does recollect having some
13 discussion with you during the time he was back in
14 Halifax.

15 A. You see, there's one thing that I want to tell you. I
16 have a recollection of two conversations with Marshall.
17 The first one was to ask about, clearing with me to
18 have the polygraph operator. And the other one is that
19 somehow or other, I knew very shortly after he went to
20 Sydney that he didn't, somehow or other, they didn't
21 think that MacNeil was giving them the straight story.
22 Now whether that, I think as far as I'm concerned, that
23 was through a conversation in Sydney, not face to face
24 with him when he come back because I don't remember him
25 coming back.

1 Q. Are you able to tell us whether that conversation that
2 MacNeil wasn't telling the truth, whether or not that
3 conversation would have taken place prior to the
4 administration of the polygraph test or after?

5 A. Well, I have no idea.

6 Q. No?

7 A. It just seemed to come to me, and I say that it is
8 very, very vague. It seemed to come to me that I knew
9 that somehow subconsciously, you might say, that they
10 didn't believe MacNeil.

11 Q. Was there any indication as to why they didn't believe
12 MacNeil?

13 A. Well, he was telling different stories. He told the
14 polygraph, he was so erratic that the polygraph
15 operator couldn't get a good reading from him and then
16 he told him apparently that he had lied, et cetera, et
17 cetera, et cetera, you see.

18 Q. Well, that discussion must have taken place after the
19 polygraph thing because you've just been...

20 A. Yeah, it must have, it must have, of course, it must
21 have but, you see, this is what I'm trying to just go
22 over the thing and try to give you the best of my
23 knowledge, you know, and not necessarily in a
24 chronological order but the way I see it or hear it or
25 think it.

- 1 Q. Maybe I could ask you now to turn to page 202 of that
2 volume.
- 3 A. Yeah, right.
- 4 Q. That's Mr. Smith's report.
- 5 A. Yeah.
- 6 Q. Is that directed to you, sir?
- 7 A. Yes, it was, uh-huh.
- 8 Q. Do you have a recollection of receiving that report?
- 9 A. Yes, I do have recollection but, you know...
- 10 Q. Do you remember discussing the substance of it with Al
11 Marshall?
- 12 A. When he came back from his initial investigation, he
13 and I discussed the whole thing before that I had
14 received this report but...
- 15 Q. Prior to receipt of the report?
- 16 A. I believe so, yes.
- 17 Q. And that report is dated November 30th and I think if
18 you just flip back one page to 201, you would see what
19 would appear to be a transmission slip of that report
20 from "F" Division to "H" Division?
- 21 A. Uh-huh.
- 22 Q. 201.
- 23 A. Yeah. No, I don't remember discussing it particularly
24 with him. I know, if you want to go in chronological
25 order, I'll tell you, when he came back from Sydney,

- 1 when Marshall came back from Sydney, we discussed the
2 whole thing complete and this would be involved. I
3 mean not necessarily...
- 4 Q. When you're saying "this", you're talking about the
5 report.
- 6 A. Not necessarily this report but the results of the
7 report.
- 8 Q. Okay. Did you have any discussions with Mr. Marshall
9 by telephone before he came back to Halifax subsequent
10 to the administration of the polygraph test in Sydney?
11 Did he phone you and say, "These are the results."
- 12 A. No, not, no, no, I don't recall anything like that. I
13 told you before and I'll tell you again, I have
14 recollection of knowing somehow or other that they
15 didn't believe MacNeil, that he was, you know, a little
16 bit, he was not, he wasn't, they didn't, they didn't
17 believe what he had said. They found that they
18 couldn't put two and two together and, you know, it
19 just didn't work out.
- 20 Q. In the normal course of events, would you be the person
21 to whom Al Marshall would report the results?
- 22 A. Yes.
- 23 Q. You did have a discussion with Inspector Marshall
24 concerning the substance of his report and the
25 polygraph results.

- 1 A. Prior to that, let me...Should we go into this? He
2 came back from Sydney and he came into my office and we
3 talked about and he said, he assured me that the
4 investigation had been thorough, that the conviction
5 had been substantiated with the evidence and that he
6 was perfectly clear and felt that it was, there was
7 nothing awry. Everything was fine and dandy, that...
- 8 Q. When you say "the investigation had been thorough",
9 you're talking now about the initial investigation in
10 Sydney.
- 11 A. The Sydney investigation had been thorough and
12 everything was copacetic. Everything was kosher. And,
13 you know, that, and, you know, he went over it again
14 and I said, "Well, are you sure?" and he said, "Yes."
15 and he expounded on the competency and the efficiency
16 of the Sydney Police Force and, in particular, John
17 MacIntyre. He went over that and I got the impression
18 that he had known John MacIntyre from time immemorial,
19 you know, the way he was talking about and his
20 capability of this and that and the other thing and...
- 21 Q. Did you have the impression they were friends?
- 22 A. Oh, I certainly had the impression that he knew him
23 quite well, you know.
- 24 Q. Did Inspector Marshall indicate to you what, in fact,
25 he had done in order to satisfy himself that everything

1 was okay in Sydney?

2 A. I'll tell you this, that he said that he had gone over
3 everything as far as the Sydney Police Force was
4 concerned. He had gone over the evidence that was
5 presented to the court. He had gone over those matters
6 and he had, then he...What else did he do? Yeah, he
7 said that he was very assured in his own mind that
8 everything was done thoroughly and completely and he
9 had no reservations whatever about it.

10 Q. When you say "he had no reservations," was he conveying
11 an attitude to you, he was enthusiastic?

12 A. Pardon me, he added that, you know, that coupled with
13 the polygraph operator's findings, certainly made him
14 feel that there was nothing further to be done in the
15 matter.

16 Q. Did you have the impression from talking to him that he
17 had conducted an independent investigation and talked
18 to witnesses and done that sort of thing?

19 A. I want to tell you this that when you go to an
20 investigation, how could he certainly substantiate or
21 negatate [sic] MacNeil's assertion that someone else
22 had done it, unless he talked to everyone. I never
23 gave that one thought. To me, that would be an
24 absolute basic routine thing to do.

25 Q. Inspector Marshall's report itself is dated December

1 21st. Are you able to tell us whether or not prior to
2 receipt of that report, you had received any inquiries
3 from the Attorney General's Department as to what was
4 going on in Sydney and how things were going?

5 A. I can't tell you that, you know, because I can't
6 recall. That's the famous phrase again, "I can't
7 recall."

8 Q. We're familiar with it.

9 A. But the thing is that I would be very, very astounded
10 if we didn't discuss it because I had weekly reports,
11 weekly reports with the senior solicitor, either Gordon
12 Gale or Bob Anderson, and the purpose of those meetings
13 were to discuss current events. And they were very
14 concerned over this thing, so I would be very, very,
15 you know, it would put me right off to think that they
16 wouldn't have, or we wouldn't have discussed it.

17 Q. In what way would they express their feelings such that
18 you can say to us that they were very concerned?

19 A. Well, you know, that if, you know, I suppose that
20 attorney generals don't want any police force under
21 their jurisdiction to be, you know, to be questionable
22 and I suppose that's why there would be concern.

23 Q. How would that concern convey itself to you, though?
24 You say that you thought they were concerned. Was it
25 things they were saying to you? Do you have

1 recollection of any discussion or how do you get that
2 feeling?

3 A. Well, you know, it's a very touchy way to tread, you
4 know, to go into another police force jurisdiction, to
5 start with, okay? That's a very difficult thing. And,
6 you know, I could see that there was some apprehension,
7 that they thought, well, you know, if there's something
8 wrong, let's try to level it out.

9 Q. What I'm trying to get at from you, sir, is whether or
10 not other than your own feeling that they were
11 concerned, there was any expression by anybody in the
12 Attorney General's Department...

13 A. No, no, no. No, no, no. Nobody came out and said
14 anything like that, no, like that we don't trust the
15 Sydney Police Force or anything, no, no.

16 Q. And prior to your receipt of Inspector Marshall's
17 report on December 21st, or about that time, was it
18 your recollection that you would have discussed the
19 substance of what was going on in Sydney at these
20 weekly meetings with representatives of the Attorney
21 General's Department?

22 A. I would say that it would very unusual if I didn't and
23 if I can say that I recall any specific discussion, no.

24 Q. Are you assuming then today that you did?

25 A. I would be very surprised if I didn't. That was the

1 | purpose of our meeting, was to every, every Friday to
2 | discuss current events and go over everything that had
3 | happened, you know, like item from item. You know, I
4 | can't tell you exactly. I mean there was, you see,
5 | this was one of the minor things that, not minor, but
6 | one of the things that we would be discussing. I mean
7 | it wouldn't be, that wasn't the only thing. There was
8 | a lot of other things going on at the same time.

9 | Q. And these discussions would take place, would you be
10 | the only representative of the RCMP there?

11 | A. Yes.

12 | Q. And you'd be discussing them either with Mr. Anderson
13 | or Mr. Gale?

14 | A. Gordon Gale. Sometimes I talked to Gordon Coles but it
15 | would be more of a personnel nature, like manpower,
16 | stuff like that, things of an administrative rather
17 | than criminal.

18 | Q. And discussions with Anderson or Gale would be
19 | substantive matters, is that it?

20 | A. Right.

21 | Q. Would they be discussions with both of them or would it
22 | be just with one of them?

23 | A. No, no, no. See, Bob Anderson was there and then he
24 | was replaced by Gordon Gale. And I can't tell you,
25 | like when I say "one of the two," I can't tell you

1 when one left and the other came on. But it would be
2 one of the two solicitor's desks at the time. So it
3 wouldn't be the two at any time.

4 Q. As far as you were concerned at the time in
5 November/December 1971, was this one of the more
6 important things that was going on in terms of your
7 relationship with the Attorney General's department?

8 A. I would say it would be very important, yes.

9 Q. When you received Inspector Marshall's report, it
10 starts on page 204. First of all, perhaps you could
11 just tell us how you received that report?

12 A. He handed it to me, as I recall, directly. And the
13 rest of the report would have gone in the routine mail
14 distribution. It would have gone to the readers, okay?
15 It's what, if you know the Mounted Police, it would...

16 Q. Yeah, just let me stop you there. When you say "the
17 rest of the report," what is it that would have gone to
18 the readers?

19 A. Okay, hold it, hold it for a second. If you know the
20 Mounted Police, when they prepare a report, it's
21 prepared in about twelve copies, okay? I get a copy
22 from Marshall. The rest of it went into the mail
23 distribution centre.

24 Q. And there were other copies.

25 A. And the readers would have sent it to where they would

1 have. Now, normally, they would send a copy to the
2 A.G. and whoever else. Maybe to Headquarters Ottawa
3 and whatever else that they thought would be involved
4 in it.

5 Q. If that were the case, sir, if the readers did, in
6 fact, distribute various copies of this report to other
7 places, should there be transmittal slips to indicate
8 that that had been done?

9 A. Possibly, yes, but normally if it would have required
10 any further dissertation, they would have put a
11 footnote on there saying, you know, we believe this, we
12 believe this, dit, dit, dit. But I don't see that on
13 there. So I would say then that they must have put a
14 transmittal slip on and said it's complete, it's
15 concluded, there's nothing more to say. There's
16 nothing we can add and let it go at that. Now on top
17 of that, you're asking me about this report. When
18 Marshall handed this report, it seemed to me this was
19 coincidental with my visit to the Attorney General's
20 visit and my best recollection is that the report that
21 he gave me, I took over and handed to either Bob
22 Anderson or Gordon Gale. Now I'm not sure which one
23 was there at the time, but one of the two. Now when I
24 say that, I can't tell you that I remember saying,
25 "Here, this is the report." But I've been trying to

1 recall the many reports that I would take over on a
2 weekly visit. If I was over there, if anything came
3 across my desk that was coincidental with my visit,
4 then I would take it across and talk to him about it,
5 you know. Above everything else, lots of times I would
6 go over there and we'd have nothing to talk about. And
7 if I had a report that we had to discuss, we'd discuss
8 it. So this is what I'm asserting, that this is
9 probably what I...If I didn't do that, and I feel in my
10 own mind as clear as I can, that I took that report
11 over by hand. But if I didn't, it would have gone over
12 in the routine mail, anyway. And if I did take it
13 over, I would, Burgess or none of the readers would
14 have known. I mean their mail would go out in the
15 regular routine flow of mail and that would be it. They
16 wouldn't know that I took it. I didn't, I wouldn't go
17 and say, "I'm taking this over. You don't have to send
18 it." So the normal course of mail would have gone
19 anyway.

20 Q. All right, I just wanted to be certain of one thing
21 arising out of what you just said. Are you telling us
22 today that you have a recollection that you took this
23 report over to somebody in the Attorney General's
24 Department or are you assuming that that's what you did
25 because that's what you would normally do?

1 A. No, no, no, I'm telling you that my best recollection
2 is that I took it over, and when I say that, I'm
3 thinking back of all of the other reports that I took
4 over and it seems to me, in my best recollection,
5 that's the only thing I can say, that I took this
6 report over at the same time. Now I can't tell you,
7 and can't tell you any conversation that ensued as a
8 result of me taking it over, like anything. But I can
9 only tell you that the Attorney General's Department
10 never asked me for any further investigation on this
11 matter at all.

12 Q. And you're telling us today that you have a
13 recollection of that happening. You're not just
14 putting the pieces together and assuming that it
15 happened.

16 A. No, no, this is my best recollection, and, you know,
17 piecing that with the other pieces of correspondence
18 that I took over, I'm, it seems to me that this is one
19 piece of correspondence that I took over.

20 Q. Do you remember, after having taken it over, do you
21 remember discussing it with anybody in the A.G.'s
22 department?

23 A. That's what I simply just got through telling you. I
24 do not recall discussing it but my purpose of a weekly
25 trip over there was to discuss current events and if I

1 | didn't discuss it, I would be completely mesmerized.

2 | If I didn't discuss...

3 | Q. What do you mean by that?

4 | A. Well, it would be, it would be totally, you know,
5 | different from any of our discussions before. I mean
6 | it would be confusing to me to say that I wouldn't
7 | discuss it. But I can't recall sitting down talking.
8 | I can only recall, and I'm telling you again, the only
9 | thing I can recall is that they did not ask me for any
10 | further investigation. And from that, I presumed that
11 | they were satisfied.

12 | Q. And you have no recollection of any discussion with
13 | anybody in the Attorney General's department about it.

14 | A. Not clearly, no. We talked about so many things that I
15 | cannot tell you of any clear distinct impression of a
16 | discussion, no.

17 | Q. What about within the RCMP itself? Would you have had
18 | to forward this report on to your superiors?

19 | A. I think in the normal course of paper flow, they would
20 | have forwarded it on but there would be no comment. I
21 | was sort of, you know, it would end right here, more or
22 | less.

23 | Q. When you say "right here", it would end at you.

24 | A. Yeah.

25 | Q. Did you have any discussions with any of your superiors

1 | concerning the substance of that report?

2 | A. No.

3 | Q. Was Al Marshall's report vented by anybody else in the
4 | RCMP? Did anybody else, to your knowledge, sit down
5 | with him and say, "Okay, what about this and what about
6 | that?

7 | A. No.

8 | Q. Would it have been normal for that to have been done?

9 | A. No.

10 | Q. Would it be fair to say then that, normally, the
11 | investigating officer who makes up his report, brings
12 | it to you, and the conclusions are his and he wouldn't
13 | have had the benefit of having sat down and had to
14 | have himself quizzed, essentially, about the findings
15 | that he made.

16 | A. No, no, you know, listen, if you're talking about a
17 | constable, a third class constable, or an inspector
18 | with 13 years services who is a very competent
19 | investigator, we're talking about two different things,
20 | no.

21 | Q. Sure.

22 | A. In his position, no, he wouldn't do that, no. I had a
23 | great deal of faith in him and I looked upon his report
24 | with a great deal of faith and admiration because I
25 | admired him as an investigator.

1 Q. Were you satisfied then in your own mind after you had
2 received this report and talked to Inspector Marshall
3 about it that, in fact, they got the right man in
4 Sydney?

5 A. Certainly the way he expressed it himself to me, I was
6 completely satisfied that he had felt, and I'll tell
7 you another thing right now. I had never thought, right
8 up until the time that he gave evidence before this
9 Inquiry, that he hadn't given me his all in this
10 investigation and when he came out with saying that he
11 had rubber-stamped things, I was astounded and annoyed
12 to no end.

13 Q. Since you bring that up, was that the first...That was
14 the first indication that you had that anything had
15 gone with Inspector Marshall's report?

16 A. Exactly. I had felt, I knew, I hadn't followed this
17 thing, I was out west. You don't hear much about this
18 out west but I had heard that Marshall was released
19 from jail and I had assumed in my own mind that
20 something come up that our Inspector Marshall was able,
21 was unable to uncover on the investigation and I don't
22 know anything else about that investigation except that
23 I heard or read in the paper something about papers
24 being hidden or something like that. And that's all I
25 know about it.

1 Q. Did you have any further involvement then at all with
2 the substance of this investigation in your last eight
3 years with the RCMP as from '71 to '79 at the time you
4 retired?

5 A. No.

6 Q. Nothing at all?

7 A. That was, that report was the last, it was concluded as
8 far as I'm concerned, that was the end of it. That's
9 all I've ever heard of it.

10 Q. And you attended the meetings in the A.G.'s office
11 during your time in Halifax, so it would have been from
12 '71 to '74?

13 A. '74, right.

14 Q. And, to your recollection, it never came up.

15 A. No.

16 Q. When you did realize the nature of the investigation
17 carried out by Inspector Marhsall, do you have any
18 views today as to why that might have happened, given
19 what you knew about him in the past from his previous
20 investigations?

21 A. I think that he was probably, his admiration of the
22 Sydney Police Force and their competency and their
23 efficiency probably overshadowed his investigative
24 ability and, possibly, he was, by virtue of that, he
25 just depended on them and expected that what they did

MR. WARDROP, EXAM. BY MR. SPICER

1 was perfectly right and everything was copacetic and
2 that was it.

3 Q. I take it that you would have expected Inspector
4 Marshall to do something other than to rely on the
5 Sydney Police Force?

6 A. Like I told you, when you go to do an investigation, an
7 officer like that, you're not talking about some young
8 junior person. You tell them, you task them with a job
9 and you expect them to do it. You don't go out and
10 spell them, say, you go see this one or that one or
11 anything else. You expect them to do the whole thing.
12 For anyone to say that he went there to just
13 investigate MacNeil, because MacNeil said something
14 without going into the background, that's beyond
15 comprehension.

16 Q. That was unbelievable to you.

17 A. Couldn't handle it.

18 MR. SPICER

19 Thank you.

20 MR. RUBY

21 I have no questions.

22 EXAMINATION BY MR. PUGSLEY

23 Q. Mr. Wardrop, my name is Ronald Pugsley. I'm appearing
24 for John MacIntyre. When you received Inspector
25 Marshall's report, did you read it?

1 A. Yes, I did.

2 Q. Would you have had an opportunity of reading it before
3 you interviewed Inspector Marshall?

4 A. No, no, I interviewed him quite a bit before that
5 because his report was a little late coming in. It
6 would be a few days, well, I don't say how long, but I
7 interviewed him before, okay?

8 Q. Yes, and after reading the report, would you have
9 interviewed him again?

10 A. Yes, I did.

11 Q. And discussed the nature of his report with him.

12 A. Yes, you know, by that time, I had made up my mind that
13 he had completed a thorough, as far as he was
14 concerned, everything was thoroughly investigated and
15 there was no problem. I went over the report but I
16 didn't go over and say sentence for sentence and dot
17 all the i's and t's and say, "Did you do this?" and or
18 anything like that. There were two things that I asked
19 him on that report. I said there was two girls and two
20 boys that Marshall and Chant met on Byng Avenue and
21 there was a driver that drove Chant and Marshall down
22 to where Seale's body was. I said, "Did you try and
23 find out who these people were? Did you try to
24 identify them?" He said he did. And then I said at
25 the end of the report, I said, "Why would you report to

1 Donald Marshall[sic], Donnie Marshall[sic] about this?"

2 Well, I understand that lawyers, prosecutors...

3 Q. Donald MacNeil, you mean?

4 A. I beg your pardon?

5 Q. I think you said "Donald Marshall". Do you mean Donald
6 MacNeil?

7 A. Donald MacNeil, pardon me, I'm sorry.

8 Q. The crown prosecutor.

9 A. Yeah, Donnie MacNeil. I said, you know, this was a
10 little bit irregular for him to be reporting to Don
11 MacNeil about his investigation. But I realize that
12 prosecuting attorneys and investigators have a rapport
13 and if there's harmony, they talk back and forth and
14 there's a lot of things exchanged that may be, and I
15 didn't take exception to it.

16 Q. And you would have been alerted to that because on page
17 207 of Volume 16 that is in front of you, at the end of
18 Inspector Marshall's report, he says under Section 10:
19 "Mr. Donald MacNeil, Q.C., has been made aware of the
20 results of this investigation."

21 A. Yeah, I read that, sure. This is what I say. I took
22 exception to it in a way in my own mind but then I
23 thought, because I'd been involved in many
24 investigations and as I tell you again, an
25 investigator and a prosecutor, if there's a good

1 rapport and lots of harmony, there's a great exchange
2 of information, that's the way it should be. So I
3 didn't accept, I didn't question it at all.

4 Q. So obviously that comment or that discussion you had
5 with him was after you received his written report.

6 A. Yes.

7 Q. Because it was in the written report that you were made
8 aware that he had talked to Donnie MacNeil.

9 A. Yeah.

10 Q. Now you say that was the second point that you had
11 discussed with him. The first point you discussed with
12 him was about two girls and two boys.

13 A. That Marshall and Chant had met on Byng Avenue.

14 Q. That's right.

15 A. Okay, and they talked there and then the driver, some
16 driver came along and picked up Marshall and Chant up
17 and took them over to where Seale's body was.

18 Q. That's right.

19 A. And I said, did you try and find out who those people
20 were, because to me, that would be very important. I
21 would have torn Sydney apart to find out, if I had been
22 the investigator.

23 Q. And you would have wanted to try and find out who they
24 were for the purposes of interviewing them, I take it.

25 A. Of course, of course, to find out what Marshall or

1 Chant might have said to them, of course.

2 Q. Precisely.

3 A. Obviously.

4 Q. And what did he tell you?

5 A. He said that he had tried and he was unable to identify
6 them.

7 Q. Unable to identify the two girls?

8 A. The two girls and the two boys, yes.

9 Q. The driver.

10 A. Yeah.

11 Q. I see. So you knew that he did not interview those
12 people.

13 A. Exactly.

14 Q. What about interviewing any other people? Did you have
15 any discussion with him about what others he
16 interviewed?

17 A. I never sat down, like I told you or I told counsel
18 here, that being an old-time investigator, when you're
19 tasked with a job, you don't go out and tell somebody,
20 who to talk to and who not to. When you task somebody
21 with a job, you would presume, and it's just basic
22 routine investigative procedure to talk to everyone.
23 And I certainly wouldn't go down and say, "Did you talk
24 to Joe Blow? Did you talk to Chant? Did you talk to
25 Pratico? Did you talk to this one and that one?" No,

1 I never did, no.

2 Q. But you assumed that he would have talked to those
3 people.

4 A. Of course, of course.

5 Q. And interviewed them.

6 A. Of course.

7 Q. And taken statements from them.

8 A. Not necessarily statements. You see, this is the thing
9 that I have to tell you. If he interviewed these
10 people and he found that their admissions or their
11 statements would be coincidental and similar to what
12 they had given the Sydney City Police, it would be a
13 duplication for him to take statements. And I assumed
14 that he didn't take statements for that very reason.

15 Q. Would you have expected him to have gone to the trial
16 transcript or the preliminary transcript to determine
17 who the witnesses were and who gave evidence?

18 A. Well, I believe he did. I don't know. I did expect
19 that, yes.

20 Q. You'd have to have, one would have to have a guide as
21 to who you were going to talk to and would not going to
22 the preliminary transcript and determining who gave
23 evidence at trial be one way of determining who you
24 would want to interview? Would that not be correct?
25 Is that not one way one would find out who gave

1 evidence?

2 A. Right, exactly, yes, of course, of course.

3 Q. And you would expect that he would interview those
4 people.

5 A. Yeah, exactly, yes. I didn't even get, listen to me, I
6 want to tell you something. If you had been on the job
7 35 years, as long as I have, you wouldn't even think of
8 some things. It's so basic routine that, you know,
9 that's just beyond comprehension. Again, I tell you
10 that and I say that, I sound like I'm repeating myself,
11 but that is a fact. That doesn't even make sense to
12 me.

13 Q. Of course. And would you have expected that since
14 MacNeil told a story about what occurred in the park,
15 would you have expected Inspector Marshall to have gone
16 to the park with MacNeil and say, "Show me where you
17 were when this happened?"

18 A. I would have thought he would have. And I thought he
19 might have. I don't know. You see, like, you see,
20 again, I have to tell you, to try and, we have
21 foresight here now and we're talking about then, at
22 that particular time. I assumed that he did all of
23 those things. They're very basic. He's a 13-year-old
24 investigator, very competent. He had done many jobs
25 for me, very well, very competent. And for me to sit

1 down and question him, I took him in good faith and I
2 thought that that was a perfect, you know, he did his
3 best and, again, I say I didn't even think for one
4 moment that he hadn't covered all of those tracks until
5 he come out here in the report and said that he had
6 rubber-stamped everything.

7 Q. Yes, there's nothing in his written report to indicate
8 that he did interview anyone...

9 A. Listen...

10 Q. I'm sorry, excuse me, let me finish.

11 A. Okay.

12 Q. Anyone really other than MacNeil. There's nothing to
13 indicate that...

14 A. No, no.

15 Q. In his written report.

16 A. Listen, when you lay down a report and you don't expect
17 all of the things to be, the t's to be crossed and the
18 i's to be dotted. I mean if you're, have been involved
19 in investigations like I have and you make an
20 assumption, you make a conclusion. You don't have to
21 say I did this--A, B, C, D, like that. Do you know
22 what I mean?

23 Q. So the fact that there was nothing in the report
24 about...

25 A. Didn't bother me at all. I assumed that I sent a very

1 experienced investigator to do a job and he did it.

2 Q. Would your expectation that he would have interviewed
3 witnesses directly, would that have arisen as a
4 consequence of the training he got when he became an
5 RCMP officer or would it have been something you would
6 have expected that he would have picked up during the
7 course of his work with the RCMP?

8 A. It's just pretty basic, you know. Like I mean, with
9 experience, eh? You don't get it in training
10 necessarily but with experience, you know what I mean,
11 you know.

12 Q. The meetings that you had with Attorney General's
13 department, they were each Friday morning, were they?

14 A. Friday morning, as I recall.

15 Q. Every week.

16 A. You know, with the exception if I was out of town or
17 they were out of town or something like that.

18 Q. And you would go down to the A.G.'s office, would you?

19 A. Right, I'd walk down. We were on Hollis Street then.
20 It was just a walk over to the building.

21 Q. Would you have a fixed time for the meeting, normally?

22 A. It was around ten o'clock usually. We had coffee and
23 our meeting.

24 Q. How long would the meeting normally last for?

25 A. Depending on what we had to discuss. It would go for a

1 half hour to an hour, an hour and a half sometimes, you
2 know.

3 Q. Incidentally, have you talked to Inspector Marshall
4 since he gave his evidence here?

5 A. No, I haven't, no.

6 Q. You didn't phone him up and say...

7 A. Never.

8 Q. You know, what happened?

9 A. No, I haven't, no. No, I haven't talked to him. I
10 haven't talked to anyone on the Inquiry, you know, like
11 that, no, I haven't.

12 Q. Would you turn to page 47 of Exhibit 20, sir? I don't
13 expect this is in your writing. Do you recognize the
14 handwriting at all?

15 A. It's not my writing, for sure.

16 Q. After the first few lines on the right-hand side of the
17 page, can you just read out loud for me what appears?

18 A.

19 He requested me to go on camera for
20 interview but I declined. Mr. Vickery
informed me that he spoke to the...

21 Can you give me a hand there?

22 Q. I don't know. Is that your name?

23 A. "Assistant Commissioner Wardrop."

24 Q. Is that you?

25 A. That's me, assistant, I was an assistant commissioner,

1 | yes.

2 | Q. Yes.

3 | A. See, you know, but I wasn't at that time. I don't know
4 | what that's all about. And then he goes, "C.B.O. "H"
5 | but was told that he, Wardrop was..."

6 | Q. Had nothing to do with the file?

7 | A. That, no, I, you know...That is all foreign to me. I
8 | don't know what they're talking about.

9 | Q. Are you the Wardrop that is referred to there?

10 | A. Well, I'm, yes, I'm, I guess I'm the only one involved
11 | in this affair.

12 | Q. But you can't shed any light on this note.

13 | A. No, but as to what I'm trying, can you decipher the
14 | rest of it? My ability to decipher may not be as acute
15 | as yours but I certainly can't come up with anything
16 | there.

17 | Q. I have the same difficulty you do.

18 | A. Well, what is it all about? I mean it's just a bunch
19 | of garbled junk, as far as I'm concerned.

20 | Q. Well, it presumably came, I don't know whether
21 | commission counsel could help us with this or not, as
22 | to who is the author of this.

23 | A. But what reference, what relevance does it have to
24 | this?

25 | Q. I don't know. I don't know what relevance it has.

MR. WARDROP, EXAM. BY MR. PUGSLEY

1 A. You try to tell me because I can't see anything
2 relevant. Vic...what's his name? Who are you talking
3 about? What's this person? Victor, Vickery...

4 Q. I only saw your name mentioned, so I thought you might
5 know something about it.

6 A. No, I do not know a thing about it and I further tell
7 you that it's completely foreign to me.

MR. SPICER

9 The page before may help you. I can't help you too much
10 but it does say "From C.O." on the page before and makes
11 reference to "Claude Vickery and CBC", telephone
12 conversation. It's part of the same thing.

MR. WARDROP

14 A. Well, let me say this, what was the gist of that
15 telephone conversation? Can you give me that without
16 me trying to go through it?

17 Q. I'm afraid I can't help you at all.

18 A. I don't recall talking to any Claude Vickery on
19 television. If I did and he was inquiring about this,
20 I would simply say to myself, it's none of his bloody
21 business to start with and I'd tell him anything that
22 came, the first thing that came to my mind.

23 Q. Why would you tell him that?

24 A. Because it's none of his bloody business. It's my
25 business.

1 Q. Right. And as far as the RCMP is concerned, is it
2 customary for the RCMP to leak to the media during the
3 course of an investigation...

4 A. Not at all. That's what I'm saying. That's why I'd
5 shut him off and say nothing. If I said anything, it
6 would be irrelevant to anything pertinent to the fact
7 at all.

8 Q. Is there any written guidelines in the RCMP about not
9 leaking information to the media during the course of
10 an investigation?

11 A. No, no, no, there's nothing laid down like that. It's
12 just good common sense.

13 Q. Something you're expected to know.

14 A. Of course, of course.

15 Q. And have you followed that practice of not...

16 A. Exactly, exactly.

17 Q. Leaking information to the media?

18 A. Exactly. And you know whatever that is all about, I
19 don't know what they're trying to suggest, but I can't
20 get a heck of a lot out of it. But as far as I'm
21 concerned, I can't recall speaking to him. If I did
22 speak to him and he was asking me what I knew about
23 this business, I would have told him nothing or told
24 him, you know, I would have told him none of his
25 business. But mostly I would have said, you know,

MR. WARDROP, EXAM. BY MR. PUGSLEY

1 nothing. I don't believe in telling people things. I
2 was, I knew that I was coming before this Inquiry.
3 This is the place that I'm going to tell what I know,
4 not to the press.

5 Q. Quite so. Did you have a superior in Halifax when you
6 were here between '71 and '74?

7 A. Yes.

8 Q. Who was that?

9 A. Chief superintendent Jack Mudge and he was my
10 predecessor on the job that I had. He was the CIB
11 officer. He moved up to Jack Ross' place and I moved
12 into his place from the C.O. down, I was the C.O. down
13 in Halifax Subdivision.

14 Q. Would Superintendent Mudge have received a copy of
15 Inspector Marshall's report?

16 A. I doubt it very much. I doubt that he would be
17 involved in that at all, no. You know, he had another
18 superior that he was involved with, he wouldn't be.

19 MR. PUGSLEY

20 Thank you.

21 EXAMINATION BY MR. BARRETT

22

23 Q. Mr. Wardrop, my name is David Barrett and I represent
24 the Estate of Donald C. MacNeil and I just have a
25

1 couple of questions for you. Were you aware when this
2 report was presented to you by Inspector Marshall that
3 the Donald Marshall case had been appealed?

4 A. No.

5 Q. And your instructions then to commence this
6 investigation were received from the Attorney General's
7 office in Halifax?

8 A. Yes.

9 Q. Your best recollection is that a copy of this report
10 was forwarded to the Attorney General's office in
11 Halifax?

12 A. I feel that is, yes.

13 Q. Would you have any reason personally to contact the
14 Attorney General's office or the crown office in
15 Sydney?

16 A. No.

17 Q. So you had no reason to speak with Donald MacNeil or
18 Lou Matheson?

19 A. No, I don't know, I've never spoken to him, no.

20 Q. Are you aware whether a copy of this report would be
21 sent to the crown office in Sydney?

22 A. I would say that it would be sent to Sydney Subdivision
23 and where they might have distributed it after that, I
24 would have no idea. It would be sent to Sydney
25 Subdivision, okay, of RCMP, Sydney Subdivision.

MR. WARDROP, EXAM. BY MR. BARRETT

1 Q. But as far as the Attorney General's department
2 requesting this investigation, a copy, you feel, would
3 be sent to the Attorney General's office in Halifax.

4 A. Absolutely. It would be, it's unthinkable to think
5 that it wasn't. I can't even, you know, that's just
6 out of the question.

MR. BARRETT

7
8 Thank you. Those are all my questions.
9

EXAMINATION BY MR. PINK

10
11 Q. Mr. Wardrop, my name is Darrel Pink and I'm counsel for
12 the Attorney General's Department. You've had a chance
13 to look at the documents in Exhibit, in Volume 16.
14 Would you just open Volume 16 again? Mr. Spicer asked
15 you to look at page 195 and if you could just start
16 there, please?

17 A. Right.

18 Q. And if you could just look at the documents from 195
19 through to page 209. I don't want you to read each
20 one but just look at them and generally know what each
21 of them is.

22 A. Yes.

23 Q. It's clear from that that there's nothing which
24 indicates in writing that Inspector Marshall's report
25 went to the Attorney General's Department, is that

1 correct?

2 A. Yes.

3 Q. And it's your understanding or it was your evidence
4 that normally one would expect two types of written
5 indication that the report was forwarded. Either a
6 forwarding note at the bottom of his report or a
7 transmittal.

8 A. Or by hand by myself.

9 Q. Yes, but your evidence also was that even if you
10 delivered it by hand, you would still expect the
11 readers to put it through the normal distribution
12 network.

13 A. Exactly.

14 Q. And that would be accompanied by either a forwarding
15 note or a transmittal.

16 A. Yeah, but you know what a transmittal slip is. It's
17 just a little green thing that you stick on there. I
18 mean there's nothing printed on the report itself. I
19 mean, you know.

20 Q. There is attached...

21 A. But there wouldn't be a duplicate copy, there wouldn't
22 not necessarily be a duplicate copy in our office of a
23 transmittal slip that was sent over like that. The
24 file copy would be kept in our office. It would be
25 sent over in a transmittal slip and that would be it.

1 One copy of a transmittal slip.

2 Q. Okay. Can you tell me what the distribution of a
3 report like this would normally be?

4 A. Well, now, listen, you're asking something that I, you
5 know, it would depend on what department was involved
6 and how many departments. First of all, everything of
7 any consequence went to the Attorney General. There's
8 no doubt about that. No question about that at all.
9 That's just automatic.

10 Q. Mr. Wardrop, let me take you back. Turn your mind back
11 to this particular investigation. Where would you have
12 expected this report to have been distributed?

13 A. To go to the Attorney General's Department, No. 1.

14 Q. Where else?

15 A. Our office in Ottawa.

16 Q. Where else?

17 A. Well, now, come on. There's nowhere else that I would
18 particularly think would be involved.

19 Q. Well, you indicated the Sydney Subdivision?

20 A. Well, of course, that's automatic. That's one of our
21 people, you know...

22 Q. Okay, but I don't know who your normal people would be
23 and that's what I'm asking you.

24 A. Well, you know, okay, the subdivision involved, okay?
25 It would be Sydney. They would get a copy of it. A

1 copy would go to the A.G., a copy would go to our
2 headquarters in Ottawa, a copy would stay here. And
3 that's about it, I would expect.

4 Q. So there would only be four copies circulated, is
5 that...

6 A. No, no, listen, you're asking for something that I
7 can't tell you. You know, like getting down to the
8 paper flow, there might have been some other persons
9 involved or some other interest. I can't tell you that
10 specifically, no.

11 Q. Do you recall regarding this particular investigation
12 whether there was anybody interested who did receive a
13 copy of the report?

14 A. There wouldn't be anyone that I know of, no.

15 Q. So with regard to this particular investigation, the
16 circulation would have been limited to four parties.

17 A. I would say so, yeah.

18 Q. You've indicated that you had weekly meetings with the
19 senior solicitor and the Attorney General's department.

20 A. I had, yeah, weekly, right.

21 Q. And you said you believed those meetings were on
22 Friday?

23 A. I believe it, yeah.

24 Q. Is it possible those meetings were regularly scheduled
25 for Thursday mornings?

1 A. I think Friday.

2 Q. Your recollection is Friday, okay. Who did you meet
3 with at the department when you first became the CIB
4 officer for "H" Division?

5 A. Bob Anderson.

6 Q. And until what time did you meet with Mr. Anderson?

7 A. Until he was replaced by Gordon Gale.

8 Q. Can you put a time frame on that?

9 A. No.

10 Q. Can you give us any help as to what caused the change
11 in meeting from Mr. Anderson to Mr. Gale?

12 A. Because, I don't know where Mr. Anderson went but there
13 was a change in the hierarchy over there and I never
14 followed it, no.

15 Q. Was there any gap or lapse between the time that you
16 met with Mr. Anderson and you began meeting with Mr.
17 Gale?

18 A. No.

19 Q. Did the meetings take place every week without fail?

20 A. No, not every week. If he happened to be out of town
21 or if I was out of town, no, there was, it wasn't every
22 week without fail, no, of course.

23 Q. The thing that strikes me about Inspector Marshall's
24 report is that it's dated the 21st of December,
25 correct?

1 A. Yeah.

2 Q. Did you receive it on that day or subsequent to that?

3 A. Subsequent. Very shortly after, I would say. I can't
4 give you the days but it would be very close after
5 that.

6 Q. 22nd, 23rd, 24th?

7 A. I don't know exactly. No, I couldn't tell you that.

8 Q. And you got the report, I believe, or indication was
9 and you took it, or your recollection is that you took
10 it with you to the Attorney General's Department?

11 A. The thing is that it didn't come on my desk right now
12 and I run over to the Attorney General and said, "Here
13 is the report." The thing is that if it came in to my
14 office on Wednesday or Thursday and I read it over and
15 digested it and knew I was going over to see the
16 Attorney General, the solicitor on Friday, I would have
17 just stuck it over there and said, "Well, I'll take it
18 over with me."

19 Q. That was your normal practice.

20 A. Exactly.

21 Q. Your normal routine.

22 A. Exactly.

23 Q. But you cannot say that Inspector Marshall's report
24 came to your desk, that you read it, and you took it
25 with you to the Attorney General's department.

1 A. I can't say specifically. My best recollection, as
2 I've told you, is that I recall handing it to one of
3 the two of them. Now I can't go beyond that.

4 Q. And your recollection is, again, somewhat qualified
5 because you're not even sure which of the two people
6 you spoke to.

7 A. Exactly.

8 Q. And just so that I'm clear, and for the Commission,
9 you're talking about what your normal practice is or
10 was at the time.

11 A. Yes.

12 Q. That's what you would have expected.

13 A. Yes.

14 Q. And you said that you would have been surprised had you
15 not done it.

16 A. Exactly.

17 Q. Now you were surprised, Mr. Wardrop, when you learned
18 about the quality of Mr. Marshall's reinvestigation,
19 weren't you?

20 A. Yes.

21 Q. I suggest to you that maybe you could be surprised with
22 regard to this and that you never did deliver it to the
23 Attorney General's department?

24 A. I would doubt it, I would doubt that. I would doubt
25 that now. Hold it for one moment. I don't say that

1 I'm completely clear that I took it over but my best
2 recollection is I did. But I'm telling you absolutely
3 for sure that that report got over to the Attorney
4 General's Department in one way or the other. You
5 know, it just doesn't make any sense to me whatever and
6 I'm very surprised, I'm very surprised that you would
7 bring this up because of all the times that I've been
8 here, there's never been any question about a flow of
9 reports over at the Attorney General's Department.
10 There's something absolutely, a weird wall put up here,
11 saying that that report didn't get over there. I'm
12 telling you that now.

13 Q. Mr. Wardrop, I'm only trying to understand what your
14 accurate and best recollection is.

15 A. Well, I'm just telling you. Our routine, and it hasn't
16 failed me yet, that mail got over to the Attorney
17 General's Department and you tell me that Bob Anderson
18 or Gordon Gale, who asked for this investigation,
19 didn't get the report and weren't querying me and
20 asking me where it was? Come on.

21 Q. Mr. Wardrop, your testimony today is based on what your
22 normal practice was at the time, correct?

23 A. No, no, I have a recollection, faint as it may be, with
24 age and time, but I have a recollection.

25 Q. The report that you received from Inspector Marshall,

- 1 you were satisfied with it?
- 2 A. Completely.
- 3 Q. You presumed...
- 4 A. No, but listen, that's based on my previous talk to
5 Inspector Marshall and his assurance of everything
6 being a thorough investigation, a complete proper
7 conviction, the competency of the Sydney Police Force,
8 especially John MacIntyre, the polygraph operator, et
9 cetera, et cetera. And my faith in a human being.
- 10 Q. You've presumed...
- 11 A. Listen, when I was involved in investigations.
- 12 Q. Excuse me, Mr. Wardrop.
- 13 A. No, I want to finish what I have to say. When I was
14 involved in an investigation and was tasked with
15 something, nobody asked me ifs, buts, or ands. You
16 didn't, they didn't say did you go out and do this or
17 that? They relied on my initiative and my capability
18 and this is what I relied on here.
- 19 Q. You presumed that Mr. Marshall had done a thorough and
20 conclusive investigation.
- 21 A. Exactly. Exactly.
- 22 Q. And as a result of his report, you concluded and were
23 satisfied that there was nothing to the story of Jimmy
24 MacNeil.
- 25 A. I concluded that they felt he, MacNeil had told the

1 polygraph operator that he had lied and then that they
2 were, he was erratic, they couldn't get a good reading
3 from the polygraph sense as an operator. That there
4 was something awry with him and that, you know, it was
5 something that you couldn't depend on.

6 Q. And you were satisfied that as a result of the
7 investigation of the Sydney Police and the trial that
8 the right person had been convicted.

9 A. Yes, I was satisfied from Marshall's report that
10 everything was thoroughly investigated, a proper
11 conviction was registered, and with the evidence that
12 was adduced at the trial and that was it. It was
13 closed as far as I'm concerned.

14 Q. The case was closed.

15 A. Yeah. I never thought of it again, as a matter of
16 fact.

17 Q. And that was the message that you gave to whomever you
18 spoke to in the Attorney General's Department?

19 A. Exactly, exactly.

20 Q. And you expected them to rely upon it.

21 A. Exactly.

22 Q. You wouldn't have expected them, based on your being
23 satisfied with the report was thorough and conclusive,
24 to look at that report and ask anything, ask of
25 anything more, would you?

1 A. No, no.

2 Q. Just go back one step in the whole exercise, Mr.
3 Wardrop, you received a request from the Attorney
4 General's Department to have a look at the new
5 information that was received from Mr. MacNeil.

6 A. Right.

7 Q. And I believe your testimony was that you're not sure
8 whether, from whom the call came.

9 A. You know, it would, let's say it this way. Normally,
10 Bob Anderson would have called me. Now...

11 Q. Again, you're talking about what the normal practice
12 was.

13 A. Exactly, all right.

14 Q. But you don't recall to whom, from whom the call came.

15 A. I do know, no, I can't say that. It might have come
16 through Burgess, if I was out of the office. But I do
17 know that I got the message loud and clear that this
18 had gone, this was going on down in Sydney and that
19 the Attorney General's Department wanted me to look
20 into it. And that's, I can tell you that with complete
21 surety.

22 Q. And in the request from the Attorney General's
23 department, the scope of the investigation, what was to
24 be done was purely in the discretion of the RCMP, is
25 that correct?

MR. WARDROP, EXAM. BY MR. PINK

1 A. Yes, they didn't spell anything out. I suppose they
2 relied on our investigative ability the way I relied on
3 Marshall. When you go to investigate something, you
4 don't go...Listen, I wouldn't expect Marshall to go up
5 and ask MacNeil, did you, what did you say, is that
6 right, is that wrong? And then come back to me with
7 the conclusion? He would have to go through more than
8 that. He would have to talk to more people.

9 Q. You wouldn't expect the Attorney General's Department
10 to ask you specifically to do something.

11 A. No, of course not. Of course not, I never had and we
12 had a good relationship and they had more confidence,
13 more faith in my ability than that.

14 Q. And in this case, they didn't specify what was to be
15 done.

16 A. No.

17 MR. PINK

18 That's all I have. Thank you.

19 11:00 a.m. INQUIRY RECESSED.

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25

1 11:15 a.m.

2 INQUIRY RESUMES

3 EXAMINATION BY MR. ROSS

4 Q. Mr. Wardrop, I have a few questions to ask on behalf of
5 Oscar Seale. Now, with respect to the investigation
6 carried out by Al Marshall, is it fair to say that you
7 would have expected him to perhaps look into the
8 background of Sandy Seale, the person who was stabbed?

9 A. Yes, I would expect that any investigator would look
10 into the background of the deceased and then possibly
11 the accused, you know, to see what, you know, what had
12 gone on before, yes.

13 Q. And this would be particularly relevant after there had
14 been a trial with no reference at all to any wrongdoing
15 by Sandy Seale, and MacNeil coming forward and
16 suggesting that there might have been an attempted
17 robbery.

18 A. Well, that's a pretty hypothetical question, you know,
19 I think. I couldn't probably comment very
20 intelligently on that, you know. As far as I'm
21 concerned you're asking me if I would have looked into
22 the background of all of them, I would have, yes.

23 Q. I see. And, the conclusion in a report filed by
24 Marshall, and I refer you to volume 16, page 207, seems
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to suggest that Marshall was satisfied that there was, in fact, an attempted robbery. In paragraph numbered 9.

A. Yes.

Q. Wouldn't you have expected that a competent investigation would have further developed the circumstances which would address the charge of...a probable charge of robbery?

A. I would think that would be an aftermath of the original investigation of murder, yes.

Q. Sure. Now, having accepted this report I take it you would have had some discussion with somebody from the Attorney General's Department about the report.

A. I'm repeating myself again when I say that I certainly should have had and probably did, but I can't recall that specifically. I went over to the Attorney General's Department every week with the specific intent of talking over current events. Now, it would leave me cold and estranged to think that having this before me that I wouldn't have discussed it with him. But coming right down to it and asking me to tell you that I talked to anyone and with any specific...specific idea or what I had said I can't tell you that.

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quarterback. It's okay to stand back and say this is...this happened and that happened, but let's put it back sixteen years ago and then stand in the same position. You can't say that.

Q. Well, I don't want to be argumentative. I just want...

A. I'm not trying to be, but I'm trying to put you on the right track so that you don't get, you know, off course.

Q. I appreciate all that, but I just want to ask some questions and whatever the answers are I will live with them. So, I take it that you'd attend these meetings and there would be no notes taken.

A. No.

Q. But as far as this report is concerned, I take it that you would have been rather surprised if, in fact, you did not deliver a copy of the report to the Attorney General's Department.

A. Absolutely. I have no doubt in mind at all that if I didn't deliver it, it went over in the regular mail, and duplications, that it probably went over in the regular mail and I took it over at the same time.

Q. And I take it you would have been really surprised if, in fact, a copy of the report did not reach the Attorney General's Department and nobody asked you

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about it?

A. I don't believe that...I don't think that could happen.

Q. My understanding, my understanding is that Robert Anderson was appointed to the County Court bench around December the 16th, 1971, that would be subsequent to the date of the investigation but prior to the date of the report. Now, accepting that as fact for a minute, could it be that you received instructions from Robert Anderson with respect to the investigation but somebody else handled the reporting?

A. Well, you know, I found him a more of a responsible person than that. I would think that he would have turned everything over to whoever

Q. I see. And tell me about the transition? Do you recall whether or not after Anderson was being moved from his position in the Attorney General's Department whether or not at any of the Friday meetings, or whenever they were, that he was accompanied by anybody else to discuss all the files that were in progress?

A. Never.

Q. And, as far as your relationship with Gordon Coles is concerned, would you have had any opportunity at the...or any reason to discuss this report with Gordon Coles?

1
2 A. No, mostly the only discussion that I had with Gordon
3 Coles would be administrative, a...all of my criminal
4 discussions were with a senior solicitor as I recall.
5 I do recall talking to Len Pace, but I don't recall the
6 specific thing, but you know like, that was the set-up,
7 eh.

8 Q. Now, I understand from the evidence that has been given
9 so far that some time around 1974 or 1975 another
10 member of the RCMP on information from one Ratchford
11 again attempted to get information with respect to this
12 inquiry. Were you aware of that?

13 A. No.

14 Q. Weren't aware of that at all.

15 A. No. Never heard of it.

16 Q. Were you aware of any attempt by the RCMP to uncover
17 anything to do with the Seale murder subsequent to your
18 filing of the report with the Attorney General's
19 Department, as I understand you say you did, back in
20 1971?

21 A. Let me say this about that. When that report came in
22 and I addressed it and I had made a decision in my own
23 mind, having read it, that there was nothing further to
24 be done, that was the end of it. I know nothing more
25 right from that day on. You can wipe that right out of

MR. WARDROP, EXAM. BY MR. ROSS

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your mind. Nothing.

Q. Uh-hum.

MR. ROSS

Thank-you very much. Those are my questions.

EXAMINATION BY MR. NICHOLAS

Q. Yes, Mr. Wardrop, my name is Mr. Graydon Nicholas. I'm representing the interests of the Union of Nova Scotia

MMP
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Indians at this Inquiry, and I have a few questions for you. Perhaps if I can probe into your background a bit, when you started with the RCMP in 1946 first.

A. Uh-hum.

Q. Now, in the basic training that you did in Regina were you trained in any way about Indian people?

A. No. No, there was no specific training, no.

Q. Were you made aware of any particular special legislation dealing with Indians?

A. No.

Q. Nor any about the reserve life?

A. No. Anything that I gained was in consequence of being stationed on several Indian reserves, and number two, hold it, I adopted two Indian children five and six years of age, okay. They grew up and they were married last year, twenty-five and twenty-six years of age and I walked them up the aisle.

Q. Well, that's very nice.

A. Now, I want to give you...well, you wanted my background, you've got it.

Q. Well, I haven't finished my preliminary.

A. No, I know, but I'm giving you my background.

Q. Fine, well that's good from your perspective. However, to satisfy my particular concerns, if I may ask a few

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more questions on it, did you at any time undertake any formal training with respect to the laws dealing with Indians in this country?

A. No, not specifically, no.

Q. Now, in the investigations that you have handled throughout your career, did any of the criminal investigations involve murder or any violent crimes where Indians either were victims or were the accused?

A. I think one murder investigation I had in a penitentiary involved an Indian, in Dorchester Penitentiary.

Q. And when would that have been, Mr. Wardrop?

A. Oh, it was way back in when I was a sergeant in Moncton, and it would be in around fifty-eight.

Q. So, in your particular post that you occupied here in Halifax in 1971 were you in any contact with the reserves in this Province with respect to investigations of offences on reserves or involving Indians?

A. Not on hand. No, you know, anything that would involve a reserve or anything would cross by my desk, but I wasn't specifically on hand involved myself, no.

Q. Did you at any time in your career work with Indians who were peace officers?

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A. In Manitoba we have several special constables who are police officers and we had two of them shot, as a matter of fact, and I was their CO at the time.

Q. How about in the Maritimes itself?

A. No.

Q. None. Now, if I may ask you then to go back to the time of the, I believe it was November 15th or 17th you were contacted by the Attorney General's office to be responsible for this investigation, how did you determine then that the accused in this case was an Indian?

A. Quite frankly, I didn't know.

Q. You didn't know.

A. Didn't know. No, I didn't even know that Marshall was...yeah, or Seale was a Negro, if you want to know the truth. I didn't know.

Q. Could I refer you then to Volume 16 that I believe you have in front of you at page 204.

A. Yeah.

Q. Mr. Wardrop and...

A. Right.

Q. In particular refer you to the very first paragraph.

A. Yes.

Q. And I think you've indicated to this Commission that

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you had perused this particular report.

A. Yes, I did. But I'll tell you another thing, I never even...this is how far that I'm away from of being concerned about people's backgrounds, I never even knew that Sandy Seale was a Negro. I'm telling you that right now. Or that Marshall was an Indian. And I can tell you that. Those things mean nothing to me.

Q. Well, if I could refer you again to that page before you close the volume so quickly.

A. No, you don't need to refer me, because I'll tell you that that means nothing to me.

Q. So, does that mean you didn't read this report?

A. I beg your pardon.

Q. Does this mean that you didn't read this report?

A. I read the report but...

Q. So, those...

A. When I read over something about a person being a Negro or a Indian that means nothing. They're people. They're my people. I don't care about that. I don't go for that. I can't even comprehend that. It doesn't mean anything to me.

I gloss over it if you will.

Q. Well, if I could refer you again to that particular page of 204, Mr...

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A. Well, go ahead, but I'm not going to... Yeah, go ahead.

Q. Well, I want to ask you the question. I think it would be best for...

A. Okay, fine.

Q. ...you to look at it.

A. Oh, well, sure.

Q. Now, in the concluding lines of paragraph 2 of that page 204.

A. Yeah.

Q. Earlier you had indicated to counsel that you were not aware an appeal had been undertaken with respect to this case.

A. Um.

Q. And I'm wondering, having examined this report, are you telling us today that you did not know an appeal had been launched?

A. I want to tell you something that I do not have any knowledge, any recall of an appeal being launched, no.

Q. So, at no time in your two discussions with Inspector Marshall, nor with the Attorney General's office, were you made aware by anyone that the accused was an Indian?

A. I...as far as I know right now, I'm telling you right now, that I didn't know he was an Indian at all, not at

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all.

Q. Now, would that have made a difference to you if, in fact, you were told that fact?

A. As I told you before I adopted two Indians and you could take that probably without asking me further questions.

Q. Well, I think it's...I'm curious because of the standard that you would have expected from your junior officers, and you were ultimately responsible for this. I'm wondering if cultural factors here were important to consider in the investigation?

A. I expect that I would...having the attitude that I have towards natives and towards me adopting them that I would expect everyone to have the same attitude.

Q. Did you not, Mr. Wardrop, also indicate to Mr. Tony Seale [sic] that you think as a...as a competent officer you would have investigated the background of the accused as well as the victim?

A. I said if I...what would I be looking for?

Q. Well, you're the one who made the statement to a question asked by my learned friend.

A. What should I be looking for though? Like I mean...

Q. Well, what did you mean when you responded to his question?

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A. Well, the thing is that you look into the...you're not looking into the...to find something derogatory. You look in to see if they were, you know, you know, what...where they lived, et cetera, et cetera, you know, if they were working, if they had a job, if they weren't working or what their situation was. I mean just general knowledge I suppose.

Q. Would you have then visited the reserve in Membertou if you were in charge of this investigation to talk to people at that reserve?

A. No, I don't think. I don't think that would be necessary, no. I don't think that would be necessary, no.

Q. Where else would you then find out the cultural background of one of these people?

A. Well, I mean...but, you know, the thing is you'd be getting too involved then.

Q. I'm sorry, pardon.

A. I think that you're going down the road too far on that. I, you know, I'd make a basic investigation as to the background or their criminal background, etcetera, etcetera. But, you know, how far can you go on that? I mean if their mother was, you know, this or if their mother was separated from their husband, is

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that what you're talking about? Come on now.

Q. No, wouldn't you try to find out if the accused in this case would have understood English? Would not a competent officer do that?

A. I would think that...that they must have. I would suspect that anybody talking to Marshall would find that out. I certainly never even gave that a thought, you know, like I would expect, yes, of course they would. They would want to know if he could speak English and comprehend English as a matter of fact.

Q. And would that make a difference whether, in fact, you would ask a polygrapher to come or not?

A. You see the polygrapher didn't talk to Marshall.

Q. No, but the reports indicate that a request may have been made to his counsel, was it not?

A. Well, the thing is that he wouldn't have given him a test if he didn't completely understand English. You know, I mean, he's very competent and, you know, you just don't go out and test somebody that doesn't understand what you're talking about. You'll have to have sort of a response for your questions and I mean you just don't go out talking to someone that doesn't understand you.

Q. I believe earlier you had indicated in one of the

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questions that was asked about on, I believe, it was page 195 of Volume 16, you indicated... On page 195 the communique indicates a possibility of three further examinations to be required. And, I believe you really were not made aware of the substances of this message. But you tried to...

A. No, I didn't try to do anything. I'm trying to tell you right now up front, I don't do anything in background, it's all up front, okay. What happened there? Marshall called me from Regina and he said, "Could I have the polygraph operator from..." No, he called me from Sydney, "Could I have the polygraph operator from Regina?" I said, "Yes." He said, "Do you agree to it?" I said, "Yes." I said, "I'll speak to Burgess and he'll get in touch with you and get the gist of the message." And that's it.

Q. But you...if I recall though, in your response at that time...

A. Somebody asked me what I thought afterward of the three further examinations and I said, Chant, Marshall and Ebsary, and I said that because I'm saying after the fact. At the time I didn't even give it a thought.

Q. Well, how can you include Mr. Marshall on that list now?

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A. I'm saying what I think that could have been the possible people that they would want to examine. That's all. Nothing more. It could have been Pratico, I don't know.

Q. So you're just...

A. I didn't get involved in it.

Q. Yours is speculation then.

A. Exactly. After the fact.

Q. And Mr.Marsh...Inspector Marshall at any time did not indicate to you, in your two meetings with him, that there were any people of native ancestry involved in this case?

A. People of, I beg your pardon.

Q. Native ancestry were involved in this case.

A. People of what? I didn't quite catch it again.

Q. There were any Indians involved in this case.

A. No, no, no.

Q. During your term as the Chief Inspector of the Criminal...

A. No, no, Superintendent, come on.

Q. Pardon.

A. Superintendent, give me my right rank. Superintendent.

Q. I said during your term.

A. Yeah, but you quoted me as some sort of a sub inspector

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or something. I'm a chief...a Superintendent I was then, okay.

Q. Well, what ever your title was?

A. Well, all right, come out with the title.

Q. Now, at that particular time in head of the criminal investigation branch of this Province on behalf of the RCMP, were you required at any time to have contact with Indian leader, Indian Chiefs of reserves in this Province? So, there were no complaints...

A. No, no, I haven't been, but let me tell you, prior to coming here way back in my history, I have a lot of relationship with Indian Chiefs, but that has no bearing. No. In Nova Scotia, no.

Q. So, as the head of the criminal investigation branch at the time did you receive any complaints about the quality of policing with regard to Indians?

A. Never.

Q. Never.

A. Never.

Q. And did you try to find out if there were any problems or was that within your authority?

A. No, you see, we don't have to delve for problems. We have problems coming to our door without going out and searching for them.

MR. WARDROP, EXAM. BY MR. NICHOLAS

1 Q. So, this particular report then that was submitted to
2 you by Inspector Marshall I assumed appended to that
3 would have been the report of the polygraph.
4

5 A. Yes.

6 Q. And these sort of documents would be submitted then, or
7 at least assume were submitted to the Attorney General
8 of this Province.

9 A. Yeah.

MR. NICHOLAS

10 I have no further questions, My Lord.
11

MR. PRINGLE

12 I'd like to ask a question if...
13

COMMISSIONER POITRAS

14 One question. All right, go ahead.
15

EXAMINATION BY MR. PRINGLE

16 Q. Mr. Wardrop, you've testified about your recollection,
17 faint though it might be, about taking the report over
18 on the weekly meeting, correct?
19

20 A. Right.

21 Q. I want to ask you did you receive at any time from
22 anyone in the Attorney General's Department any
23 request, complaint or inquiry alluding to the fact that
24 they hadn't received a report and wanted one?

25 A. No.

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Q. Not from Mr. Gordon Gale.

A. No.

Q. From Mr. Robert Anderson.

A. No, no, none whatever, and I...I was in constant contact with all of them, you know, off and on, no.

Q. And you would have expected, sir, that they having asked you to conduct the investigation would be looking for a follow up.

A. Exactly.

Q. And you would have expected, sir, that if they didn't receive one they would certainly follow it up and request one.

A. I'm very sure they would.

MR. PRINGLE

Thank-you very much.

EXAMINATION BY COMMISSIONER POITRAS

11:40 a.m.

Q. Mr. Wardrop, just one or two questions, if I may. I understand from your testimony that you interviewed Mr. Marshall, Inspector Marshall, following his investigation in Sydney, and then you received his report and then you would have interviewed him again after that.

A. The interview occurred before his report, okay. The

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in-depth interview, and I was satisfied with that interview that he had completed a full investigation and everything had been completed. The report was a confirmation really, if you will, of that report, of his interview.

Q. And, did I understand you to say that you interviewed him again after that report?

A. After the report I asked him...after I got the report in my hand, he hadn't mentioned anything about these two girls and two boys that met Chant and Marshall on Byng Avenue, and I said to him...and also the driver that drove Marshall and Chant over to where Seale was lying, and I said, "Did you make every attempt to find out who these people were and identify them?" He said, "Yes," and he couldn't find out who they were. That was after the report. The next thing that I said to him was that, you know, I said, "Donnie MacNeil got a copy of the report," and he said, "Yes," and I, you know, I didn't...not a copy...not a copy of the report. Donnie..."You talked to Donnie MacNeil," and he said, "Yes, I did," and I didn't...so, you know, I was going to... In my mind I thought that was a little irregular and I didn't pursue it. I said, well, like I told the hearing here before, that a rapport creates between the

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prosecutor and an investigator and harmony, if there's harmony, they tell one lots of things probably that you wouldn't expect.

Q. Well, did you make a point of reading Mr. Marshall's report carefully after receiving it?

A. I read it over, yes.

Q. Did you?

A. Uh-hum.

Q. And were you concerned with the fact, as I note, I think, that the only person he appeared to have interviewed was Mr. James William MacNeil?

A. The thing is that I've mentioned here before that as an experienced investigator of thirty-five years you don't...you don't necessarily say, "Did you hear this or did you hear that or did you do this?" I expected him, it's almost routine, basic routine investigative procedure that he would have talked to everyone. Not...he doesn't necessarily...I wouldn't expect him to necessarily, I talked to A, B, C, D, E, F. You know, his conclusion was enough to convince me that everything was done properly and thoroughly.

Q. Well, as I understand the report, he appears to have made reference to having interviewed a person, that is clear enough, I think that is Mr. MacNeil. But does he

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in his report indicate that he would have interviewed anyone else? Is there sort of a catch-all clause that would convince you that he had, indeed, interviewed a number of other persons?

A. Well...not...

Q. Any where in that report?

A. It wasn't specifically spelled out, and I say again, this is almost basic routine, and I suppose an assumption on my part, maybe incorrectly so. Maybe I should have said...listen we're talking about an experienced investigator with thirteen years' service who had done many investigations for me, thoroughly without a cinch. And, for me to stand up and ask him, "Did you do this, did you do that?" it was...it would be beyond my comprehension. Nobody has ever done that to me. I depended on his initiative and his ability and capability to do that without me saying to him. I know it's not spelled out in the report. I agree with you there.

Q. Of course, I benefit from hindsight here, but as I look at this report, which is only, I think, four pages long, I see that he would have interviewed MacNeil, he would have ordered a polygraph, he made reference to certain statements, certain excerpts of the evidence,

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and then on page 207, under Item 7, he would have examined some of the exhibits. And I don't think there is anything else in this entire report.

A. Let me say now after hearing his evidence.

Q. Uh-hum.

A. That he rubberstamped probably many too things with regards to the Sydney City Police Force. I didn't know that at the time. And, as far as I can tell you again, and I'll repeat, I did not even have one inkling that he hadn't gone through the whole thing, investigated everything that I would have done on the same type of job, which I was involved in Moncton. I don't want to get into this at. I don't want to bore you with this.

Q. No.

A. But I would not, having been told to go do something, have someone tell me you're going to do, you're going to talk to this one, you're going to talk to that one, and then come back and say, "What did you talk to? Who did you talk to?" You would assume that they did this. He's an experienced man, thirteen years of service, and as, again I repeat, had done several investigations for me completely and thoroughly and satisfactorily.

Q. So, in short, you were not concerned with the fact that

MR. WARDROP, EXAM. BY COMM. POITRAS1
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there is a single interview referred to in this report?

A. It didn't come across to me as being very important because I took it for granted, okay.

COMMISSIONER POITRAS

Thank-you.

MR. SPICER

Just a couple of things.

EXAMINATION BY MR. SPICER

Q. One small point. If you could just flip to page 1, sorry, 201 of Volume 16. I just want to be clear, you were asked some questions concerning these transmittal slips. Do I take it from your...from your testimony that a transmittal slip is a document that doesn't have a bunch of carbons behind it so that once it is sent that may be the end of it?

A. A single copy.

Q. A single copy.

A. A single copy, yeah.

Q. Okay.

A. They don't even put it on the file copy.

Q. Okay. And there's one other area that's...came up in the examination actually by Mr. Justice Poitras to some extent. I had asked you some questions earlier about venting of these reports, and you indicated that with a

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senior official that wouldn't be done. What do you do though in a circumstance and what does the RCMP do to prevent tunnel-vision, in other words, somebody getting any idea in their mind that this is the solution and excluding everything else which may tend to negate that conclusion?

A. Well, the thing is that normally when you get people like that that you say are sitting behind a desk and trying to be desk detective and, you know, trying to solve the solution and coming up, it passes over my desk and I read it. And, I'll read some of their ideas and what have you and then you go through that and you talk to someone, and you say, well, you know, is this right or does it sound feasible and, yeah, that's...

Q. But my question then is how in any circumstance can you distinguish between somebody that's...an investigation that you think might have any element of tunnel-vision in it from one that doesn't unless you ask the questions, unless you ask, "Well, did you in fact interview so and so, and did you in fact do this, did you in fact do that?"

A. Well, you see, I 'll tell you something that you probably don't appreciate that. I suppose when you're talking to a younger junior person you do that. You're

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very, very careful. But when you're talking to a person like Marshall, Inspector Marshall, and I'm not trying to downgrade him or anything else, but I'm trying to tell you the way that I see it. I think that as far as I'm concerned, and I'll say it again, that Inspector Marshall relied too much on the competency of the Sydney Police Force and their efficiency and he just rubberstamped things then and this after the fact, you know, it came out in his evidence, and I have to tell you that I'm surprised.

Q. It's fair to say, isn't it, sir, that at the time in 1971 if you had asked him you could have found that out in 1971?

A. Well, but you're talking about foresight now. Come on.

Q. I'm just asking a question.

A. Yeah, I know, yeah, of course. Of course, if I had asked him, yes. If I...listen if I had a crystal ball or something like that, short of going up there myself or being a soothsayer, I did everything possible as far as that investigation is concerned, you know. I satisfied myself and I...and in my mind everything was completely right.

Q. Is it fair to say that it wouldn't have been your policy to secondguess the investigation of a senior

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investigator where you might have with a more junior constable?

A. Well, of course, of course, of course. I took him at face value and I honoured his commitment as a senior investigator and with his previous record and appreciated it.

Q. And, so in the case of a senior investigator would it then be the case that there really wasn't a method in place by which you could assess whether or not that particular investigator had adopted tunnel-vision?

A. You see, like, you know, the only thing that I think of with hindsight as you're talking of there that here's...when he expounded on the competency and efficiency of the Sydney City Police Force, especially John MacIntyre, looking back on it I begin to think that maybe he was mesmerized by something or other and, you know, by their...by his admiration or whatever, what you will, for his capability and just said, "That's it." He did a good job and there's no further, you know, I can't expound any further on that. But that is my personal feeling.

Q. Was there... in 1971 would there have been any policy of the RCMP to vet even the reports of senior investigators or was that a decision that you just made

MR. WARDROP, EXAM. BY MR. SPICER

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on your own as to whether you would or wouldn't?

A. Well, you know, you have, you know, it's a...there's no policy, no.

Q. So, it would have been your decision solely as to whether or not you wanted to second guess, in a sense, in the way Mr. Justice Poitras...

A. Yes, yeah.

Q. ...was just doing to Al Marshall's report.

A. Yes, yeah, uh-hum.

MR. SPICER

Thank-you.

MR. CHAIRMAN

Mr. Wardrop, before you leave us.

EXAMINATION BY MR. CHAIRMAN

Q. You had made reference to the reader, was it Staff-Sergeant Burgess?

A. Burgess, My Lord, yes.

Q. His rank was Sergeant or Staff-Sergeant?

A. I believe he was Sergeant at that time, but it changed. Like he was a Corporal and Sergeant. I'm not sure. It was one of the two. He wound up as a Sergeant and I believe he would be a Sergeant.

Q. As I understand it from your evidence, that the

MR. WARDROP, EXAM. BY MR. CHAIRMAN

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responsibility of a reader is to review all reports coming in very carefully.

A. Research and research and go back and, you know, anything that he could dig up of relevance.

Q. So, are we entitled to assume then that Sergeant Burgess very carefully perused the report and researched the report that had come in from Inspector Marshall?

A. I had the greatest faith in him and I would assume that he would, yes. I never questioned...I had to question him never once.

Q. A reading of that report by a skilled RCMP officer, given the appointment of reader, I would suggest would very quickly indicate to him that only one witness had been interviewed by Inspector Marshall?

A. Reading it literally, I suppose he would have, yes.

Q. If he reached that conclusion would it be his responsibility then to bring that to your attention?

A. No, you know, I would have thought that, you know, he would have satisfied himself otherwise if he...and got himself involved in delving into it further and when it came to my, you know, to my area I would have thought that he would have satisfied himself that everything had been done. No, you know, I wouldn't say that he

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should have come up to me and said, "Listen, hey, this didn't happen, or that didn't happen," no.

Q. Or come up to you and say, "In my view Inspector Marshall didn't..."

A. No.

Q. "...carry out the kind of investigation that I would have expected."

A. No, I wouldn't expect him to do that.

Q. Would you expect him to go to Inspector Marshall?

A. No, you know, when the thing went through...if there was...if he was completely dissatisfied with himself, if there was an irregularity or that something hadn't been done, then, yes. But if he was satisfied with it and felt that everything had been done the way that we do things in the Mounted Police, you know, like without...again I go back to this whole business of crossing the T's and dotting the I's. He knows as well as I do, as well as I tried to relate here, that Marshall is a very competent person and, you know, he would probably assume too much also.

Q. But isn't that the duty of the reader to cross the T's and dot the I's?

A. It probably would be in a lot of cases. It probably...yes.

MR. WARDROP, EXAM. BY MR. CHAIRMAN

1
2 It probably would be, but, you know, the thing is that
3 hindsight is very easy and in that particular case it
4 seemed that everything was above board, and the
5 investigation was well carried out and the conviction
6 was supported by evidence and the, you know, like it's
7 very easy then to turn around and, you know, and now
8 say that...

9 Q. Now, say what? I'm waiting.

10 A. I think I extended myself.

11 MR. CHAIRMAN

12 Thank-you. That's all, thank-you.

13 WITNESS WITHDRAWS

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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 And that was in 1971.

4 MR. SMITH

5 That was in 1971, sir, yes.

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

8 Q. Was that an internship in polygraph testing?

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

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

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

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

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

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.

10

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14

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

15

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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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25

Q. Polygraph of other RCMP officers.

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

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

9 | Q. And if you happen...

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

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

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

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

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

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
- 3 A. Yes.
- 4 Q. So, it would have been...it's about fifty that got sent
5 back then, is that right?
- 6 A. No, you're misunderstanding, I think. The cases, not
7 tests.
- 8 Q. Oh, it's cases, okay.
- 9 A. If you go to the second file you'll see polygraph file
10 number, that particular one was 71 and poly 25.
- 11 Q. Right.
- 12 A. I was still in internship with them until I got to 71
13 poly 50.
- 14 Q. I see.
- 15 A. And the reason your numbers are different because you
16 run many tests sometimes on an individual
17 investigation.
- 18 Q. Okay. So, it's not fifty polygraph examinations, it's
19 fifty different cases regardless of how many polygraph
20 tests there has been.
- 21 A. That's correct, sir.
- 22 Q. Okay. Now, in 1971 what uses was the polygraph being
23 put to by the RCMP?
- 24 A. The only use that I know the polygraph has ever been
25 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 Q. Did Inspector Marshall offer to you at that time his
2 views concerning whether or not that Jimmy MacNeil was
3 telling the truth?
4

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

MR. SMITH, EXAM. BY MR. SPICER

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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
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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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2 himself dry of emotions of that particular question.

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

6 A. Something to be concerned about with that question.

7 Q. With respect to that control question.

8 A. That's correct.

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

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

22 Q. What does that mean, those two categories?

23 A. A known truth question, again, is a question that you
24 know the subject is telling the truth to. And you
25 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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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

1 Q. And how does this relate to the development of the
2 control questions in any particular case?

3 A. Well, I'm just, it really doesn't...
4

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

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.

1
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

1
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

1
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
7 There were irregular and erratic
8 reactions to the test questions. These
9 variations are the type which prevent an
10 analysis of the charts and I can render no
11 opinion as to whether or not MacNeil was
12 telling the truth when he answered "yes" to
13 the following test questions..."

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

16 A. Absolutely not.

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

20 A. I can't say I can answer that. I don't recall that part
21 of it. I would say my normal procedure then was
22 certainly to discuss them with him. You certainly
23 would not have a question on the test the subject did
24 not want to answer. That was an out and out no-no.
25 You can't have any surprise questions thrown in there.
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?

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

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

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

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

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

17 A. I don't recall it.

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

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

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

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

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

4 They're strong controls.

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

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

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

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.

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

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

24 Q. That's Donnie MacNeil?

25 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

1
2 knowledge, the Attorney General's office, or the
3 department?

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

15 Q. Was John MacIntyre present at the meeting?

16 A. No.

17 Q. So it was just the three of you.

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

24 Q. How was it, again, that the question of Junior Marshall
25 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.
25

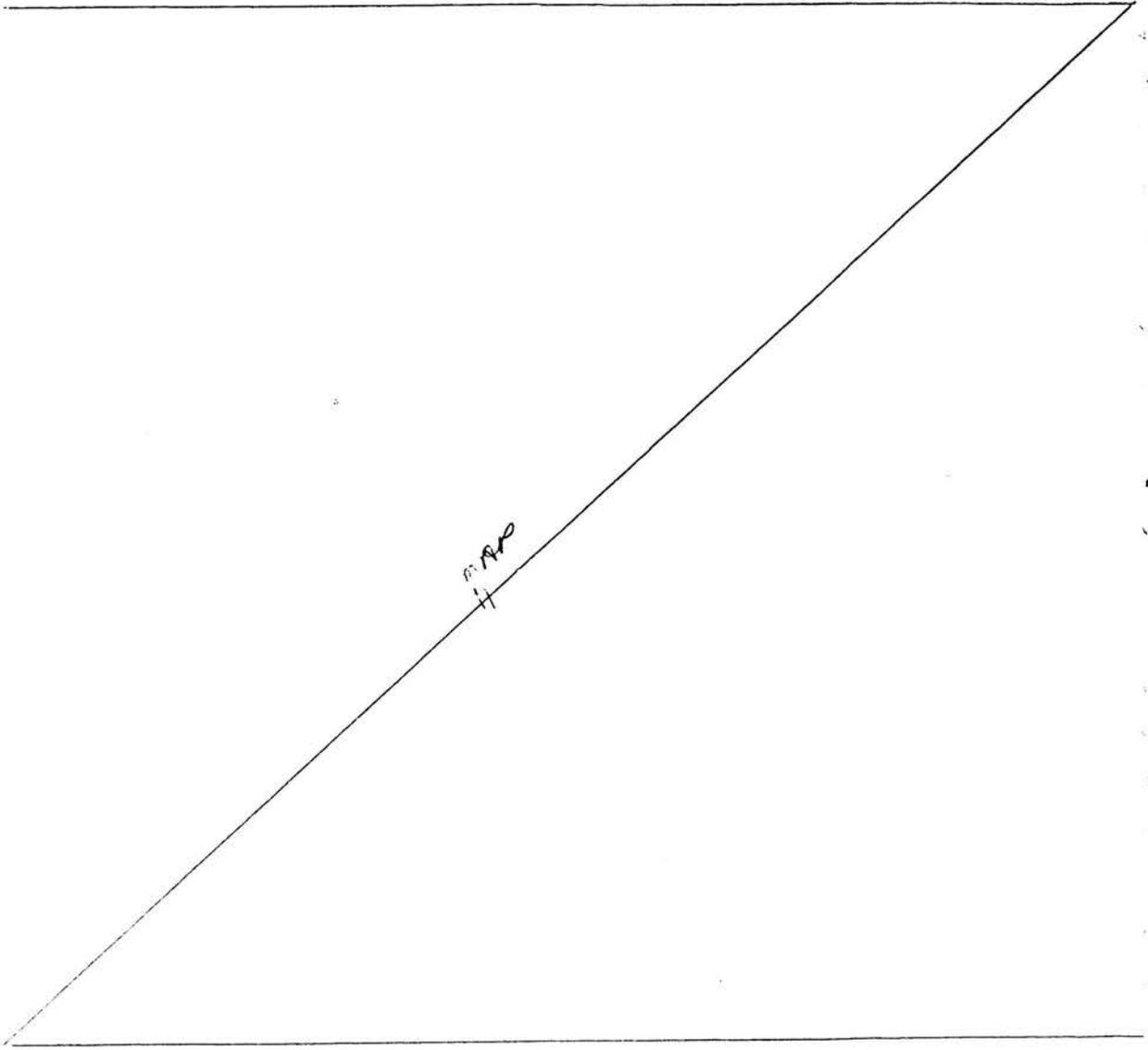
- 1 A. What's your question?
- 2 Q. The validity of the test depends upon the control
- 3 question validity.
- 4 A. The validity of the test depends upon the whole
- 5 procedure...
- 6 Q. Yes. And inter alia, among other things, the validity
- 7 of the control question.
- 8 A. Yes.
- 9 Q. And on the 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
25

1 statement?

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

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

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

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

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

17 A. Pardon me?

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

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

22 Q. Yes. How would you ever know whether someone was
23 rationalizing their way to a false positive, a false
24 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
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polygraph tests.

A. Yeah, they were trumped up tests. Make-believe tests.
You tested your fellow classmates, this type of thing.

Q. They weren't in the real world.

A. Not in the real world.

Q. They were pretend tests. Pretend tests.

A. Oh, yes. Absolutely.

Q. So that you did not perform your first test until,
well, did you perform any in Michigan?

A. No.

Q. So it was not until you returned to Canada and that
would be in August 1971, when you performed your first
test?

A. August of '71.

Q. And you performed, so this was your twenty-fifth test
you indeed performed...

A. No.

Q. I'm sorry, your twenty-fifth case.

A. Twenty-fifth case, fifty-first, fifty-second test.

Q. Right. Did you play any part in the number of people
who were going to be put through the test in Sydney in
November 1971?

A. The only part that I tried to play in there was that I
suggested that we do Donald Marshall.

- 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

4

A. Yes, correct.

5

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

6

A. A number of...

7

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.

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Q. You open the shirt, do you?

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A. No.

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Q. Attach it to the shirt itself?

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

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Q. Yes, got that.

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

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Q. You roll up the sleeve, do you?

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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?

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

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Q. And where do you sit?

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

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

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A. Correct.

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

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A. Correct.

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

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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